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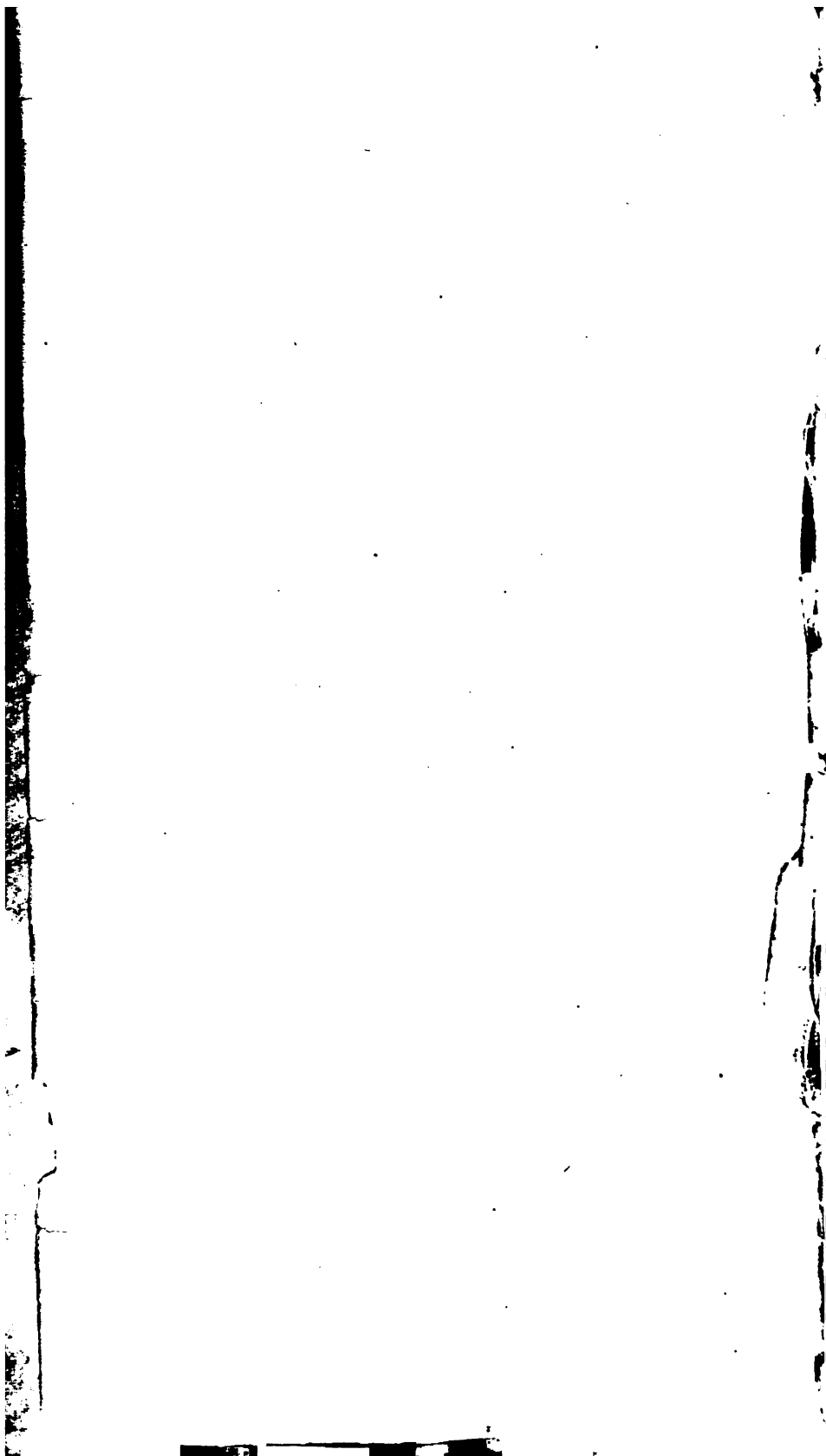
H. Morse Stephens.

University of California

Professor N. Nurse Stephens

from

Charles H. Lawrence



A HISTORICAL AND LEGAL
DIGEST
OF ALL THE
CONTESTED ELECTION CASES
IN THE
HOUSE OF REPRESENTATIVES
OF THE
UNITED STATES
FROM THE
FIRST TO THE FIFTY-SIXTH CONGRESS,
1789-1901.

BY
CHESTER H. ROWELL.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1901.

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Resolved by the House of Representatives (the Senate concurring):
That there be printed and substantially bound two thousand copies of
"A digest of all the contested election cases in the House of Repre-
sentatives of the United States from the First to the Fifty-sixth Con-
gress, inclusive;" compiled by Chester H. Rowell; one thousand five
hundred for the use of the House and five hundred for the use of the
Senate; and that in addition to said number there be printed and sub-
stantially bound five hundred copies, the same to be deposited in the
office of the clerk of the House and distributed from time to time on
his order; and that there be further printed and substantially bound
the additional number of fifty copies, ten each to be deposited in the
library of the House of Representatives and in the rooms of the Com-
mittees on Elections, and ten to be delivered to the compiler."

House concurrent resolution, passed the Senate February 27, 1901.

P R E F A C E .

For more than a hundred years the Committee on Elections of the United States House of Representatives has enjoyed the unique distinction of being the only important judicial or quasi-judicial body in the world which was without any adequate means of reference to its own precedents. This committee is the nucleus from which the whole committee system of Congress has grown. It was the first standing committee appointed by the House of Representatives of the First Congress, and is the only one which has a continuous history coextensive with the history of the Government and an independent primary jurisdiction conferred by law. It has always maintained the forms and much more than is popularly supposed of the substance of judicial procedure, and in its reports and the action of the House upon them is found the only final source of information and authority in the law and practice of Congressional contested election cases. These precedents, as preserved in the standard text-books of Paine and McCrary, in certain imperfect compilations, and in the unwritten tradition of the committee, have developed a fairly coherent body of law, whose principles are not often nor lightly departed from; but hitherto no attempt has been made to present the whole body of this law in one view in a form adapted to practical use. As these cases cover some issues which can come before no other tribunal and many others to which no other tribunal stands in the same relation, the propriety of preserving them in a form available for reference is obvious.

Most of the reports in the first fifty-two Congresses are included in the nine volumes known from the names of their compilers as: (1) Clarke and Hall (First to Twenty-third Congress), (2) 1 Bartlett (Twenty-fourth to Thirty-eighth Congress), (3) 2 Bartlett (Thirty-ninth to Forty-first Congress), (4) Smith (Forty-second to Forty-fourth Congress), (5) 1 Ellsworth (Forty-fifth and Forty-sixth Congresses), (6) 2 Ellsworth (Forty-seventh Congress), (7) Mobley (Forty-eighth to Fiftieth Congress), (8) Rowell (Fifty-first Congress), and (9) Stofor (Fifty-second Congress). Since the Fifty-second Congress there have been no compilations of cases. These volumes have received, by custom and courtesy, the ambitious title of "digests," but, aside from the title, they make no pretense of being anything more than volumes of reports, and even as such the series is incomplete, inaccurate, and almost wholly unedited. Most of the volumes have no index of subjects, and not more than one of them has anything approaching a complete and accurate index; the syllabi, where any are printed, are usually incomplete, often misleading, and sometimes in direct contradiction to the actual decision; there are several cases not included in any volume, besides the recent cases not compiled, and the volume covering one of

the most important periods omits most of the minority reports and large portions of many of the majority reports. The material could scarcely be in more chaotic condition if no compilations had ever been made. Indeed, from the standpoint of the attorneys who prepare the cases, these compilations may be regarded as practically nonexistent, since access to the very few complete sets in existence is usually impossible.

It is the purpose of this work to meet the difficulty, so far as possible, by presenting in one volume, compiled from original sources, everything of permanent value or interest connected with the contested election cases of the past one hundred and twelve years. Obviously, this purpose could not be entirely accomplished by an alphabetical digest of the law of the cases. The original reports are generally inaccessible and are nearly all very long and complicated, requiring much labor to segregate the matters of permanent interest from those of only temporary importance contained in them. An election case report is at once the finding of a jury, the ruling of a court of primary jurisdiction, the decision of a court of final jurisdiction, and an argument addressed to the House, and all of these elements are usually mingled indiscriminately in it. To examine the actual bearing in the case of a ruling of law referred to as having been made in a certain contest may require wading through a hundred pages of discussion of minor issues of fact, of no permanent significance. For the benefit of the committee, then, to whom the original reports may be accessible, no less than of the attorney to whom they are inaccessible, it is important that some substitute for the original reports be prepared which shall bring them within manageable limits.

More than half of this book is devoted to such a condensation of the cases, arranged chronologically by Congresses. All the reports have been rewritten, as no other course was consistent with the great degree of condensation necessary; but I have endeavored, in reporting the decisions of the committee, to express neither more nor less than the committee decided, even in cases where the decision itself was vague, evasive, or ambiguous. In stating the facts and issues of the case, on the other hand, on which a decision was based, I have endeavored to be as clear and specific as possible after exhausting all available sources of information, whether the report of the committee was clear or not. The action of the House is given in every case, and where the discussion in the House is important to an understanding of the case an outline is given of that also.

The second part of the book consists of the digest proper, an alphabetical summary, arranged under titles, subtitles, and headlines, with numerous cross-references, of all the law in all the cases. The form of statement differs somewhat from that of the standard digests of court reports, on account of the less formal character of the material digested, and an effort is made to cover, in addition to the formal decisions of definite propositions of law, also every action of the House or of the committee which may be considered as a precedent. The rulings of minority as well as of majority reports are included, and where the recommendations of the minority were sustained by the House this fact is also noted. The references to the compiled cases are to the pages of the "digests" above mentioned. References to cases or reports not contained in these compilations give the Congress, number of report, and page of the original report. This digest, being alpha-

betical, serves as an index to itself and to the first part of the book as well; but full tables of contents, cases, and topics are also given in the proper place.

The Committee on Elections of the Twenty-third Congress on January 9, 1834, in reporting a resolution for printing the first compilation of election cases, said:

That, upon an examination of the plan of the work, they are of opinion the same would be useful and conducive to lighten the labors of the committee and of the House in future contests, and calculated to produce uniformity and consistency of decision, which is highly desirable on all such occasions.

It is my hope that this book will serve in the same sense and on a more comprehensive scale as an aid in the trial and adjudication of contested election cases, and that it may also arouse some interest in an entirely unworked field of American constitutional and legislative history.

CHESTER H. ROWELL.

FRESNO, CAL., *July, 1901.*

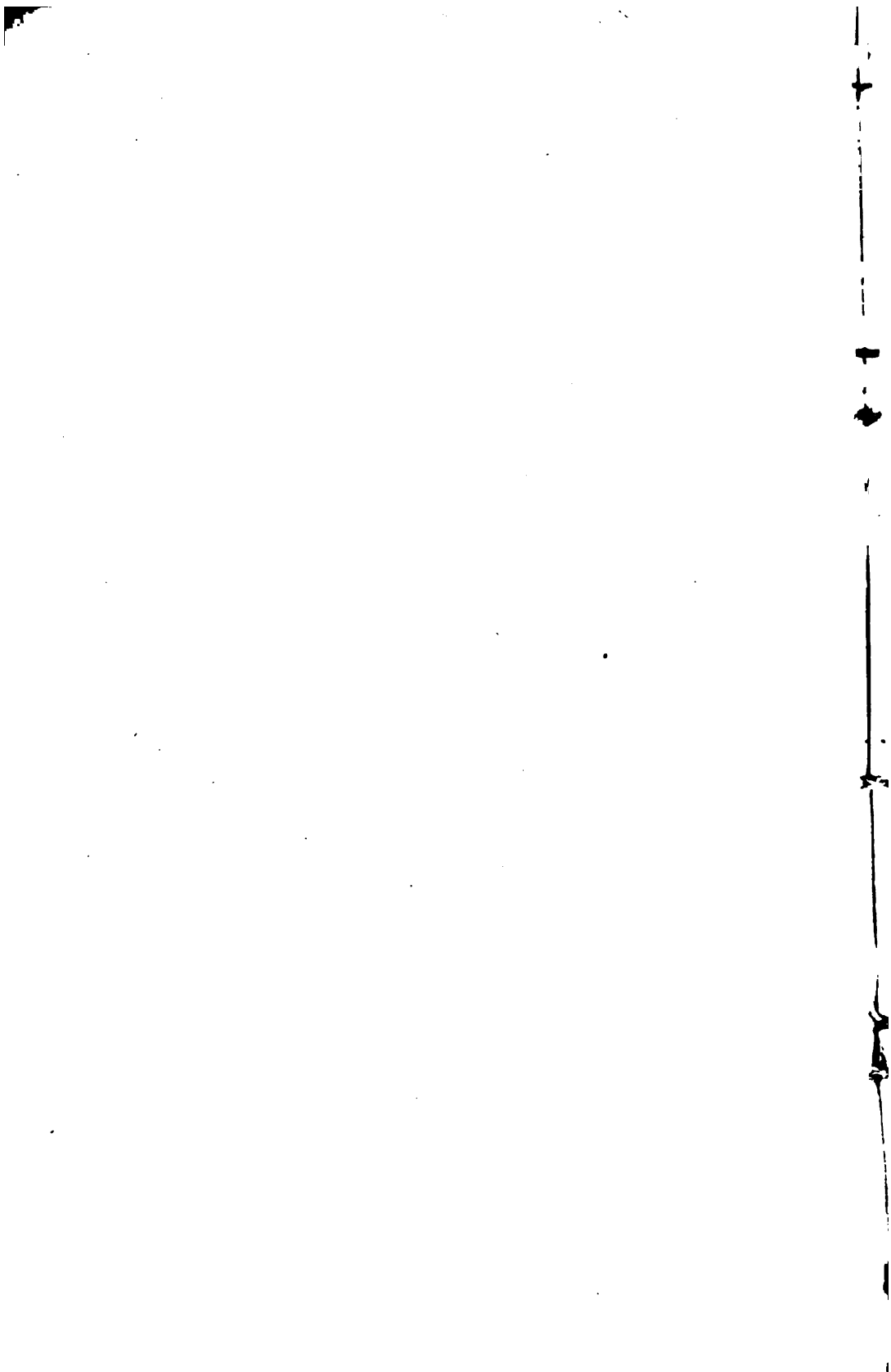


TABLE OF CASES.

BY CONGRESSES.

	Page.
FIRST CONGRESS, 1789-1791:	
1. David Ramsay <i>vs.</i> William Smith, <i>South Carolina</i>	37
2. <i>New Jersey</i> members	38
SECOND CONGRESS, 1791-1793:	
1. John F. Mercer, <i>Maryland</i>	39
2. James Jackson <i>vs.</i> Anthony Wayne, <i>Georgia</i>	39
THIRD CONGRESS, 1793-1795:	
1. Henry Latimer <i>vs.</i> John Patton, <i>Delaware</i>	41
2. Henry K. Van Rensselaer <i>vs.</i> John E. Van Allen, <i>New York</i>	42
3. Abraham Trigg <i>vs.</i> Francis Preston, <i>Virginia</i>	42
4. James White, <i>Southwestern Territory</i>	43
5. Benjamin Edwards, <i>Maryland</i>	43
FOURTH CONGRESS, 1795-1797:	
1. John Richards, <i>Pennsylvania</i>	45
2. John Clopton, <i>Virginia</i>	46
3. Matthew Lyon <i>vs.</i> Israel Smith, <i>Vermont</i>	46
4. John Swanwick, <i>Pennsylvania</i>	46
5. Joseph B. Varnum, <i>Massachusetts</i>	47
6. David Bard, <i>Pennsylvania</i>	47
FIFTH CONGRESS, 1797-1799:	
1. Robert Rutherford <i>vs.</i> Daniel Morgan, <i>Virginia</i>	48
SIXTH CONGRESS, 1799-1801:	
No cases.	
SEVENTH CONGRESS, 1801-1803:	
1. Narsworthy Hunter, <i>Mississippi Territory</i>	49
2. John P. Van Ness, <i>New York</i>	49
3. Paul Fearing, <i>Northwestern Territory</i>	50
EIGHTH CONGRESS, 1803-1805:	
1. Andrew Moore <i>vs.</i> Thomas Lewis, <i>Virginia</i>	51
2. Duncan McFarland <i>vs.</i> Samuel D. Purviance, <i>North Carolina</i>	51
3. Samuel J. Cabell <i>vs.</i> Thomas M. Randolph, <i>Virginia</i>	52
4. John Hoge, <i>Pennsylvania</i>	52
NINTH CONGRESS, 1805-1807:	
1. Thomas Spaulding <i>vs.</i> Cowles Mead, <i>Georgia</i>	54
2. Michael Leib, <i>Pennsylvania</i>	55
TENTH CONGRESS, 1807-1809:	
1. Joshua Barney <i>vs.</i> William McCreery, <i>Maryland</i>	56
2. Duncan McFarland <i>vs.</i> John Culpepper, <i>North Carolina</i>	58
3. Philip B. Key, <i>Maryland</i>	58
ELEVENTH CONGRESS, 1809-1811:	
1. Charles Turner, jr., <i>vs.</i> William Baylies, <i>Massachusetts</i>	60
2. Thomas Randolph <i>vs.</i> Jonathan Jennings, <i>Indiana Territory</i>	61
TWELFTH CONGRESS, 1811-1813:	
1. John Taliaferro <i>vs.</i> John P. Hungerford, <i>Virginia</i>	62
THIRTEENTH CONGRESS, 1813-1815:	
1. John Taliaferro <i>vs.</i> John P. Hungerford, <i>Virginia</i>	63
2. Burwell Bassett <i>vs.</i> Thomas M. Bayley, <i>Virginia</i>	64
3. William Kelly <i>vs.</i> Thomas K. Harris, <i>Tennessee</i>	65
4. Isaac Williams, jr., <i>vs.</i> John M. Bowers, <i>New York</i>	65
5. Blydenburg and Jay <i>vs.</i> Sage and Lefferts, <i>New York</i>	66

	Page.
FOURTEENTH CONGRESS, 1815-1817:	
1. Westel Willoughby vs. William S. Smith, <i>New York</i>	67
2. Robert Porterfield vs. William McCoy, <i>Virginia</i>	67
3. Erastus Root vs. John Adams, <i>New York</i>	68
4. Rufus Easton vs. John Scott, <i>Missouri Territory</i>	68
FIFTEENTH CONGRESS, 1817-1819:	
1. Charles Hammond vs. Samuel Herrick, <i>Ohio</i>	70
2. Elias Earle, <i>South Carolina</i>	73
3. George Mumford, <i>North Carolina</i>	73
SIXTEENTH CONGRESS, 1819-1821:	
1. Rollin C. Mallary vs. Orasmus C. Merrill, <i>Vermont</i>	75
2. James Guyon vs. Ebenezer Sage, <i>New York</i>	76
SEVENTEENTH CONGRESS, 1821-1823:	
1. Philip Reed vs. Jeremiah Cosden, <i>Maryland</i>	77
2. Cadwallader D. Colden vs. Peter Sharpe, <i>New York</i>	78
3. Matthew Lyon vs. James W. Bates, <i>Arkansas Territory</i>	78
EIGHTEENTH CONGRESS, 1823-1825:	
1. Parmenio Adams vs. Isaac Wilson, <i>New York</i>	79
2. John Biddle vs. Gabriel Richard, <i>Michigan Territory</i>	80
3. Sundry electors vs. John Bailey, <i>Massachusetts</i>	80
4. John Forsyth, <i>Georgia</i>	82
NINETEENTH CONGRESS, 1825-1827:	
1. Daniel Hugunin vs. Egbert Ten Eyck, <i>New York</i>	83
2. John Biddle and Gabriel Richard vs. Austin E. Wing, <i>Michigan Territory</i>	83
3. Sundry citizens vs. John Sergeant, <i>Pennsylvania</i>	85
TWENTIETH CONGRESS, 1827-1829:	
No cases.	
TWENTY-FIRST CONGRESS, 1829-1831:	
1. Silas Wright, jr., vs. George Fisher, <i>New York</i>	87
2. George Loyall vs. Thomas Newton, <i>Virginia</i>	87
3. Thomas D. Arnold vs. Pryor Lea, <i>Tennessee</i>	89
4. Reuel Washburn vs. James W. Ripley, <i>Maine</i>	91
TWENTY-SECOND CONGRESS, 1831-1833:	
1. David Crockett vs. William Fitzgerald, <i>Tennessee</i>	94
2. Joseph Draper vs. Charles C. Johnston, <i>Virginia</i>	94
TWENTY-THIRD CONGRESS, 1833-1835:	
1. William Allen, <i>Ohio</i>	97
2. Robert P. Letcher vs. Thomas P. Moore, <i>Kentucky</i>	98
TWENTY-FOURTH CONGRESS, 1835-1837:	
1. David Newland vs. James Graham, <i>North Carolina</i>	105
TWENTY-FIFTH CONGRESS, 1837-1839:	
1. Samuel J. Gholson and John F. H. Claiborne, <i>Mississippi</i>	106
2. James D. Doty vs. George W. Jones, <i>Wisconsin Territory</i>	107
TWENTY-SIXTH CONGRESS, 1839-1841:	
1. The <i>New Jersey</i> case.....	109
2. C. J. Ingersoll vs. Charles Naylor, <i>Pennsylvania</i>	112
TWENTY-SEVENTH CONGRESS, 1841-1843:	
1. Joshua A. Lowell, <i>Maine</i>	114
2. David Levy, <i>Florida Territory</i>	114
TWENTY-EIGHTH CONGRESS, 1843-1845:	
1. Members elected by general ticket.....	117
2. William L. Goggin vs. Thomas W. Gilmer, <i>Virginia</i>	120
3. John M. Botts vs. John W. Jones, <i>Virginia</i>	122
TWENTY-NINTH CONGRESS, 1845-1847:	
1. William H. Brockenbrough vs. Edward C. Cabell, <i>Florida</i>	123
2. Isaac G. Farlee vs. John Runk, <i>New Jersey</i>	124
3. Edward D. Baker, <i>Illinois</i> ; Thomas W. Newton and Archibald Yell, <i>Arkansas</i>	125
THIRTIETH CONGRESS, 1847-1849:	
1. James Monroe vs. David S. Jackson, <i>New York</i>	126
2. H. H. Sibley, <i>Wisconsin Territory</i>	127
THIRTY-FIRST CONGRESS, 1849-1851:	
1. Hugh N. Smith, <i>New Mexico</i>	129
2. A. W. Babbitt, <i>Deseret</i>	130
3. Daniel F. Miller vs. William Thompson, <i>Iowa</i>	130
4. John S. Littell vs. John Robbins, jr., <i>Pennsylvania</i>	133

THIRTY-FIRST CONGRESS—Continued.	Page.
5. Jared Perkins <i>vs.</i> George W. Morrison, <i>New Hampshire</i>	135
6. W. S. Messervy, <i>New Mexico</i>	135
THIRTY-SECOND CONGRESS, 1851-1853:	
1. Hendrick B. Wright <i>vs.</i> Henry M. Fuller, <i>Pennsylvania</i>	137
THIRTY-THIRD CONGRESS, 1853-1855:	
1. William Carr Lane <i>vs.</i> José Manuel Gallegos, <i>New Mexico</i>	140
THIRTY-FOURTH CONGRESS, 1855-1857:	
1. J. S. Turney <i>vs.</i> Samuel S. Marshall, and P. B. Fouke <i>vs.</i> Lyman Trumbull, <i>Illinois</i>	141
2. William B. Archer <i>vs.</i> James C. Allen, <i>Illinois</i>	142
3. James A. Milliken <i>vs.</i> Thomas J. D. Fuller, <i>Maine</i>	143
4. Miguel A. Otero <i>vs.</i> José M. Gallegos, <i>New Mexico</i>	144
5. A. H. Reeder <i>vs.</i> J. W. Whitfield, <i>Kansas</i>	145
6. Hiram P. Bennet <i>vs.</i> Bird B. Chapman, <i>Nebraska</i>	147
7. S. B. Clark <i>vs.</i> Augustus Hall, <i>Iowa</i>	148
8. A. H. Reeder <i>vs.</i> J. W. Whitfield, <i>Kansas</i> (second case).....	149
THIRTY-FIFTH CONGRESS, 1857-1859:	
1. Clement L. Vallandigham <i>vs.</i> Lewis D. Campbell, <i>Ohio</i>	151
2. Henry P. Brooks <i>vs.</i> Henry Winter Davis, <i>Maryland</i>	154
3. W. W. Phelps <i>vs.</i> James M. Cavanaugh, <i>Minnesota</i>	154
4. Alpheus G. Fuller <i>vs.</i> W. W. Kingsbury, <i>Minnesota Territory</i>	155
5. William Pinkney Whyte <i>vs.</i> J. Morrison Harris, <i>Maryland</i>	158
6. Bird B. Chapman <i>vs.</i> Fenner Ferguson, <i>Nebraska</i>	159
THIRTY-SIXTH CONGRESS, 1859-1861:	
1. William A. Howard <i>vs.</i> George B. Gooper, <i>Michigan</i>	161
2. A. J. Williamson <i>vs.</i> D. E. Sickles, <i>New York</i>	163
3. Samuel G. Daily <i>vs.</i> Experience Estabrook, <i>Nebraska Territory</i>	163
4. Francis P. Blair, jr., <i>vs.</i> J. Richard Barrett, <i>Missouri</i>	165
5. James S. Chrisman <i>vs.</i> William C. Anderson, <i>Kentucky</i>	167
6. William G. Harrison <i>vs.</i> Henry Winter Davis, <i>Maryland</i>	168
7. William P. Preston <i>vs.</i> J. Morrison Harris, <i>Maryland</i>	169
THIRTY-SEVENTH CONGRESS, 1861-1863:	
1. George S. Shiel <i>vs.</i> A. J. Thayer, <i>Oregon</i>	171
2. John M. Butler <i>vs.</i> William E. Lehman, <i>Pennsylvania</i>	172
3. Andrew J. Clements, <i>Tennessee</i>	174
4. Charles H. Upton, <i>Virginia</i>	174
5. John Kline <i>vs.</i> John P. Verree, <i>Pennsylvania</i>	175
6. S. Ferguson Beach, <i>Virginia</i>	176
7. Le Grand Byington <i>vs.</i> William Vandever, <i>Iowa</i>	177
8. J. Sterling Morton <i>vs.</i> Samuel G. Daily, <i>Nebraska</i>	178
9. Joseph Segar (first case), <i>Virginia</i>	179
10. F. F. Lowe, <i>California</i>	179
11. Charles Henry Foster, <i>North Carolina</i>	180
12. Joseph Segar (second case), <i>Virginia</i>	181
13. Benjamin F. Flanders and Michael Hahn, <i>Louisiana</i>	181
14. John B. McCloud and W. W. Wing, <i>Virginia</i>	182
15. Lewis McKenzie, <i>Virginia</i>	183
16. John B. Rodgers, <i>Tennessee</i>	184
17. Jennings Pigott, <i>North Carolina</i>	184
18. Christopher L. Graffin, <i>Virginia</i>	184
19. Alvin Hawkins, <i>Tennessee</i>	184
THIRTY-EIGHTH CONGRESS, 1863-1865:	
1. Lewis McKenzie <i>vs.</i> B. M. Kitchen, <i>Virginia</i>	186
2. John S. Sleeper <i>vs.</i> Alexander H. Rice, <i>Massachusetts</i>	187
3. José M. Gallegos <i>vs.</i> Francisco Perea, <i>New Mexico</i>	188
4. John P. Bruce <i>vs.</i> Benjamin F. Loan, <i>Missouri</i>	188
5. Birch <i>vs.</i> King and Price <i>vs.</i> McClurg, <i>Missouri</i>	189
6. Lucius H. Chandler, <i>Virginia</i>	190
7. Samuel Knox <i>vs.</i> Francis P. Blair, <i>Missouri</i>	190
8. Robert C. Schenck, Ohio, and Francis P. Blair, Missouri.....	192
9. John H. McHenry, jr., <i>vs.</i> George H. Yeaman, <i>Kentucky</i>	193
10. J. B. S. Todd <i>vs.</i> William Jayne, <i>Dakota Territory</i>	193
11. James Lindsay <i>vs.</i> John G. Scott, <i>Missouri</i>	195
12. John Kline <i>vs.</i> Leonard Myers, <i>Pennsylvania</i>	196
13. Charles W. Carrigan <i>vs.</i> M. Russell Thayer, <i>Pennsylvania</i>	196
14. Joseph Segar, <i>Virginia</i>	197

THIRTY-EIGHTH CONGRESS—Continued.

	Page.
15. A. P. Field, <i>Louisiana</i>	197
16. M. F. Bonanzo, A. P. Field, and W. D. Mann, <i>Louisiana</i>	198
17. T. M. Jacks and J. M. Johnson, <i>Arkansas</i>	199

THIRTY-NINTH CONGRESS, 1865-1867:

1. Augustus C. Baldwin vs. Rowland E. Trowbridge, <i>Michigan</i>	200
2. Henry D. Washburn vs. Daniel W. Voorhees, <i>Indiana</i>	201
3. William E. Dodge vs. James Brooks, <i>New York</i>	203
4. Charles Follett vs. Columbus Delano, <i>Ohio</i>	205
5. S. H. Boyd vs. John R. Kelso, <i>Missouri</i>	206
6. Smith Fuller vs. John L. Dawson, <i>Pennsylvania</i>	207
7. William H. Koontz vs. Alexander H. Coffroth (two cases), <i>Pennsylvania</i>	207
8. Dorsey B. Thomas vs. Samuel M. Arnell, <i>Tennessee</i>	211

FORTIETH CONGRESS, 1867-1869:

1. <i>Colorado case</i> (Hunt and Chilcott).....	212
2. Columbus Delano vs. George W. Morgan, <i>Ohio</i>	213
3. James H. Burch vs. Robert T. Van Horn, <i>Missouri</i>	215
4. William H. McGorty vs. William T. Hooper, <i>Utah</i>	216
5. John Hogan vs. William A. Pile, <i>Missouri</i>	216
6. <i>Kentucky members</i> (two cases).....	218
7. G. G. Symes vs. Lawrence S. Trimble, <i>Kentucky</i>	218
8. William F. Switzler vs. George W. Anderson (two cases), <i>Missouri</i>	219
9. Samuel E. Smith vs. John Young Brown, <i>Kentucky</i>	220
10. George D. Blakey vs. J. S. Golladay, <i>Kentucky</i>	221
11. Samuel McKee vs. John D. Young (two cases), <i>Kentucky</i>	222
12. Roderick R. Butler, <i>Kentucky</i>	224
13. John H. Christy and John A. Wimpy, <i>Georgia</i>	225
14. J. Francisco Chaves vs. Charles P. Clever, <i>New Mexico</i>	225
15. Simon Jones vs. James Mann, <i>Louisiana</i>	226
16. Caleb S. Hunt vs. J. Willis Menard, <i>Louisiana</i>	226
17. Thomas A. Hamilton, <i>Tennessee</i>	228
18. J. S. Casement, <i>Wyoming</i>	229

FORTY-FIRST CONGRESS, 1869-1871:

1. Henry D. Foster vs. John Covode (<i>prima facie case</i>), <i>Pennsylvania</i>	231
2. Caleb S. Hunt vs. Lionel Allen Sheldon (<i>prima facie case</i>), <i>Louisiana</i>	232
3. S. L. Hoge vs. J. P. Reed (<i>prima facie case</i>), <i>South Carolina</i>	233
4. A. S. Wallace vs. William D. Simpson (<i>prima facie case</i>), <i>South Carolina</i>	235
5. Leonard Myers vs. John Moffett, <i>Pennsylvania</i>	235
6. <i>Georgia cases</i>	236
7. John Covode vs. Henry D. Foster (final case), <i>Pennsylvania</i>	237
8. Charles H. Van Wyck vs. George W. Greene, <i>New York</i>	239
9. Caleb U. Taylor vs. John R. Reading, <i>Pennsylvania</i>	240
10. J. Hale Sypher vs. Louis St. Martin, <i>Louisiana</i>	241
11. Caleb S. Hunt vs. Lionel Allen Sheldon (final case), <i>Louisiana</i>	241
12. Frank Morey vs. George W. McCranie, <i>Louisiana</i>	243
13. J. P. Newsham vs. Michael Ryan, <i>Louisiana</i>	244
14. A. S. Wallace vs. William D. Simpson (final case), <i>South Carolina</i>	244
15. Charles Whittlesey vs. Lewis McKenzie, <i>Virginia</i>	246
16. Chester B. Darrall vs. Adolphe Bailey, <i>Louisiana</i>	246
17. Sidney M. Barnes vs. George M. Adams, <i>Kentucky</i>	247
18. George Tucker vs. George W. Booker, <i>Virginia</i>	250
19. William F. Switzler vs. David P. Dyer, <i>Missouri</i>	250
20. Joseph Segar, <i>Virginia</i>	253
21. John S. Reid vs. George W. Julian, <i>Indiana</i>	253
22. John L. Zeigler vs. John M. Rice, <i>Kentucky</i>	255
23. Benjamin Eggleston vs. Peter W. Strader, <i>Ohio</i>	256
24. Nathaniel Boyden vs. Francis E. Shober, <i>North Carolina</i>	257
25. C. A. Sheafe vs. Lewis Tillman, <i>Tennessee</i>	257
26. James Shields vs. Robert T. Van Horn, <i>Missouri</i>	259
27. John B. Rodgers, <i>Tennessee</i>	260

FORTY-SECOND CONGRESS, 1871-1873:

1. <i>Tennessee election</i>	261
2. W. T. Clarke, <i>Texas</i>	263
3. Thomas Boles vs. John Edwards, <i>Arkansas</i>	264
4. Lewis McKenzie vs. Elliott M. Braxton, <i>Virginia</i>	265
5. Election frauds in <i>Arkansas</i>	266
6. John Cessna vs. Benjamin F. Myers, <i>Pennsylvania</i>	266

TABLE OF CASES.

11

FORTY-SECOND CONGRESS—Continued.

	Page.
7. B. W. Norris <i>vs.</i> W. A. Handley, <i>Alabama</i>	275
8. David S. Gooding <i>vs.</i> Jeremiah M. Wilson, <i>Indiana</i>	276
9. W. A. Burleigh and S. L. Spink <i>vs.</i> M. K. Armstrong, <i>Dakota Territory</i> ..	278
10. D. C. Giddings <i>vs.</i> W. T. Clarke, <i>Texas</i>	279
11. Isaac G. McKissick <i>vs.</i> Alexander S. Wallace, <i>South Carolina</i>	281
12. Christopher C. Bowen <i>vs.</i> Robert C. De Large, <i>South Carolina</i>	282
13. Silas L. Niblack <i>vs.</i> Josiah T. Walls, <i>Florida</i>	282
14. J. Hale Sypher, <i>Louisiana</i>	283

FORTY-THIRD CONGRESS, 1873-1875:

1. {John J. Davis <i>vs.</i> Benjamin Wilson, J. Marshall Hagans <i>vs.</i> Benjamin F. Martin,} <i>West Virginia</i>	284
2. Thomas M. Gunter <i>vs.</i> W. W. Wilshire (two cases), <i>Arkansas</i>	286
3. Andrew Sloan <i>vs.</i> Morgan Rawls, <i>Georgia</i>	288
4. John M. Burns <i>vs.</i> John D. Young, <i>Kentucky</i>	290
5. George R. Maxwell <i>vs.</i> George Q. Cannon, <i>Utah Territory</i>	291
6. John M. Bradley <i>vs.</i> Wm. J. Hynes, <i>Arkansas</i>	292
7. George A. Sheridan <i>vs.</i> P. B. S. Pinchback (2 cases), <i>Louisiana</i>	293
8. Marcus L. Bell <i>vs.</i> O. P. Snyder, <i>Arkansas</i>	297
9. George Q. Cannon, <i>Utah Territory</i>	298
10. Lucien S. Gause <i>vs.</i> Asa Hodges, <i>Arkansas</i>	299
11. Effingham Lawrence <i>vs.</i> J. Hale Sypher, <i>Louisiana</i>	300

FORTY-FOURTH CONGRESS, 1875-1877:

1. Frederick G. Bromberg <i>vs.</i> Jere Haralson, <i>Alabama</i>	303
2. Jesse J. Finley <i>vs.</i> Josiah T. Walls, <i>Florida</i>	305
3. John V. LeMoyné <i>vs.</i> Charles B. Farwell, <i>Illinois</i>	308
4. E. St. Julien Cox <i>vs.</i> Horace B. Strait, <i>Minnesota</i>	309
5. William B. Spencer <i>vs.</i> Frank Morey, <i>Louisiana</i>	311
6. Samuel Lee <i>vs.</i> Joseph R. Rainey, <i>South Carolina</i>	313
7. S. S. Fenn <i>vs.</i> T. W. Bennett, <i>Idaho Territory</i>	314
8. Josiah G. Abbott <i>vs.</i> Rufus S. Frost, <i>Massachusetts</i>	314
9. James H. Platt <i>vs.</i> John Goode, jr., <i>Virginia</i>	318
10. C. W. Buttz <i>vs.</i> E. W. M. Mackey, <i>South Carolina</i>	320

FORTY-FIFTH CONGRESS, 1877-1879:

1. Peter D. Wigginton <i>vs.</i> Romualdo Pacheco, <i>California</i>	322
2. Thomas M. Patterson <i>vs.</i> James B. Belford, <i>Colorado</i>	324
3. Jesse J. Finley <i>vs.</i> Horatio Bisbee, jr., <i>Florida</i>	326
4. Joseph H. Acklen <i>vs.</i> Chester B. Darrall, <i>Louisiana</i>	329
5. Benjamin Dean <i>vs.</i> Walbridge A. Field, <i>Massachusetts</i>	332
6. John S. Richardson <i>vs.</i> Joseph H. Rainey, <i>South Carolina</i>	334
7. R. Graham Frost <i>vs.</i> Lyne S. Metcalfe, <i>Missouri</i>	337

FORTY-SIXTH CONGRESS, 1879-1881:

1. John M. Bradley <i>vs.</i> William F. Slemons, <i>Arkansas</i>	339
2. Horatio Bisbee <i>vs.</i> Noble A. Hull, <i>Florida</i>	341
3. James McCabe <i>vs.</i> Godlove S. Orth, <i>Indiana</i>	342
4. J. C. Holmes and John L. Wilson, <i>Iowa</i>	342
5. W. B. Merchant and Robert A. Herbert <i>vs.</i> Joseph H. Acklen, <i>Louisiana</i> ..	344
6. E. Moody Boynton <i>vs.</i> George B. Loring, <i>Massachusetts</i>	345
7. Sebastian Duffy <i>vs.</i> Joseph Mason, <i>New York</i>	346
8. James E. O'Hara <i>vs.</i> William K. Kitchin, <i>North Carolina</i>	348
9. Jesse J. Yeates <i>vs.</i> Joseph J. Martin, <i>North Carolina</i>	349
10. Andrew G. Curtin <i>vs.</i> Seth H. Yocum, <i>Pennsylvania</i>	350
11. Ignatius Donnelly <i>vs.</i> William D. Washburn, <i>Minnesota</i>	355

FORTY-SEVENTH CONGRESS, 1881-1883:

1. Paul Strobach <i>vs.</i> Hilary A. Herbert, <i>Alabama</i>	362
2. Algernon A. Mabson <i>vs.</i> William C. Oates, <i>Alabama</i>	363
3. James I. Smith <i>vs.</i> Charles M. Shelley, <i>Alabama</i>	364
4. William M. Lowe <i>vs.</i> Joseph Wheeler, <i>Alabama</i>	365
5. George Witherspoon <i>vs.</i> Robert H. M. Davidson, <i>Florida</i>	368
6. Horatio Bisbee, jr., <i>vs.</i> Jesse J. Finley, <i>Florida</i>	368
7. John C. Cook <i>vs.</i> Marsena E. Cutts, <i>Iowa</i>	371
8. Alexander Smith <i>vs.</i> E. W. Robertson, <i>Louisiana</i>	372
9. Samuel J. Anderson <i>vs.</i> Thomas B. Reed, <i>Maine</i>	372
10. George M. Buchanan <i>vs.</i> Van H. Manning, <i>Mississippi</i>	373
11. John R. Lynch <i>vs.</i> James R. Chalmers, <i>Mississippi</i>	375
12. Gustavus Seessinghaus <i>vs.</i> R. Graham Frost, <i>Missouri</i>	378
13. Robert Smalls <i>vs.</i> George D. Tillman, <i>South Carolina</i>	381

FORTY-SEVENTH CONGRESS—Continued.

	Page.
14. Samuel Lee <i>vs.</i> John S. Richardson, <i>South Carolina</i>	384
15. Edmund W. M. Mackey <i>vs.</i> M. P. O'Connor, <i>South Carolina</i>	387
16. Carlos J. Stolbrand <i>vs.</i> D. Wyatt Aiken, <i>South Carolina</i>	391
17. George Q. Cannon <i>vs.</i> Allen J. Campbell, <i>Utah Territory</i>	391
18. John T. Stovell <i>vs.</i> George C. Cabell, <i>Virginia</i>	393
19. S. P. Bayley <i>vs.</i> John S. Barbour, <i>Virginia</i>	394
20. John W. Jones <i>vs.</i> Charles M. Shelley, <i>Alabama</i>	394

FORTY-EIGHTH CONGRESS, 1883-1885:

1. J. R. Chalmers <i>vs.</i> V. H. Manning, <i>Mississippi</i>	396
2. George T. Garrison <i>vs.</i> Robert Mayo, <i>Virginia</i>	398
3. Francisco A. Manzanares <i>vs.</i> Tranquilino Luna, <i>New Mexico</i>	399
4. Charles C. Pool <i>vs.</i> Thomas G. Skinner, <i>North Carolina</i>	400
5. S. N. Wood <i>vs.</i> S. R. Peters, <i>Kansas</i>	401
6. Charles T. O'Ferrall <i>vs.</i> John Paul, <i>Virginia</i>	402
7. William M. English <i>vs.</i> Stanton J. Peele, <i>Indiana</i>	404
8. Jonathan H. Wallace <i>vs.</i> William McKinley, jr., <i>Ohio</i>	406
9. James E. Campbell <i>vs.</i> Henry L. Morey, <i>Ohio</i>	408
10. John E. Massey <i>vs.</i> John S. Wise, <i>Virginia</i>	410
11. George H. Craig <i>vs.</i> Charles M. Shelley, <i>Alabama</i>	411
12. A. C. Botkin <i>vs.</i> Martin Maginnis, <i>Montana Territory</i>	411
13. James H. McLean <i>vs.</i> James O. Broadhead, <i>Missouri</i>	412
14. Benjamin T. Frederick <i>vs.</i> James Wilson, <i>Iowa</i>	413

FORTY-NINTH CONGRESS, 1885-1887:

1. Frank H. Hurd <i>vs.</i> Jacob Romeis, <i>Ohio</i>	415
2. Frank T. Campbell <i>vs.</i> J. B. Weaver, <i>Iowa</i>	417
3. Charles H. Page <i>vs.</i> William A. Pirce, <i>Rhode Island</i>	419
4. <i>California cases</i>	421
5. Meredith H. Kidd <i>vs.</i> George W. Steele, <i>Indiana</i>	422

FIFTIETH CONGRESS, 1887-1889:

1. George H. Thobe <i>vs.</i> John G. Carlisle, <i>Kentucky</i>	423
2. John V. McDuffie <i>vs.</i> Alexander C. Davidson, <i>Alabama</i>	424
3. Robert Lowry <i>vs.</i> James B. White, <i>Indiana</i>	426
4. Nicholas E. Worthington <i>vs.</i> Philip S. Post, <i>Illinois</i>	427
5. Nathan Frank <i>vs.</i> John M. Glover, <i>Missouri</i>	428
6. Joseph D. Lynch <i>vs.</i> William Vandever, <i>California</i>	429
7. Robert Smalls <i>vs.</i> William Elliott, <i>South Carolina</i>	429
8. Frank J. Sullivan <i>vs.</i> Charles N. Felton, <i>California</i>	432

FIFTY-FIRST CONGRESS, 1889-1891:

1. Charles B. Smith <i>vs.</i> James M. Jackson, <i>West Virginia</i>	436
2. George W. Atkinson <i>vs.</i> John O. Pendleton, <i>West Virginia</i>	440
3. L. P. Featherston <i>vs.</i> W. H. Cate, <i>Arkansas</i>	441
4. Sydney E. Mudd <i>vs.</i> Barnes Compton, <i>Maryland</i>	447
5. Frank H. Threest <i>vs.</i> Richard H. Clarke, <i>Alabama</i>	450
6. Francis B. Posey <i>vs.</i> Wm. F. Parrett, <i>Indiana</i>	451
7. Henry Bowen <i>vs.</i> John A. Buchanan, <i>Virginia</i>	451
8. Edmund Waddill, jr., <i>vs.</i> George D. Wise, <i>Virginia</i>	452
9. John V. McDuffie <i>vs.</i> Louis W. Turpin, <i>Alabama</i>	454
10. James R. Chalmers <i>vs.</i> James B. Morgan, <i>Mississippi</i>	457
11. John M. Langston <i>vs.</i> E. C. Venable, <i>Virginia</i>	458
12. Thomas E. Miller <i>vs.</i> William Elliott, <i>South Carolina</i>	461
13. Fred S. Goodrich <i>vs.</i> Robert Bullock, <i>Florida</i>	464
14. James H. McGinnis <i>vs.</i> John D. Alderson, <i>West Virginia</i>	466
15. John M. Clayton <i>vs.</i> Clifton R. Breckinridge, <i>Arkansas</i>	468
16. Henry Kernaghan <i>vs.</i> Charles E. Hooker, <i>Mississippi</i>	470
17. James Hill <i>vs.</i> T. C. Catchings, <i>Mississippi</i>	471

FIFTY-SECOND CONGRESS, 1891-1893:

1. Alexander H. Craig <i>vs.</i> Andrew Stewart, <i>Pennsylvania</i>	472
2. Henry T. Noyes <i>vs.</i> Hosea H. Rockwell, <i>New York</i>	474
3. John B. Reynolds <i>vs.</i> George W. Shonk, <i>Pennsylvania</i>	477
4. John V. McDuffie <i>vs.</i> Louis W. Turpin, <i>Alabama</i>	477
5. Thomas R. Greevy <i>vs.</i> Edward Scull, <i>Pennsylvania</i>	478
6. Thomas E. Miller <i>vs.</i> William Elliott, <i>South Carolina</i>	480

FIFTY-THIRD CONGRESS, 1893-1895:

1. W. W. Whatley <i>vs.</i> J. E. Cobb, <i>Alabama</i>	483
2. A. H. A. Williams <i>vs.</i> Thomas Settle, <i>North Carolina</i>	484
3. Warren B. English <i>vs.</i> Samuel G. Hilborn, <i>California</i>	486

TABLE OF CASES.

13

FIFTY-THIRD CONGRESS—Continued.

	Page.
4. P. H. Thrasher <i>vs.</i> B. A. Enloe, <i>Tennessee</i>	487
5. Thomas E. Watson <i>vs.</i> James C. C. Black, <i>Georgia</i>	489
6. H. L. Moore <i>vs.</i> Edward H. Funston, <i>Kansas</i>	491
7. Charles H. Page <i>Rhode Island</i>	493
8. Louis Steward <i>vs.</i> Robert A. Childs, <i>Illinois</i>	493
9. Charles E. Belknap <i>vs.</i> George F. Richardson, <i>Michigan</i>	494
10. J. T. Goode <i>vs.</i> J. F. Epes, <i>Virginia</i>	496
11. John J. O'Neill <i>vs.</i> Charles F. Joy, <i>Missouri</i>	497

FIFTY-FOURTH CONGRESS, 1895-1897:

Committee No. 1—

1. Hugh R. Belknap <i>vs.</i> Lawrence E. McGann, <i>Illinois</i>	501
2. James J. McDonald <i>vs.</i> William A. Jones, <i>Virginia</i>	502
3. William F. Aldrich <i>vs.</i> Gaston A. Robbins, <i>Alabama</i>	502
4. Albert T. Goodwyn <i>vs.</i> James E. Cobb, <i>Alabama</i>	504
5. W. C. Robinson <i>vs.</i> George P. Harrison, <i>Alabama</i>	505
6. John I. Rinaker <i>vs.</i> Finis E. Downing, <i>Illinois</i>	506
7. Truman H. Aldrich <i>vs.</i> Oscar W. Underwood, <i>Alabama</i>	509
8. William H. Felton <i>vs.</i> John W. Maddox, <i>Georgia</i>	510
9. George Denny, jr., <i>vs.</i> W. C. Owens, <i>Kentucky</i>	511
10. N. T. Hopkins <i>vs.</i> Joseph M. Kendall, <i>Kentucky</i>	512
11. Thomas E. Watson <i>vs.</i> James C. C. Black, <i>Georgia</i>	513

Committee No. 2—

12. Robert A. Chesebrough <i>vs.</i> George B. McClellan, <i>New York</i>	513
13. Timothy J. Campbell <i>vs.</i> Henry C. Miner, <i>New York</i>	514
14. Robert T. Van Horn <i>vs.</i> John C. Tarsney, <i>Missouri</i>	515
15. H. Dudley Coleman <i>vs.</i> Charles F. Buck, <i>Louisiana</i>	518
16. William S. Booze <i>vs.</i> Harry Welles Rusk, <i>Maryland</i>	519
17. Alexis Benoit <i>vs.</i> Charles J. Boatner (first case), <i>Louisiana</i>	519
18. Cyrus Thompson <i>vs.</i> John G. Shaw, <i>North Carolina</i>	520
19. Henry P. Cheatham <i>vs.</i> Frederick A. Woodard, <i>North Carolina</i>	521
20. John Murray Mitchell <i>vs.</i> James J. Walsh, <i>New York</i>	521
21. Charles H. Martin <i>vs.</i> John A. Lockhart, <i>North Carolina</i>	524
22. Alexis Benoit <i>vs.</i> Charles J. Boatner (second case), <i>Louisiana</i>	526
23. Taylor Beattie <i>vs.</i> Andrew Price, <i>Louisiana</i>	527

Committee No. 3—

24. J. H. Davis <i>vs.</i> D. B. Culberson, <i>Texas</i>	529
25. A. J. Rosenthal <i>vs.</i> Miles Crowley, <i>Texas</i>	529
26. Robert Moorman <i>vs.</i> A. C. Latimer, <i>South Carolina</i>	530
27. Thomas B. Johnston <i>vs.</i> J. William Stokes, <i>South Carolina</i>	530
28. George W. Cornett <i>vs.</i> Claude A. Swanson, <i>Virginia</i>	534
29. J. Hampton Hoge <i>vs.</i> Peter J. Otey, <i>Virginia</i>	537
30. R. T. Thorp <i>vs.</i> W. R. McKenney, <i>Virginia</i>	537
31. Giles Otis Pearce <i>vs.</i> John C. Bell, <i>Colorado</i>	540
32. A. M. Newman <i>vs.</i> J. G. Spencer, <i>Mississippi</i>	540
33. W. P. Ratliff <i>vs.</i> J. S. Williams, <i>Mississippi</i>	540
34. John A. Brown <i>vs.</i> John M. Allen, <i>Mississippi</i>	540
35. Joshua E. Wilson <i>vs.</i> John McLaurin, <i>South Carolina</i>	541
36. George W. Murray <i>vs.</i> William Elliott, <i>South Carolina</i>	543
37. J. C. Kearby <i>vs.</i> Jo. Abbott, <i>Texas</i>	546
38. Jacob Yost <i>vs.</i> H. St. George Tucker, <i>Virginia</i>	547

FIFTY-FIFTH CONGRESS, 1897-1899:

Committee No. 1—

1. Thomas H. Clark <i>vs.</i> Jesse F. Stallings, <i>Alabama</i>	554
2. G. L. Comer <i>vs.</i> Henry D. Clayton, <i>Alabama</i>	554
3. William F. Aldrich <i>vs.</i> Thomas S. Plowman, <i>Alabama</i>	554
4. Grattan B. Crowe <i>vs.</i> Oscar W. Underwood, <i>Alabama</i>	557
5. Jonathan S. Willis <i>vs.</i> L. Irving Handy, <i>Delaware</i>	557
6. W. Godfrey Hunter <i>vs.</i> John S. Rhea, <i>Kentucky</i>	557

Committee No. 2—

7. Samuel E. Hudson <i>vs.</i> William McAleer, <i>Pennsylvania</i>	558
8. W. S. Vanderburg <i>vs.</i> Thomas H. Tongue, <i>Oregon</i>	559
9. Ben L. Fairchild <i>vs.</i> William L. Ward, <i>New York</i>	559
10. William E. Ryan <i>vs.</i> Henry C. Brewster, <i>New York</i>	563
11. Armand Romain <i>vs.</i> Adolph Meyer, <i>Louisiana</i>	563
12. Joseph Gazin <i>vs.</i> Adolph Meyer, <i>Louisiana</i>	564

FIFTY-FIFTH CONGRESS—Continued.	Page.
Committee No. 3—	
13. R. T. Thorp <i>vs.</i> Sydney P. Epes, <i>Virginia</i>	565
14. Richard A. Wise <i>vs.</i> William A. Young, <i>Virginia</i>	569
15. Josiah Patterson <i>vs.</i> E. W. Carmack, <i>Tennessee</i>	574
16. John R. Brown <i>vs.</i> Claude A. Swanson, <i>Virginia</i>	578
FIFTY-SIXTH CONGRESS, 1899-1901:	
Special committee—	
(1) Brigham H. Roberts, <i>Utah</i>	582
Committee No. 1—	
(2) Walter Evans <i>vs.</i> Oscar Turner, <i>Kentucky</i>	596
(3) William F. Aldrich <i>vs.</i> Gaston A. Robbins, <i>Alabama</i>	597
(4) Robert Wilcox, <i>Hawaii</i>	601
(5) George M. Davidson <i>vs.</i> George G. Gilbert, <i>Kentucky</i>	603
(6) James A. Walker <i>vs.</i> William F. Rhea, <i>Virginia</i>	606
Committee No. 2—	
(7) John D. White <i>vs.</i> Vincent S. Boreing, <i>Kentucky</i>	606
Committee No. 3—	
(8) Richmond Pearson <i>vs.</i> William T. Crawford, <i>North Carolina</i>	608
(9) Richard A. Wise <i>vs.</i> William A. Young, <i>Virginia</i>	611

CASES BY STATES AND TERRITORIES.

Alabama.

1. Norris <i>vs.</i> Handley, Forty-second Congress.....	275
2. Bromberg <i>vs.</i> Haralson, Forty-fourth Congress.....	303
3. Jones <i>vs.</i> Shelley, Forty-seventh Congress.....	394
4. Lowe <i>vs.</i> Wheeler, Forty-seventh Congress.....	365
5. Mabson <i>vs.</i> Oates, Forty-seventh Congress.....	363
6. Smith <i>vs.</i> Shelley, Forty-seventh Congress.....	364
7. Strobach <i>vs.</i> Herbert, Forty-seventh Congress.....	362
8. Craig <i>vs.</i> Shelley, Forty-eighth Congress.....	411
9. McDuffie <i>vs.</i> Davidson, Fiftieth Congress.....	424
10. McDuffie <i>vs.</i> Turpin, Fifty-first Congress.....	454
11. Threet <i>vs.</i> Clarke, Fifty-first Congress.....	450
12. McDuffie <i>vs.</i> Turpin, Fifty-second Congress.....	477
13. Whatley <i>vs.</i> Cobb, Fifty-third Congress.....	483
14. Aldrich <i>vs.</i> Robbins, Fifty-fourth Congress.....	502
15. Aldrich <i>vs.</i> Underwood, Fifty-fourth Congress.....	509
16. Goodwyn <i>vs.</i> Cobb, Fifty-fourth Congress.....	504
17. Robinson <i>vs.</i> Harrison, Fifty-fourth Congress.....	505
18. Aldrich <i>vs.</i> Plowman, Fifty-fifth Congress.....	554
19. Clark <i>vs.</i> Stallings, Fifty-fifth Congress.....	554
20. Comer <i>vs.</i> Clayton, Fifty-fifth Congress.....	554
21. Crowe <i>vs.</i> Underwood, Fifty-fifth Congress.....	557
22. Aldrich <i>vs.</i> Robbins, Fifty-sixth Congress.....	597

Arkansas Territory.

1. Lyon <i>vs.</i> Bates, Seventeenth Congress.....	78
---	----

Arkansas.

1. Newton and Yell, Twenty-ninth Congress.....	125
2. Jacks and Johnson, Thirty-eighth Congress.....	199
3. Election frauds in Arkansas, Forty-second Congress.....	266
4. Boles <i>vs.</i> Edwards, Forty-second Congress.....	264
5. Bell <i>vs.</i> Snyder, Forty-third Congress.....	297
6. Bradley <i>vs.</i> Hynes, Forty-third Congress.....	292
7. Gause <i>vs.</i> Hodges, Forty-third Congress.....	299
8. Gunter <i>vs.</i> Wilshire (two cases), Forty-third Congress.....	286
9. Bradley <i>vs.</i> Slemmons, Forty-sixth Congress.....	339
10. Clayton <i>vs.</i> Breckinridge, Fifty-first Congress.....	468
11. Featherston <i>vs.</i> Cate, Fifty-first Congress.....	441

TABLE OF CASES.

15

California.

	Page.
1. Lowe, Thirty-seventh Congress	179
2. Wigginton <i>vs.</i> Pacheco, Forty-fifth Congress	322
3. California cases, Forty-ninth Congress	421
4. Lynch <i>vs.</i> Vandever, Fiftieth Congress	429
5. Sullivan <i>vs.</i> Felton, Fiftieth Congress	432
6. English <i>vs.</i> Hilborn, Fifty-third Congress	486

Colorado Territory.

1. Colorado case, Hunt and Chilcott, Fortieth Congress	212
--	-----

Colorado.

1. Patterson <i>vs.</i> Belford, Forty-fifth Congress	324
2. Pearce <i>vs.</i> Bell, Fifty-fourth Congress	540

Dakota Territory.

1. Todd <i>vs.</i> Jayne, Thirty-eighth Congress	193
2. Burleigh and Spink <i>vs.</i> Armstrong, Forty-second Congress	278

Delaware.

1. Latimer <i>vs.</i> Patton, Third Congress	41
2. Willis <i>vs.</i> Handy, Fifty-fifth Congress	557

Deseret.

1. Babbitt, Thirty-first Congress	130
---	-----

Florida Territory.

1. Levy, Twenty-seventh Congress	114
--	-----

Florida.

1. Brockenbrough <i>vs.</i> Cabell, Twenty-ninth Congress	123
2. Niblack <i>vs.</i> Walls, Forty-second Congress	282
3. Finley <i>vs.</i> Walls, Forty-fourth Congress	305
4. Finley <i>vs.</i> Bisbee, Forty-fifth Congress	326
5. Bisbee <i>vs.</i> Hull, Forty-sixth Congress	341
6. Bisbee <i>vs.</i> Finley, Forty-seventh Congress	368
7. Witherspoon <i>vs.</i> Davidson, Forty-seventh Congress	368
8. Goodrich <i>vs.</i> Bullock, Fifty-first Congress	464

Georgia.

1. Jackson <i>vs.</i> Wayne, Second Congress	39
2. Spaulding <i>vs.</i> Mead, Ninth Congress	54
3. Forsyth, Eighteenth Congress	82
4. Christy and Wimpy, Fortieth Congress	225
5. Georgia Cases, Forty-first Congress	236
6. Sloan <i>vs.</i> Rawls, Forty-third Congress	288
7. Watson <i>vs.</i> Black, Fifty-third Congress	489
8. Felton <i>vs.</i> Maddox, Fifty-fourth Congress	510
9. Watson <i>vs.</i> Black, Fifty-fourth Congress	513

Hawaii.

1. Wilcox, Fifty-sixth Congress	601
---------------------------------------	-----

Idaho Territory.

1. Fenn <i>vs.</i> Bennett, Forty-fourth Congress	314
---	-----

Illinois.

	Page.
1. Baker, Twenty-ninth Congress.....	125
2. Archer <i>vs.</i> Allen, Thirty-fourth Congress.....	142
3. Fouke <i>vs.</i> Trumbull, Thirty-fourth Congress.....	141
4. Turney <i>vs.</i> Marshall, Thirty-fourth Congress.....	141
5. Le Moyne <i>vs.</i> Farwell, Forty-fourth Congress.....	308
6. Worthington <i>vs.</i> Post, Fiftieth Congress.....	427
7. Steward <i>vs.</i> Childs, Fifty-third Congress.....	493
8. Belknap <i>vs.</i> McGann, Fifty-fourth Congress.....	501
9. Rinaker <i>vs.</i> Downing, Fifty-fourth Congress.....	506

Indiana Territory.

1. Randolph <i>vs.</i> Jennings, Eleventh Congress.....	61
---	----

Indiana.

1. Washburn <i>vs.</i> Voorhees, Thirty-ninth Congress.....	201
2. Reid <i>vs.</i> Julian, Forty-first Congress.....	253
3. Goodings <i>vs.</i> Wilson, Forty-second Congress.....	276
4. McCabe <i>vs.</i> Orth, Forty-sixth Congress.....	342
5. English <i>vs.</i> Peelle, Forty-eighth Congress.....	404
6. Kidd <i>vs.</i> Steele, Forty-ninth Congress.....	422
7. Lowry <i>vs.</i> White, Fiftieth Congress.....	426
8. Posey <i>vs.</i> Parrett, Fifty-first Congress.....	451

Iowa.

1. Miller <i>vs.</i> Thompson, Thirty-first Congress.....	130
2. Clark <i>vs.</i> Hall, Thirty-fourth Congress.....	148
3. Byington <i>vs.</i> Vandever, Thirty-seventh Congress.....	177
4. Holmes and Wilson, Forty-sixth Congress.....	342
5. Cook <i>vs.</i> Cutts, Forty-seventh Congress.....	371
6. Frederick <i>vs.</i> Wilson, Forty-eighth Congress.....	413
7. Campbell <i>vs.</i> Weaver, Forty-ninth Congress.....	417

Kansas Territory.

1. Reeder <i>vs.</i> Whitfield (2 cases), Thirty-fourth Congress.....	145, 149
---	----------

Kansas.

1. Wood <i>vs.</i> Peters, Forty-eighth Congress.....	401
2. Moore <i>vs.</i> Funston, Fifty-third Congress.....	491

Kentucky.

1. Letcher <i>vs.</i> Moore, Twenty-third Congress.....	98
2. Chrisman <i>vs.</i> Anderson, Thirty-sixth Congress.....	167
3. McHenry <i>vs.</i> Yeaman, Thirty-eighth Congress.....	193
4. Kentucky members (2 cases), Fortieth Congress.....	218
5. Blakey <i>vs.</i> Golladay, Fortieth Congress.....	221
6. Butler, Fortieth Congress.....	224
7. McKee <i>vs.</i> Young (2 cases), Fortieth Congress.....	222
8. Smith <i>vs.</i> Brown, Fortieth Congress.....	220
9. Symes <i>vs.</i> Trimble, Fortieth Congress.....	218
10. Barnes <i>vs.</i> Adams, Forty-first Congress.....	247
11. Zeigler <i>vs.</i> Rice, Forty-first Congress.....	255
12. Burns <i>vs.</i> Young, Forty-third Congress.....	290
13. Thobe <i>vs.</i> Carlisle, Fiftieth Congress.....	423
14. Denny <i>vs.</i> Owens, Fifty-fourth Congress.....	511
15. Hopkins <i>vs.</i> Kendall, Fifty-fourth Congress.....	512
16. Hunter <i>vs.</i> Rhea, Fifty-fifth Congress.....	557
17. Evans <i>vs.</i> Turner, Fifty-sixth Congress.....	596
18. White <i>vs.</i> Boreing, Fifty-sixth Congress.....	606
19. Davidson <i>vs.</i> Gilbert, Fifty-sixth Congress.....	603

Louisiana.

	Page.
1. Flanders and Hahn, Thirty-seventh Congress	181
2. Field, Thirty-eighth Congress	197
3. Bonanzo, Field, and Mann, Thirty-eighth Congress	198
4. Hunt <i>vs.</i> Menard, Fortieth Congress	226
5. Jones <i>vs.</i> Mann, Fortieth Congress	226
6. Darrall <i>vs.</i> Bailey, Forty-first Congress	246
7. Hunt <i>vs.</i> Sheldon (2 cases), Forty-first Congress	232, 241
8. Morey <i>vs.</i> McCranie, Forty-first Congress	243
9. Newsham <i>vs.</i> Ryan, Forty-first Congress	244
10. Sypher <i>vs.</i> St. Martin, Forty-first Congress	241
11. Sypher, Forty-second Congress	283
12. Lawrence <i>vs.</i> Sypher, Forty-third Congress	300
13. Sheridan <i>vs.</i> Pinchback (2 cases), Forty-third Congress	293
14. Spencer <i>vs.</i> Morey, Forty-fourth Congress	311
15. Acklen <i>vs.</i> Darrall, Forty-fifth Congress	329
16. Merchant and Herbert <i>vs.</i> Acklen, Forty-sixth Congress	344
17. Smith <i>vs.</i> Robertson, Forty-seventh Congress	372
18. Beattie <i>vs.</i> Price, Fifty-fourth Congress	527
19. Benoit <i>vs.</i> Boatner (2 cases), Fifty-fourth Congress	519, 526
20. Coleman <i>vs.</i> Buck, Fifty-fourth Congress	518
21. Gazin <i>vs.</i> Meyer, Fifty-fifth Congress	564
22. Romain <i>vs.</i> Meyer, Fifty-fifth Congress	563

Maine.

1. Washburn <i>vs.</i> Ripley, Twenty-first Congress	91
2. Lowell, Twenty-seventh Congress	114
3. Milliken <i>vs.</i> Fuller, Thirty-fourth Congress	143
4. Anderson <i>vs.</i> Reed, Forty-seventh Congress	372

Maryland.

1. Mercer, Second Congress	39
2. Edwards, Third Congress	43
3. Barney <i>vs.</i> McCreery, Tenth Congress	56
4. Key, Tenth Congress	58
5. Reed <i>vs.</i> Cosden, Seventeenth Congress	77
6. Brooks <i>vs.</i> Davis, Thirty-fifth Congress	154
7. Whyte <i>vs.</i> Harris, Thirty-fifth Congress	156
8. Harrison <i>vs.</i> Davis, Thirty-sixth Congress	168
9. Preston <i>vs.</i> Harris, Thirty-sixth Congress	169
10. Mudd <i>vs.</i> Compton, Fifty-first Congress	447
11. Booze <i>vs.</i> Rusk, Fifty-fourth Congress	519

Massachusetts.

1. Varnum, Fourth Congress	47
2. Turner <i>vs.</i> Baylies, Eleventh Congress	60
3. Bailey, Eighteenth Congress	80
4. Sleeper <i>vs.</i> Rice, Thirty-eighth Congress	187
5. Abbott <i>vs.</i> Frost, Forty-fourth Congress	314
6. Dean <i>vs.</i> Field, Forty-fifth Congress	332
7. Boynton <i>vs.</i> Loring, Forty-sixth Congress	345

Michigan Territory.

1. Biddle <i>vs.</i> Richard, Eighteenth Congress	80
2. Biddle and Richard <i>vs.</i> Wing, Nineteenth Congress	83

Michigan.

1. Howard <i>vs.</i> Cooper, Thirty-sixth Congress	161
2. Baldwin <i>vs.</i> Trowbridge, Thirty-ninth Congress	200
3. Belknap <i>vs.</i> Richardson, Fifty-third Congress	494

Minnesota Territory.

	Page.
1. Fuller <i>vs.</i> Kingsbury, Thirty-fifth Congress	155

Minnesota.

1. Phelps <i>vs.</i> Cavanaugh, Thirty-fifth Congress	154
2. Cox <i>vs.</i> Strait, Forty-fourth Congress	309
3. Donnelly <i>vs.</i> Washburn, Forty-sixth Congress	355

Mississippi Territory.

1. Hunter, Seventh Congress	49
-----------------------------------	----

Mississippi.

1. Gholson and Claiborne, Twenty-fifth Congress	108
2. Buchanan <i>vs.</i> Manning, Forty-seventh Congress	373
3. Lynch <i>vs.</i> Chalmers, Forty-seventh Congress	375
4. Chalmers <i>vs.</i> Manning, Forty-eighth Congress	396
5. Chalmers <i>vs.</i> Morgan, Fifty-first Congress	457
6. Hill <i>vs.</i> Catchings, Fifty-first Congress	471
7. Kernaghan <i>vs.</i> Hooker, Fifty-first Congress	470
8. Brown <i>vs.</i> Allen, Fifty-fourth Congress	540
9. Newman <i>vs.</i> Spencer, Fifty-fourth Congress	540
10. Ratliff <i>vs.</i> Williams, Fifty-fourth Congress	540

Missouri Territory.

1. Easton <i>vs.</i> Scott, Fourteenth Congress	68
---	----

Missouri.

1. Blair <i>vs.</i> Barrett, Thirty-sixth Congress	165
2. Birch <i>vs.</i> King, Thirty-eighth Congress	189
3. Bruce <i>vs.</i> Loan, Thirty-eighth Congress	188
4. Blair, Thirty-eighth Congress	192
5. Knox <i>vs.</i> Blair, Thirty-eighth Congress	190
6. Lindsay <i>vs.</i> Scott, Thirty-eighth Congress	195
7. Price <i>vs.</i> McClurg, Thirty-eighth Congress	189
8. Boyd <i>vs.</i> Kelso, Thirty-ninth Congress	206
9. Burch <i>vs.</i> Van Horn, Fortieth Congress	215
10. Hogan <i>vs.</i> Pile, Fortieth Congress	216
11. Switzler <i>vs.</i> Anderson (2 cases), Fortieth Congress	219
12. Shields <i>vs.</i> Van Horn, Forty-first Congress	259
13. Switzler <i>vs.</i> Dyer, Forty-first Congress	250
14. Frost <i>vs.</i> Metcalfe, Forty-fifth Congress	337
15. Sessinghaus <i>vs.</i> Frost, Forty-seventh Congress	378
16. McLean <i>vs.</i> Broadhead, Forty-eighth Congress	412
17. Frank <i>vs.</i> Glover, Fiftieth Congress	428
18. O'Neill <i>vs.</i> Joy, Fifty-third Congress	497
19. Van Horn <i>vs.</i> Tarsney, Fifty-fourth Congress	515

Montana Territory.

1. Botkin <i>vs.</i> Maginnis, Forty-eighth Congress	411
--	-----

Nebraska Territory.

1. Bennett <i>vs.</i> Chapman, Thirty-fourth Congress	147
2. Chapman <i>vs.</i> Ferguson, Thirty-fifth Congress	159
3. Daily <i>vs.</i> Estabrook, Thirty-sixth Congress	163
4. Morton <i>vs.</i> Daily, Thirty-seventh Congress	178

TABLE OF CASES.

19

New Hampshire.

	Page.
1. Perkins <i>vs.</i> Morrison, Thirty-first Congress	135

New Jersey.

1. New Jersey members, First Congress	38
2. The New Jersey case, Twenty-sixth Congress	109
3. Farlee <i>vs.</i> Runk, Twenty-ninth Congress	124

New Mexico (Territory).

1. Messervy, Thirty-first Congress	135
2. Smith, Thirty-first Congress	129
3. Lane <i>vs.</i> Gallegos, Thirty-third Congress	140
4. Otero <i>vs.</i> Gallegos, Thirty-fourth Congress	144
5. Gallegos <i>vs.</i> Perea, Thirty-eighth Congress	188
6. Chaves <i>vs.</i> Clever, Fortieth Congress	225
7. Manzanares <i>vs.</i> Luna, Forty-eighth Congress	399

New York.

1. Van Rensselaer <i>vs.</i> Van Allen, Third Congress	42
2. Van Ness, Seventh Congress	49
3. Blydenburg and Jay <i>vs.</i> Sage and Lefferts, Thirteenth Congress	66
4. Williams <i>vs.</i> Bowers, Thirteenth Congress	65
5. Root <i>vs.</i> Adams, Fourteenth Congress	68
6. Willoughby <i>vs.</i> Smith, Fourteenth Congress	67
7. Guyon <i>vs.</i> Sage, Sixteenth Congress	76
8. Colden <i>vs.</i> Sharpe, Seventeenth Congress	78
9. Adams <i>vs.</i> Wilson, Eighteenth Congress	79
10. Hugunin <i>vs.</i> Ten Eyck, Nineteenth Congress	83
11. Wright <i>vs.</i> Fisher, Twenty-first Congress	87
12. Monroe <i>vs.</i> Jackson, Thirtieth Congress	126
13. Williamson <i>vs.</i> Sickles, Thirty-sixth Congress	163
14. Dodge <i>vs.</i> Brooks, Thirty-ninth Congress	203
15. Van Wyck <i>vs.</i> Greene, Forty-first Congress	239
16. Duffy <i>vs.</i> Mason, Forty-sixth Congress	346
17. Noyes <i>vs.</i> Rockwell, Fifty-second Congress	474
18. Cheesbrough <i>vs.</i> McClellan, Fifty-fourth Congress	513
19. Campbell <i>vs.</i> Miner, Fifty-fourth Congress	514
20. Mitchell <i>vs.</i> Walsh, Fifty-fourth Congress	521
21. Fairchild <i>vs.</i> Ward, Fifty-fifth Congress	559
22. Ryan <i>vs.</i> Brewster, Fifty-fifth Congress	563

North Carolina.

1. McFarland <i>vs.</i> Purviance, Eighth Congress	51
2. McFarland <i>vs.</i> Culpepper, Tenth Congress	58
3. Mumford, Fifteenth Congress	73
4. Newland <i>vs.</i> Graham, Twenty-fourth Congress	105
5. Foster, Thirty-seventh Congress	180
6. Pigott, Thirty-seventh Congress	184
7. Boyden <i>vs.</i> Shober, Forty-first Congress	257
8. O'Hara <i>vs.</i> Kitchin, Forty-sixth Congress	348
9. Yeates <i>vs.</i> Martin, Forty-sixth Congress	349
10. Pool <i>vs.</i> Skinner, Forty-eighth Congress	400
11. Williams <i>vs.</i> Settle, Fifty-third Congress	484
12. Cheatham <i>vs.</i> Woodard, Fifty-fourth Congress	521
13. Martin <i>vs.</i> Lockhart, Fifty-fourth Congress	524
14. Thompson <i>vs.</i> Shaw, Fifty-fourth Congress	520
15. Pearson <i>vs.</i> Crawford, Fifty-sixth Congress	608

Northwest Territory.

1. Fearing, Seventh Congress	50
------------------------------------	----

Ohio.

	Page.
1. Hammond <i>vs.</i> Herrick, Fifteenth Congress	70
2. Allen, Twenty-third Congress	97
3. Vallandigham <i>vs.</i> Campbell, Thirty-fifth Congress	151
4. Follett <i>vs.</i> Delano, Thirty-ninth Congress	205
5. Delano <i>vs.</i> Morgan, Fortieth Congress	213
6. Eggleston <i>vs.</i> Strader, Forty-first Congress	256
7. Campbell <i>vs.</i> Morey, Forty-eighth Congress	408
8. Wallace <i>vs.</i> McKinley, Forty-eighth Congress	406
9. Hurd <i>vs.</i> Romeis, Forty-ninth Congress	415

Oregon.

1. Shiel <i>vs.</i> Thayer, Thirty-seventh Congress	171
2. Vanderburg <i>vs.</i> Tongue, Fifty-fifth Congress	559

Pennsylvania.

1. Bard, Fourth Congress	47
2. Richards, Fourth Congress	45
3. Swanwick, Fourth Congress	46
4. Hoge, Eighth Congress	52
5. Leih, Ninth Congress	55
6. Sergeant, Nineteenth Congress	85
7. Ingersoll <i>vs.</i> Naylor, Twenty-sixth Congress	112
8. Littell <i>vs.</i> Robbins, Thirty-first Congress	133
9. Wright <i>vs.</i> Fuller, Thirty-second Congress	137
10. Butler <i>vs.</i> Lehman, Thirty-seventh Congress	172
11. Kline <i>vs.</i> Verree, Thirty-seventh Congress	175
12. Carrigan <i>vs.</i> Thayer, Thirty-eighth Congress	196
13. Kline <i>vs.</i> Myers, Thirty-eighth Congress	196
14. Fuller <i>vs.</i> Dawson, Thirty-ninth Congress	207
15. Koontz <i>vs.</i> Coffroth (2 cases), Thirty-ninth Congress	207
16. Foster <i>vs.</i> Coyode (2 cases), Forty-first Congress	231, 237
17. Myers <i>vs.</i> Moffett, Forty-first Congress	235
18. Taylor <i>vs.</i> Reading, Forty-first Congress	240
19. Cessna <i>vs.</i> Myers, Forty-second Congress	266
20. Curtin <i>vs.</i> Yocum, Forty-sixth Congress	350
21. Craig <i>vs.</i> Stewart, Fifty-second Congress	472
22. Greevy <i>vs.</i> Scull, Fifty-second Congress	478
23. Reynolds <i>vs.</i> Shonk, Fifty-second Congress	477
24. Hudson <i>vs.</i> McAleer, Fifty-fifth Congress	558

Rhode Island.

1. Page <i>vs.</i> Pirce, Forty-ninth Congress	419
2. Page, Fifty-third Congress	493

South Carolina.

1. Ramsay <i>vs.</i> Smith, First Congress	37
2. Earle, Fifteenth Congress	73
3. Hoge <i>vs.</i> Reed (2 cases), Forty-first Congress	233
4. Wallace <i>vs.</i> Simpson (2 cases), Forty-first Congress	235, 244
5. Bowen <i>vs.</i> DeLarge, Forty-second Congress	282
6. McKissick <i>vs.</i> Wallace, Forty-second Congress	281
7. Buttz <i>vs.</i> Mackey, Forty-fourth Congress	320
8. Lee <i>vs.</i> Rainey, Forty-fourth Congress	313
9. Richardson <i>vs.</i> Rainey, Forty-fifth Congress	334
10. Lee <i>vs.</i> Richardson, Forty-seventh Congress	384
11. Mackey <i>vs.</i> O'Connor, Forty-seventh Congress	387
12. Smalls <i>vs.</i> Tillman, Forty-seventh Congress	381
13. Stolbrand <i>vs.</i> Aiken, Forty-seventh Congress	391
14. Smalls <i>vs.</i> Elliott, Fiftieth Congress	429
15. Miller <i>vs.</i> Elliott, Fifty-first Congress	461

TABLE OF CASES.

21

	Page.
16. Miller <i>vs.</i> Elliott, Fifty-second Congress	480
17. Johnston <i>vs.</i> Stokes, Fifty-fourth Congress	530
18. Moorman <i>vs.</i> Latimer, Fifty-fourth Congress	530
19. Murray <i>vs.</i> Elliott, Fifty-fourth Congress	543
20. Wilson <i>vs.</i> McLaurin, Fifty-fourth Congress	541

Southwest Territory.

1. White, Third Congress	43
--------------------------------	----

Tennessee.

1. Kelly <i>vs.</i> Harris, Thirteenth Congress	65
2. Arnold <i>vs.</i> Lea, Twenty-first Congress	89
3. Crockett <i>vs.</i> Fitzgerald, Twenty-second Congress	94
4. Clements, Thirty-seventh Congress	174
5. Hawkins, Thirty-seventh Congress	184
6. Rodgers, Thirty-seventh Congress	184
7. Thomas <i>vs.</i> Arnell, Thirty-ninth Congress	211
8. Hamilton, Fortieth Congress	228
9. Rodgers, Forty-first Congress	260
10. Sheafe <i>vs.</i> Tillman, Forty-first Congress	257
11. Tennessee election, Forty-second Congress	261
12. Thrasher <i>vs.</i> Enloe, Fifty-third Congress	487
13. Patterson <i>vs.</i> Carmack, Fifty-fifth Congress	574

Texas.

1. Clarke, Forty-second Congress	263
2. Giddings <i>vs.</i> Clarke, Forty-second Congress	279
3. Davis <i>vs.</i> Culbertson, Fifty-fourth Congress	529
4. Kearby <i>vs.</i> Abbott, Fifty-fourth Congress	546
5. Rosenthal <i>vs.</i> Crowley, Fifty-fourth Congress	529

Utah Territory. (See also Deseret.)

1. McGrorty <i>vs.</i> Hooper, Fortieth Congress	216
2. Maxwell <i>vs.</i> Cannon, Forty-third Congress	291
3. Cannon, Forty-third Congress	298
4. Cannon <i>vs.</i> Campbell, Forty-seventh Congress	391

Utah.

1. Roberts, Fifty-sixth Congress	582
--	-----

Vermont.

1. Lyon <i>vs.</i> Smith, Fourth Congress	46
2. Mallary <i>vs.</i> Merrill, Sixteenth Congress	75

Virginia.

1. Trigg <i>vs.</i> Preston, Third Congress	42
2. Clopton, Fourth Congress	46
3. Rutherford <i>vs.</i> Morgan, Fifth Congress	48
4. Cabell <i>vs.</i> Randolph, Eighth Congress	52
5. Moore <i>vs.</i> Lewis, Eighth Congress	51
6. Taliaferro <i>vs.</i> Hungerford, Twelfth Congress	62
7. Bassett <i>vs.</i> Bayley, Thirteenth Congress	64
8. Taliaferro <i>vs.</i> Hungerford, Thirteenth Congress	63
9. Porterfield <i>vs.</i> McCoy, Fourteenth Congress	67
10. Loyall <i>vs.</i> Newton, Twenty-first Congress	87
11. Draper <i>vs.</i> Johnston, Twenty-second Congress	94
12. Botts <i>vs.</i> Jones, Twenty-eighth Congress	122
13. Goggin <i>vs.</i> Gilmer, Twenty-eighth Congress	120
14. Beach, Thirty-seventh Congress	176
15. Grafflin, Thirty-seventh Congress	184
16. McCloud and Wing, Thirty-seventh Congress	182

	Page.
17. McKenzie, Thirty-seventh Congress	183
18. Segar (2 cases), Thirty-seventh Congress	179, 181
19. Upton, Thirty-seventh Congress	174
20. Chandler, Thirty-eighth Congress	190
21. McKenzie vs. McKitchen, Thirty-eighth Congress	186
22. Segar, Thirty-eighth Congress	197
23. Segar, Forty-first Congress	253
24. Tucker vs. Booker, Forty first Congress	230
25. Whittlesey vs. McKenzie, Forty-first Congress	246
26. McKenzie vs. Braxton, Forty-second Congress	265
27. Platt vs. Goode, Forty-fourth Congress	318
28. Bayley vs. Barbour, Forty-seventh Congress	394
29. Stovell vs. Cabell, Forty-seventh Congress	393
30. Garrison vs. Mayo, Forty-eighth Congress	398
31. Massey vs. Wise, Forty-eighth Congress	410
32. O'Ferrall vs. Paul, Forty-eighth Congress	402
33. Bowen vs. Buchanan, Fifty-first Congress	451
34. Langston vs. Venable, Fifty-first Congress	458
35. Waddill vs. Wise, Fifty-first Congress	452
36. Goode vs. Epes, Fifty-third Congress	496
37. Cornett vs. Swanson, Fifty-fourth Congress	534
38. Hoge vs. Otey, Fifty-fourth Congress	537
39. McDonald vs. Jones, Fifty-fourth Congress	502
40. Thorp vs. McKenney, Fifty-fourth Congress	537
41. Yost vs. Tucker, Fifty-fourth Congress	547
42. Brown vs. Swanson, Fifty-fifth Congress	578
43. Thorp vs. Epes, Fifty-fifth Congress	565
44. Wise vs. Young, Fifty-fifth Congress	569
45. Wise vs. Young, Fifty-sixth Congress	611
46. Walker vs. Rhea, Fifty-sixth Congress	606

West Virginia.

1. Davis vs. Wilson, Forty-third Congress	284
2. Hagans vs. Martin, Forty-third Congress	284
3. Atkinson vs. Pendleton, Fifty-first Congress	440
4. McGinnis vs. Alderson, Fifty-first Congress	466
5. Smith vs. Jackson, Fifty-first Congress	436

Wisconsin Territory.

1. Doty vs. Jones, Twenty-fifth Congress	107
2. Sibley, Thirtieth Congress	127

Wyoming Territory.

1. Casement, Fortieth Congress	229
--------------------------------------	-----

INDEX TO CASES.

	Congress.	State or Territory.	Page.
Abbott (Josiah G.) <i>vs.</i> Frost	44	Mass	314
Abbott (Jo.), Kearby <i>vs.</i>	54	Tex	546
Acklen <i>vs.</i> Darrall	45	La	329
Acklen, Merchant and Herbert <i>vs.</i>	46	La	344
Adams (George M.), Barnes <i>vs.</i>	41	Ky	247
Adams (John), Root <i>vs.</i>	14	N. Y	68
Adams (Parmenio) <i>vs.</i> Wilson	18	N. Y	79
Aiken, Stolbrand <i>vs.</i>	47	S. C	391
Alderson, McGinnis <i>vs.</i>	51	W. Va.	466
Aldrich <i>vs.</i> Robbins	54	Ala	502
Aldrich <i>vs.</i> Underwood	54	Ala	509
Aldrich <i>vs.</i> Plowman	55	Ala	554
Aldrich <i>vs.</i> Robbins	56	Ala	597
Allen (James C.), Archer <i>vs.</i>	34	Ill	142
Allen (John M.), Brown <i>vs.</i>	54	Miss	540
Allen (William)	23	Ohio	97
Anderson (George W.), Switzler <i>vs.</i> (2 cases)	40	Mo.	219
Anderson (Samuel J.) <i>vs.</i> Reed	47	Maine	372
Anderson (William C.), Chrisman <i>vs.</i>	36	Ky	167
Archer <i>vs.</i> Allen	34	Ill	142
Arkansas, election frauds in	42	Ark	266
Armstrong, Burleigh and Spink <i>vs.</i>	42	Dak	278
Arnell, Thomas <i>vs.</i>	39	Tenn	211
Arnold <i>vs.</i> Lea	21	Tenn	89
Atkinson <i>vs.</i> Pendleton	51	W. Va.	440
Babbitt	31	Deseret	130
Bailey (Adolphe), Darrall <i>vs.</i>	41	La	246
Bailey, John	18	Mass	80
Baker	29	Ill	125
Baldwin <i>vs.</i> Trowbridge	39	Mich	200
Barbour, Bailey <i>vs.</i>	47	Va	394
Bard	4	Pa	47
Barnes <i>vs.</i> Adams	41	Ky	247
Barney <i>vs.</i> McCreery	10	Md	56
Barrett, Blair <i>vs.</i>	36	Mo.	165
Bassett <i>vs.</i> Bayley	13	Va	64
Bates, Lyon <i>vs.</i>	17	Ark	78
Bayley (S. P.) <i>vs.</i> Barbour	47	Va	394
Bayley (Thomas M.), Bassett <i>vs.</i>	13	Va	64
Baylies, Turner <i>vs.</i>	11	Mass	60
Beach	37	Va	176
Beattie <i>vs.</i> Price	54	La	527
Belford, Patterson <i>vs.</i>	45	Colo	324
Belknap (Charles E.) <i>vs.</i> Richardson	53	Mich	494
Belknap (Hugh R.) <i>vs.</i> McGann	54	Ill	501
Bell (John C.), Pearce <i>vs.</i>	54	Colo	540
Bell (Marcus L.) <i>vs.</i> Snyder	43	Ark	297
Bennet (H. P.) <i>vs.</i> Chapman	34	Neb	147
Bennett (T. W.), Fenn <i>vs.</i>	44	Idaho	314
Benoit <i>vs.</i> Boatner (2 cases)	54	La	519, 526
Biddle <i>vs.</i> Richard	18	Mich	80
Biddle and Richard <i>vs.</i> Wing	19	Mich	83

	Congress.	State or Territory.	Page.
Birch <i>vs.</i> King	38	Mo.	189
Bisbee, Finley <i>vs.</i>	45	Fla.	326
Bisbee <i>vs.</i> Hull	46	Fla.	341
Bisbee <i>vs.</i> Finley	47	Fla.	368
Black, Watson <i>vs.</i>	53	Ga.	489
Black, Watson <i>vs.</i>	54	Ga.	513
Blair <i>vs.</i> Barrett	36	Mo.	165
Blair	38	Mo.	192
Blair, Knox <i>vs.</i>	38	Mo.	190
Blakey <i>vs.</i> Golladay	40	Ky.	221
Blydenburg and Jay <i>vs.</i> Sage and Lefferts	13	N. Y.	66
Boatner, Benoit <i>vs.</i> (2 cases.)	54	La.	519, 526
Boles <i>vs.</i> Edwards	42	Ark.	264
Bonanzo, Field and Mann	38	La.	198
Booker, Tucker <i>vs.</i>	41	Va.	250
Booze <i>vs.</i> Rusk	54	Md.	519
Boreing, White <i>vs.</i>	56	Ky.	606
Botkin <i>vs.</i> Maginnis	48	Mont.	411
Botts <i>vs.</i> Jones	28	Va.	122
Bowen (Christopher C.) <i>vs.</i> De Large	42	S. C.	282
Bowen (Henry) <i>vs.</i> Buchanan	51	Va.	451
Bowers, Williams <i>vs.</i>	13	N. Y.	65
Boyd <i>vs.</i> Kelso	39	Mo.	206
Boyden <i>vs.</i> Shober	41	N. C.	257
Boynton <i>vs.</i> Loring	46	Mass.	345
Bradley <i>vs.</i> Hynes	43	Ark.	292
Bradley <i>vs.</i> Slemons	46	Ark.	339
Braxton, McKenzie <i>vs.</i>	42	Va.	265
Breckinridge, Clayton <i>vs.</i>	51	Ark.	468
Brewster, Ryan <i>vs.</i>	55	N. Y.	563
Broadhead, McLean <i>vs.</i>	48	Mo.	412
Brockenbrough <i>vs.</i> Cabell	29	Fla.	123
Bromberg <i>vs.</i> Haralson	44	Ala.	303
Brooks (Henry P.) <i>vs.</i> Davi	35	Md.	154
Brooks (James), Dodge <i>vs.</i>	39	N. Y.	203
Brown (John) <i>vs.</i> Allen	54	Miss.	540
Brown (John R.) <i>vs.</i> Swanson	55	Va.	578
Brown (John Young), Smith <i>vs.</i>	40	Ky.	220
Bruce <i>vs.</i> Loan	38	Mo.	188
Buchanan (George M.) <i>vs.</i> Manning	47	Miss.	373
Buchanan (John A.), Bowen <i>vs.</i>	51	Va.	451
Buck, Coleman <i>vs.</i>	54	La.	518
Bullock, Goodrich <i>vs.</i>	51	Fla.	464
Burch <i>vs.</i> Van Horn	40	Mo.	215
Burleigh and Spink <i>vs.</i> Armstrong	42	Dak.	278
Burns <i>vs.</i> Young	43	Ky.	290
Butler (John M.) <i>vs.</i> Lehman	37	Pa.	172
Butler (Roderick R.)	40	Ky.	224
Buttz <i>vs.</i> Mackey	44	S. C.	320
Byington <i>vs.</i> Vandever	37	Iowa	177
Cabell (Edward C.), Brockenbrough <i>vs.</i>	29	Fla.	123
Cabell (George C.), Stovell <i>vs.</i>	47	Va.	393
Cabell (Samuel J.) <i>vs.</i> Randolph	8	Va.	52
California cases	49	Cal.	421
Campbell (Allen J.), Cannon <i>vs.</i>	47	Utah	391
Campbell (Frank T.) <i>vs.</i> Weaver	49	Iowa	417
Campbell (James E.) <i>vs.</i> Morey	48	Ohio	408
Campbell (Lewis D.), Vollandigham <i>vs.</i>	35	Ohio	151
Campbell (Timothy J.) <i>vs.</i> Miner	54	N. Y.	514
Cannon, Maxwell <i>vs.</i>	43	Utah	291
Cannon	43	Utah	298
Cannon <i>vs.</i> Campbell	47	Utah	391
Carlisle, Thobe <i>vs.</i>	50	Ky.	423

	Congress.	State or Territory.	Page.
Carmack, Patterson <i>vs.</i>	55	Va.	574
Carrigan <i>vs.</i> Thayer	38	Pa.	196
Casement	40	Wyo.	229
Catchings, Hill <i>vs.</i>	51	Miss.	471
Cate, Featherston <i>vs.</i>	51	Ark.	441
Cavanaugh, Phelps <i>vs.</i>	35	Minn.	154
Cesena <i>vs.</i> Myers	42	Pa.	266
Chalmers, Lynch <i>vs.</i>	47	Miss.	375
Chalmers <i>vs.</i> Manning	48	Miss.	396
Chalmers <i>vs.</i> Morgan	51	Miss.	457
Chandler	38	Va.	190
Chapman, Bennet <i>vs.</i>	34	Nebr.	147
Chapman <i>vs.</i> Ferguson	35	Nebr.	159
Chaves <i>vs.</i> Clever	40	N. Mex.	225
Cheatham <i>vs.</i> Woodard	54	N. C.	521
Chesebrough <i>vs.</i> McClellan	54	N. Y.	513
Chilcott, Hunt and	40	Colo.	212
Childs, Steward <i>vs.</i>	53	Ill.	493
Chrisman <i>vs.</i> Anderson	36	Ky.	167
Christy and Wimpy	40	Ga.	225
Claiborne, Gholson and	25	Miss.	106
Clark (S. B.) <i>vs.</i> Hall	34	Iowa	148
Clark (Thomas H.) <i>vs.</i> Stallings	55	Ala.	554
Clark (Richard H.), Threet <i>vs.</i>	51	Ala.	450
Clarke (W. T.)	42	Tex.	263
Clarke (W. T.), Giddings <i>vs.</i>	42	Tex.	279
Clayton (Henry D.), Comer <i>vs.</i>	55	Ala.	554
Clayton (John M.) <i>vs.</i> Breckinridge	51	Ark.	468
Clements	37	Tenn.	174
Clever, Chaves <i>vs.</i>	40	N. Mex.	225
Clopton	4	Va.	46
Cobb, Whatley <i>vs.</i>	53	Ala.	483
Cobb, Goodwin <i>vs.</i>	54	Ala.	504
Coffroth, Koontz <i>vs.</i> (2 cases)	39	Pa.	207
Colden <i>vs.</i> Sharpe	17	N. Y.	78
Coleman <i>vs.</i> Buck	54	La.	518
Colorado case (Hunt and Chilcott)	40	Colo.	212
Comer <i>vs.</i> Clayton	55	Ala.	554
Compton, Mudd <i>vs.</i>	51	Md.	447
Cook <i>vs.</i> Cutts	47	Iowa	371
Cooper, Howard <i>vs.</i>	36	Mich.	161
Cornett <i>vs.</i> Swanson	54	Va.	534
Cosden, Reed <i>vs.</i>	17	Md.	77
Covode, Foster <i>vs.</i> (2 cases)	41	Pa.	231, 237
Cox <i>vs.</i> Strait	44	Minn.	309
Craig (Alexander H.) <i>vs.</i> Stewart	52	Pa.	472
Craig (George H.) <i>vs.</i> Shelley	48	Ala.	411
Crawford, Pearson <i>vs.</i>	58	N. Car.	608
Crockett (David) <i>vs.</i> Fitzgerald	22	Tenn.	94
Crowe <i>vs.</i> Underwood	55	Ala.	557
Crowley, Rosenthal <i>vs.</i>	54	Tex.	529
Culberson, Davis <i>vs.</i>	54	Tex.	529
Culpepper, McFarland <i>vs.</i>	10	N. C.	58
Curtin <i>vs.</i> Yocum	46	Pa.	350
Cutts, Cook <i>vs.</i>	47	Iowa	371
Daily <i>vs.</i> Estabrook	36	Nebr.	163
Daily, Morton <i>vs.</i>	37	Nebr.	178
Darrall <i>vs.</i> Bailey	41	La.	246
Darrall, Acklen <i>vs.</i>	45	La.	329
Davidson (Alexander C.), McDuffie <i>vs.</i>	50	Ala.	424
Davidson (George M.) <i>vs.</i> Gilbert	56	Ky.	603
Davidson (Robert H. M.), Witherspoon <i>vs.</i>	47	Fla.	368
Davis (Henry Winter), Brooks <i>vs.</i>	35	Md.	154
Davis (Henry Winter), Harrison <i>vs.</i>	36	Md.	168

	Con- gress.	State or Territory.	Page.
Davis (J. H.) <i>vs.</i> Culberson.....	54	Tex.....	529
Davis (John J.) <i>vs.</i> Wilson.....	43	W. Va.....	284
Dawson, Fuller <i>vs.</i>	39	Pa.....	207
Dean <i>vs.</i> Field.....	45	Mass.....	332
Delano, Follett <i>vs.</i>	39	Ohio.....	205
Delano <i>vs.</i> Morgan.....	40	Ohio.....	213
De Large, Bowen <i>vs.</i>	42	S. C.....	282
Denny <i>vs.</i> Owens.....	54	Ky.....	511
Dodge <i>vs.</i> Brooks.....	39	N. Y.....	203
Donnelly (Ignatius) <i>vs.</i> Washburn.....	46	Minn.....	355
Doty <i>vs.</i> Jones.....	25	Wis.....	107
Downing, Rinaker <i>vs.</i>	54	Ill.....	506
Draper <i>vs.</i> Johnston.....	22	Va.....	94
Duffy <i>vs.</i> Mason.....	46	N. Y.....	346
Dyer, Switzler <i>vs.</i>	41	Mo.....	250
Earle.....	15	S. C.....	73
Easton <i>vs.</i> Scott.....	14	Mo.....	68
Edwards (Benjamin).....	3	Md.....	43
Edwards (John), Boles <i>vs.</i>	42	Ark.....	264
Eggleston <i>vs.</i> Strader.....	41	Ohio.....	256
Elliott, Smalls <i>vs.</i>	50	S. C.....	429
Elliott, Miller <i>vs.</i>	51	S. C.....	461
Elliott, Miller <i>vs.</i>	52	S. C.....	480
Elliott, Murray <i>vs.</i>	54	S. C.....	543
English (Warren B.) <i>vs.</i> Hilborn.....	53	Cal.....	486
English (William M.) <i>vs.</i> Peelle.....	48	Ind.....	404
Enloe, Thrasher <i>vs.</i>	53	Tenn.....	487
Epes, Goode <i>vs.</i>	53	Va.....	496
Epes, Thorp <i>vs.</i>	55	Va.....	565
Estabrook, Daily <i>vs.</i>	36	Nebr.....	163
Evans <i>vs.</i> Turner.....	56	Ky.....	590
Fairchild <i>vs.</i> Ward.....	55	N. Y.....	559
Farlee <i>vs.</i> Runk.....	29	N. J.....	124
Farwell, Le Moyne <i>vs.</i>	44	Ill.....	308
Fearing.....	7	N. W. Ty.....	50
Featherston <i>vs.</i> Cate.....	51	Ark.....	441
Felton (Charles N.), Sullivan <i>vs.</i>	50	Cal.....	432
Felton (William H.) <i>vs.</i> Maddox.....	54	Ga.....	510
Fenn <i>vs.</i> Bennett.....	44	Idaho.....	314
Ferguson, Chapman <i>vs.</i>	35	Nebr.....	159
Field (A. P.).....	38	La.....	197
Field (A. P.), Bonanzo, Mann, and.....	38	La.....	198
Field (Walbridge A.), Dean <i>vs.</i>	45	Mass.....	332
Finley <i>vs.</i> Walls.....	44	Fla.....	305
Finley <i>vs.</i> Bisbee.....	45	Fla.....	326
Finley, Bisbee <i>vs.</i>	47	Fla.....	368
Fisher, Wright <i>vs.</i>	21	N. Y.....	87
Fitzgerald, Crockett <i>vs.</i>	22	Tenn.....	94
Flanders and Hahn.....	37	La.....	181
Follett <i>vs.</i> Delano.....	39	Ohio.....	205
Forsyth.....	18	Ga.....	82
Foster (Charles Henry).....	37	N. C.....	180
Foster (Henry D.) <i>vs.</i> Covode (2 cases).....	41	Pa.....	231, 237
Fouke <i>vs.</i> Trumbull.....	34	Ill.....	141
Frank <i>vs.</i> Glover.....	50	Mo.....	428
Frederick <i>vs.</i> Wilson.....	48	Iowa.....	413
Frost (R. Graham) <i>vs.</i> Metcalfe.....	45	Mo.....	337
Frost (R. Graham), Sessinghaus <i>vs.</i>	47	Mo.....	378
Frost (Rufus S.), Abbott <i>vs.</i>	44	Mass.....	314
Fuller (Alpheus) <i>vs.</i> Kingsbury.....	35	Minn.....	155
Fuller (Henry M.), Wright <i>vs.</i>	32	Pa.....	137
Fuller (Smith) <i>vs.</i> Dawson.....	39	Pa.....	207
Fuller (Thomas J. D.), Milliken <i>vs.</i>	34	Me.....	143

	Con- gress.	State or Territory.	Page.
Funston, Moore <i>vs.</i>	53	Kans.....	491
Gallegos, Lane <i>vs.</i>	33	N. Mex.....	140
Gallegos, Otero <i>vs.</i>	34	N. Mex.....	144
Gallegos <i>vs.</i> Perea.....	38	N. Mex.....	188
Garrison <i>vs.</i> Mayo.....	48	Va.....	398
Gause <i>vs.</i> Hodges.....	43	Ark.....	299
Gazin <i>vs.</i> Meyer.....	55	La.....	564
General ticket.....	28		117
Georgia cases.....	41	Ga.....	236
Gholson and Claiborne.....	25	Miss.....	106
Giddings <i>vs.</i> Clarke.....	42	Tex.....	279
Gilbert, Davidson, <i>vs.</i>	56	Ky.....	603
Gilmer, Goggin <i>vs.</i>	28	Va.....	120
Glover, Frank <i>vs.</i>	50	Mo.....	428
Goggin <i>vs.</i> Gilmer.....	28	Va.....	120
Golladay, Blakey <i>vs.</i>	40	Ky.....	221
Goode (John), Platt <i>vs.</i>	44	Va.....	318
Goode (J. T.) <i>vs.</i> Epes.....	53	Va.....	496
Gooding <i>vs.</i> Wilson.....	42	Ind.....	276
Goodrich <i>vs.</i> Bullock.....	51	Fla.....	464
Goodwyn <i>vs.</i> Cobb.....	54	Ala.....	504
Grafflin.....	37	Va.....	184
Graham, Newland <i>vs.</i>	24	N. C.....	105
Greene, Van Wyck <i>vs.</i>	41	N. Y.....	239
Greevy <i>vs.</i> Scull.....	52	Pa.....	478
Gunter <i>vs.</i> Wilshire (2 cases).....	43	Ark.....	286
Guyon <i>vs.</i> Sage.....	16	N. Y.....	76
Hagans <i>vs.</i> Martin.....	43	W. Va.....	284
Hahn, Flanders and.....	37	La.....	181
Hall, Clark <i>vs.</i>	34	Iowa.....	148
Hamilton.....	40	Tenn.....	228
Hammond <i>vs.</i> Herrick.....	15	Ohio.....	70
Handley, Norris <i>vs.</i>	42	Ala.....	275
Handy, Willis <i>vs.</i>	55	Del.....	557
Haralson, Bromberg <i>vs.</i>	44	Ala.....	303
Harris (J. Morrison), Whyte <i>vs.</i>	35	Md.....	156
Harris (J. Morrison), Preston <i>vs.</i>	36	Md.....	169
Harris (Thomas K.), Kelly <i>vs.</i>	13	Tenn.....	65
Harrison (George P.), Robinson <i>vs.</i>	54	Ala.....	505
Harrison (William G.) <i>vs.</i> Davis.....	36	Md.....	168
Hawkins.....	37	Tenn.....	184
Herrick, Hammond <i>vs.</i>	15	Ohio.....	70
Herbert (Hilary A.), Strobach <i>vs.</i>	47	Ala.....	362
Herbert (Robert O.), Merchant and, <i>vs.</i> Acklen.....	46	La.....	344
Hilborn, English <i>vs.</i>	53	Cal.....	486
Hill <i>vs.</i> Catchings.....	51	Miss.....	471
Hodges, Gause <i>vs.</i>	43	Ark.....	299
Hogan <i>vs.</i> Pile.....	40	Mo.....	216
Hoge (John).....	8	Pa.....	52
Hoge (J. Hampton) <i>vs.</i> Otey.....	54	Va.....	537
Hoge (S. L.) <i>vs.</i> Reed (two cases).....	41	S. C.....	233
Holmes and Wilson.....	46	Iowa.....	342
Hooker, Kernaghan <i>vs.</i>	51	Miss.....	470
Hooper, McGrorty <i>vs.</i>	40	Utah.....	216
Hopkins <i>vs.</i> Kendall.....	54	Ky.....	512
Howard <i>vs.</i> Cooper.....	36	Mich.....	161
Hudson <i>vs.</i> McAleer.....	55	Pa.....	558
Hugunin <i>vs.</i> Ten Eyck.....	19	N. Y.....	83
Hull, Bisbee <i>vs.</i>	46	Fla.....	341
Hungerford, Taliaferro <i>vs.</i>	12	Va.....	62
Hungerford, Taliaferro <i>vs.</i>	13	Va.....	63
Hunt <i>vs.</i> Menard.....	40	La.....	226
Hunt <i>vs.</i> Sheldon (two cases).....	41	La.....	232, 241
Hunter (Narsworthy).....	7	Miss.....	49

	Con- gress.	State or Territory.	Page.
Hunter (W. Godfrey) <i>vs.</i> Rhea.....	55	Ky.....	557
Hurd <i>vs.</i> Romeis.....	49	Ohio.....	415
Hynes, Bradley <i>vs.</i>	43	Ark.....	292
Ingersoll <i>vs.</i> Naylor.....	26	Pa.....	112
Jacks and Johnson.....	38	Ark.....	199
Jackson (David S.), Monroe <i>vs.</i>	30	N. Y.....	126
Jackson (James) <i>vs.</i> Wayne.....	2	Ga.....	39
Jackson (James M.), Smith <i>vs.</i>	51	W. Va.....	436
Jay, Blydenburg and, <i>vs.</i> Sage and Lefferts.....	13	N. Y.....	66
Jayne, Todd <i>vs.</i>	38	Dak.....	193
Jennings, Randolph <i>vs.</i>	11	Ind.....	61
Johnson, Jacks and.....	38	Ark.....	199
Johnston (Charles C.), Draper <i>vs.</i>	22	Va.....	94
Johnston (Thomas B.) <i>vs.</i> Stokes.....	54	S. C.....	530
Jones (George W.), Doty <i>vs.</i>	25	Wis.....	107
Jones (John W.), Botts <i>vs.</i>	28	Va.....	122
Jones (John W.) <i>vs.</i> Shelley.....	47	Ala.....	394
Jones (Simon) <i>vs.</i> Mann.....	40	La.....	226
Jones (William A.), McDonald <i>vs.</i>	54	Va.....	502
Joy, O'Neill <i>vs.</i>	53	Mo.....	497
Julian, Reid <i>vs.</i>	41	Ind.....	253
Kearby <i>vs.</i> Albott.....	54	Tex.....	546
Kelly <i>vs.</i> Harris.....	13	Tenn.....	65
Kelso, Boyd <i>vs.</i>	39	Mo.....	206
Kendall, Hopkins <i>vs.</i>	54	Ky.....	512
Kentucky Members (2 cases).....	40	Ky.....	218
Kernaghan <i>vs.</i> Hooker.....	51	Miss.....	470
Key.....	10	Md.....	58
Kidd <i>vs.</i> Steele.....	49	Ind.....	422
King, Birch <i>vs.</i>	38	Mo.....	189
Kingsbury, Fuller <i>vs.</i>	35	Minn.....	155
Kitchen, McKenzie <i>vs.</i>	38	Va.....	186
Kitchin, O'Hara <i>vs.</i>	46	N. C.....	348
Kline <i>vs.</i> Verree.....	37	Pa.....	175
Kline <i>vs.</i> Myers.....	38	Pa.....	196
Knox <i>vs.</i> Blair.....	38	Mo.....	190
Koontz <i>vs.</i> Coffroth (2 cases).....	39	Pa.....	207
Lane <i>vs.</i> Gallegos.....	33	N. Mex.....	140
Langston <i>vs.</i> Venable.....	51	Va.....	458
Latimer (A. C.), Moorman <i>vs.</i>	54	S. C.....	530
Latimer (Henry) <i>vs.</i> Patton.....	3	Del.....	41
Lawrence <i>vs.</i> Sypher.....	43	La.....	300
Lea, Arnold <i>vs.</i>	21	Tenn.....	89
Lee <i>vs.</i> Rainey.....	44	S. C.....	313
Lee <i>vs.</i> Richardson.....	47	S. C.....	384
Lefferts, Blydenburg and Jay <i>vs.</i> Sage and.....	13	N. Y.....	66
Lehman, Butler <i>vs.</i>	37	Pa.....	172
Leib.....	9	Pa.....	55
Le Moyne <i>vs.</i> Farwell.....	44	Ill.....	308
Letcher <i>vs.</i> Moore.....	23	Ky.....	98
Levy.....	27	Fla.....	114
Lewis, Moore <i>vs.</i>	8	Va.....	51
Lindsay <i>vs.</i> Scott.....	38	Mo.....	195
Littell <i>vs.</i> Robbins.....	31	Pa.....	133
Loan, Bruce <i>vs.</i>	38	Mo.....	188
Lockhart, Martin <i>vs.</i>	54	N. C.....	524
Loring, Boynton <i>vs.</i>	46	Mass.....	345
Lowe (F. F.).....	37	Cal.....	179
Lowe (William M.) <i>vs.</i> Wheeler.....	47	Ala.....	365
Lowell.....	27	Me.....	114
Lowry <i>vs.</i> White.....	50	Ind.....	426
Loyall <i>vs.</i> Newton.....	21	Va.....	87
Luna, Manzanares <i>vs.</i>	48	N. Mex.....	399

	Congress.	State or Territory.	Page.
Lynch (John R.) <i>vs.</i> Chalmers.....	47	Miss.....	375
Lynch (Joseph D.) <i>vs.</i> Vandever.....	50	Cal.....	429
Lyon (Matthew) <i>vs.</i> Smith.....	4	Vt.....	46
Lyon (Matthew) <i>vs.</i> Bates.....	17	Ark.....	78
Mabson <i>vs.</i> Oates.....	47	Ala.....	363
Mackey, Buttz <i>vs.</i>	44	S. C.....	320
Mackey <i>vs.</i> O'Connor.....	47	S. C.....	387
Maddox, Felton <i>vs.</i>	54	Ga.....	510
Maginnis, Botkin <i>vs.</i>	48	Mont.....	411
Mallary <i>vs.</i> Merrill.....	16	Vt.....	75
Mann, Bonanzo, Field and.....	38	La.....	198
Mann, Jones <i>vs.</i>	40	La.....	226
Manning, Buchanan <i>vs.</i>	47	Miss.....	373
Manning, Chalmers <i>vs.</i>	48	Miss.....	396
Manzanares <i>vs.</i> Luna.....	48	N. Mex.....	399
Marshall, Turney <i>vs.</i>	34	Ill.....	141
Martin (Benjamin F.), Hagans <i>vs.</i>	43	W. Va.....	284
Martin (Charles H.) <i>vs.</i> Lockhart.....	54	N. C.....	524
Martin (Joseph J.), Yeates <i>vs.</i>	46	N. C.....	349
Mason, Duffy <i>vs.</i>	46	N. Y.....	346
Massey <i>vs.</i> Wise.....	48	Va.....	410
Maxwell <i>vs.</i> Cannon.....	43	Utah.....	291
Mayo, Garrison <i>vs.</i>	48	Va.....	398
McAleer, Hudson <i>vs.</i>	55	Pa.....	558
McCabe <i>vs.</i> Orth.....	46	Ind.....	342
McClellan, Chesebrough <i>vs.</i>	54	N. Y.....	513
McCloud and Wing.....	37	Va.....	182
McClurg, Price <i>vs.</i>	38	Mo.....	189
McCoy, Porterfield <i>vs.</i>	14	Va.....	67
McCranie, Morey <i>vs.</i>	41	La.....	243
McCreery, Barney <i>vs.</i>	10	Md.....	56
McDonald <i>vs.</i> Jones.....	54	Va.....	502
McDuffie <i>vs.</i> Davidson.....	50	Ala.....	424
McDuffie <i>vs.</i> Turpin.....	51	Ala.....	454
McDuffie <i>vs.</i> Turpin.....	52	Ala.....	477
McFarland <i>vs.</i> Purviance.....	8	N. C.....	51
McFarland <i>vs.</i> Culpepper.....	10	N. C.....	58
McGann, Belknap <i>vs.</i>	54	Ill.....	501
McGinnis <i>vs.</i> Alderson.....	51	W. Va.....	466
McGrorty <i>vs.</i> Hooper.....	40	Utah.....	216
McHenry <i>vs.</i> Yeaman.....	38	Ky.....	193
McKee <i>vs.</i> Young (2 cases).....	40	Ky.....	222
McKenney, Thorp <i>vs.</i>	54	Va.....	537
McKenzie.....	37	Va.....	183
McKenzie <i>vs.</i> Kitchen.....	38	Va.....	186
McKenzie, Whittlesey <i>vs.</i>	41	Va.....	246
McKenzie <i>vs.</i> Braxton.....	42	Va.....	265
McKinley (William), Wallace <i>vs.</i>	48	Ohio.....	406
McKissick <i>vs.</i> Wallace.....	42	S. C.....	281
McLaurin, Wilson <i>vs.</i>	54	S. C.....	541
McLean <i>vs.</i> Broadhead.....	48	Mo.....	412
Mead, Spaulding <i>vs.</i>	9	Ga.....	54
Menard, Hunt <i>vs.</i>	40	La.....	226
Mercer.....	2	Md.....	39
Merchant and Herbert <i>vs.</i> Acklen.....	46	La.....	344
Merrill, Mallary <i>vs.</i>	16	Vt.....	75
Messervy.....	31	N. Mex.....	135
Metcalfe, Frost <i>vs.</i>	45	Mo.....	337
Meyer, Gazin <i>vs.</i>	55	La.....	564
Meyer, Romain <i>vs.</i>	55	La.....	563
Milliken <i>vs.</i> Fuller.....	34	Me.....	143
Miller (Daniel F.) <i>vs.</i> Thompson.....	31	Iowa.....	130
Miller (Thomas E.) <i>vs.</i> Elliott.....	51	S. C.....	461

	Con- gress.	State or Territory.	Page.
Miller (Thomas E.) <i>vs.</i> Elliott.....	52	S. C.	480
Miner, Campbell <i>vs.</i>	54	N. Y.	514
Mitchell <i>vs.</i> Walsh.....	54	N. Y.	521
Moffett, Myers <i>vs.</i>	41	Pa.	235
Monroe <i>vs.</i> Jackson.....	30	N. Y.	126
Moore (Andrew) <i>vs.</i> Lewis.....	8	Va.	51
Moore (H. L.) <i>vs.</i> Funston.....	53	Kans.	491
Moore (Thomas P.), Letcher <i>vs.</i>	23	Ky.	98
Moorman <i>vs.</i> Latimer.....	54	S. C.	530
Morey (Frank) <i>vs.</i> McCranie.....	41	La.	243
Morey (Frank), Spencer <i>vs.</i>	44	La.	311
Morey (Henry L.), Campbell <i>vs.</i>	48	Ohio	408
Morgan (Daniel), Rutherford <i>vs.</i>	5	Va.	48
Morgan (George W.), Delano <i>vs.</i>	40	Ohio	213
Morgan (James B.), Chalmers <i>vs.</i>	51	Miss.	457
Morrison, Perkins <i>vs.</i>	31	N. H.	135
Morton (J. Sterling) <i>vs.</i> Daily.....	37	Nebr.	178
Mudd <i>vs.</i> Compton.....	51	Md.	447
Mumford.....	15	N. C.	73
Murray <i>vs.</i> Elliott.....	54	S. C.	543
Myers (Leonard), Kline <i>vs.</i>	38	Pa.	196
Myers (Leonard) <i>vs.</i> Moffett.....	41	Pa.	235
Myers (Benjamin F.), Cessna <i>vs.</i>	42	Pa.	266
Naylor, Ingersoll <i>vs.</i>	26	Pa.	112
New Jersey members.....	1	N. J.	38
New Jersey case.....	26	N. J.	109
Newland <i>vs.</i> Graham.....	24	N. C.	105
Newman <i>vs.</i> Spencer.....	54	Miss.	540
Newsham <i>vs.</i> Ryan.....	41	La.	244
Newton (Thomas), Loyall <i>vs.</i>	21	Va.	87
Newton (Thomas W.) and Yell.....	29	Ark.	125
Niblack <i>vs.</i> Walls.....	42	Fla.	282
Norris <i>vs.</i> Handley.....	42	Ala.	275
Noyes <i>vs.</i> Rockwell.....	52	N. Y.	474
Oates, Mabson <i>vs.</i>	47	Ala.	363
O'Connor, Mackey <i>vs.</i>	47	S. C.	387
O'Ferrall <i>vs.</i> Paul.....	48	Va.	402
O'Hara <i>vs.</i> Kitchin.....	46	N. C.	348
O'Neill <i>vs.</i> Joy.....	53	Mo.	497
Orth, McCabe <i>vs.</i>	46	Ind.	342
Otero <i>vs.</i> Gallegos.....	34	N. Mex.	144
Otey, Hoge <i>vs.</i>	54	Va.	537
Owens, Denny <i>vs.</i>	54	Ky.	511
Pacheco, Wigginton <i>vs.</i>	45	Cal.	322
Page <i>vs.</i> Pirce.....	49	R. I.	419
Page.....	53	R. I.	493
Parrett, Posey <i>vs.</i>	51	Ind.	451
Patterson (Josiah) <i>vs.</i> Carmack.....	55	Va.	574
Patterson (Thomas W.) <i>vs.</i> Belford.....	45	Colo.	324
Patton, Latimer <i>vs.</i>	3	Del.	41
Paul, O'Ferrall <i>vs.</i>	48	Va.	402
Pearce <i>vs.</i> Bell.....	54	Colo.	540
Pearson <i>vs.</i> Crawford.....	56	N. C.	608
Peelle, English <i>vs.</i>	48	Ind.	404
Pendleton, Atkinson <i>vs.</i>	51	W. Va.	440
Perea, Gallegos <i>vs.</i>	38	N. Mex.	188
Perkins <i>vs.</i> Morrison.....	31	N. H.	135
Peters, Wood <i>vs.</i>	48	Kans.	401
Phelps <i>vs.</i> Cavanaugh.....	35	Minn.	154
Pigott.....	37	N. C.	184
Pile, Hogan <i>vs.</i>	40	Mo.	216
Pinchback, Sheridan <i>vs.</i> (2 cases).....	43	La.	293
Pirce, Page <i>vs.</i>	49	R. I.	419

	Congress.	State or Territory.	Page.
Platt <i>vs.</i> Goode.....	44	Va.....	318
Plowman, Aldrich <i>vs.</i>	55	Ala.....	554
Pool <i>vs.</i> Skinner.....	48	N. C.....	400
Porterfield <i>vs.</i> McCoy.....	14	Va.....	67
Posey <i>vs.</i> Parrett.....	51	Ind.....	451
Post, Worthington <i>vs.</i>	50	Ill.....	427
Preston (Francis), Trigg <i>vs.</i>	3	Va.....	42
Preston (William P.) <i>vs.</i> Harris.....	36	Md.....	169
Price (Andrew), Beattie <i>vs.</i>	54	La.....	527
Price <i>vs.</i> McClurg.....	38	Mo.....	189
Purviance, McFarland <i>vs.</i>	8	N. C.....	51
Rainey, Lee <i>vs.</i>	44	S. C.....	313
Rainey, Richardson <i>vs.</i>	45	S. C.....	334
Ramsay <i>vs.</i> Smith.....	1	S. C.....	37
Randolph (Thomas) <i>vs.</i> Jennings.....	11	Ind.....	61
Randolph (Thomas M.), Cabell <i>vs.</i>	8	Va.....	52
Ratliff <i>vs.</i> Williams.....	54	Miss.....	540
Rawls, Sloan <i>vs.</i>	43	Ga.....	288
Reading, Taylor <i>vs.</i>	41	Pa.....	240
Reed (J. P.), Hoge <i>vs.</i> (2 cases).....	41	S. C.....	233
Reed (Philip) <i>vs.</i> Cosden.....	17	Md.....	77
Reed (Thomas B.), Anderson <i>vs.</i>	47	Me.....	372
Reeder <i>vs.</i> Whitfield (2 cases).....	34	Kans.....	145, 149
Reid <i>vs.</i> Julian.....	41	Ind.....	253
Reynolds <i>vs.</i> Shonk.....	52	Pa.....	477
Rhea (William F.), Walker <i>vs.</i>	56	Va.....	606
Rhea (John S.), Hunter <i>vs.</i>	55	Ky.....	557
Rice (Alexander H.), Sleeper <i>vs.</i>	38	Mass.....	187
Rice (John M.), Zeigler <i>vs.</i>	41	Ky.....	255
Richard, Biddle <i>vs.</i>	18	Mich.....	80
Richard, Biddle and, <i>vs.</i> Wing.....	19	Mich.....	83
Richards.....	4	Pa.....	45
Richardson (George F.), Belknap <i>vs.</i>	53	Mich.....	494
Richardson (John S.) <i>vs.</i> Rainey.....	45	S. C.....	334
Richardson (John S.), Lee <i>vs.</i>	47	S. C.....	384
Rinaker <i>vs.</i> Downing.....	54	Ill.....	506
Ripley, Washburn <i>vs.</i>	21	Me.....	91
Robbins (Gaston A.), Aldrich <i>vs.</i>	54	Ala.....	502
Robbins (Gaston A.), Aldrich <i>vs.</i>	56	Ala.....	597
Robbins (John), Littell <i>vs.</i>	31	Pa.....	133
Roberts.....	56	Utah.....	582
Robertson, Smith <i>vs.</i>	47	La.....	372
Robinson <i>vs.</i> Harrison.....	54	Ala.....	505
Rockwell, Noyes <i>vs.</i>	52	N. Y.....	474
Rodgers.....	37	Tenn.....	184
Rodgers.....	41	Tenn.....	260
Romain <i>vs.</i> Meyer.....	55	La.....	563
Romeis, Hurd <i>vs.</i>	49	Ohio.....	415
Root <i>vs.</i> Adams.....	14	N. Y.....	68
Rosenthal <i>vs.</i> Crowley.....	54	Tex.....	529
Runk, Farlee <i>vs.</i>	29	N. J.....	124
Rusk, Booze <i>vs.</i>	54	Md.....	519
Rutherford <i>vs.</i> Morgan.....	5	Va.....	48
Ryan (Michael), Newsham <i>vs.</i>	41	La.....	244
Ryan (William E.) <i>vs.</i> Brewster.....	55	N. Y.....	563
Sage, Blydenburg and, Jay <i>vs.</i> Lefferts and.....	13	N. Y.....	66
Sage, Guyon <i>vs.</i>	16	N. Y.....	76
Schenck.....	38	N. Y.....	192
Scott (John), Easton <i>vs.</i>	14	Mo.....	68
Scott (John G.), Lindsay <i>vs.</i>	38	Mo.....	195
Scull, Greevy <i>vs.</i>	52	Pa.....	478
Segar (2 cases).....	37	Va.....	179, 181
Segar.....	38	Va.....	197
Segar.....	41	Va.....	253

	Con- gress.	State or Territory.	Page.
Sergeant.....	19	Pa.....	85
Sessinghaus <i>vs.</i> Frost.....	47	Mo.....	378
Settle, Williams <i>vs.</i>	53	N. C.....	484
Sharpe, Colden <i>vs.</i>	17	N. Y.....	78
Shaw, Thompson <i>vs.</i>	54	N. C.....	520
Sheafe <i>vs.</i> Tillman.....	41	Tenn.....	257
Sheldon, Hunt <i>vs.</i> (2 cases).....	41	La.....	232, 241
Shelley, Jones <i>vs.</i>	47	Ala.....	394
Shelley, Smith <i>vs.</i>	47	Ala.....	364
Shelley, Craig <i>vs.</i>	48	Ala.....	411
Sheridan <i>vs.</i> Pinchback (2 cases).....	43	La.....	293
Shiel <i>vs.</i> Thayer.....	37	Oreg.....	171
Shields <i>vs.</i> Van Horn.....	41	Mo.....	259
Shober, Boyden <i>vs.</i>	41	N. C.....	257
Shonk, Reynolds <i>vs.</i>	52	Pa.....	477
Sibley.....	30	Wis.....	127
Sickles (Daniel), Williamson <i>vs.</i>	36	N. Y.....	163
Simpson, Wallace <i>vs.</i> (2 cases).....	41	S. C.....	235, 244
Skinner, Pool <i>vs.</i>	48	N. C.....	400
Sleeper <i>vs.</i> Rice.....	38	Mass.....	187
Slemons, Bradley <i>vs.</i>	46	Ark.....	339
Sloan <i>vs.</i> Rawls.....	43	Ga.....	288
Smalls <i>vs.</i> Tillman.....	47	S. C.....	381
Smalls <i>vs.</i> Elliott.....	50	S. C.....	429
Smith (Alexander) <i>vs.</i> Robertson.....	47	La.....	372
Smith (Charles B.) <i>vs.</i> Jackson.....	51	W. Va.....	436
Smith (Hugh N.).....	31	N. Mex.....	129
Smith (Israel), Lyon <i>vs.</i>	4	Vt.....	46
Smith (James Q.) <i>vs.</i> Shelley.....	47	Ala.....	364
Smith (Samuel E.) <i>vs.</i> Brown.....	40	Ky.....	220
Smith (William), Ramsay <i>vs.</i>	1	S. C.....	37
Smith (William S.), Willoughby <i>vs.</i>	14	N. Y.....	67
Snyder, Bell <i>vs.</i>	43	Ark.....	297
Spaulding <i>vs.</i> Mead.....	9	Ga.....	54
Spencer (J. G.), Newman <i>vs.</i>	54	Miss.....	540
Spencer (William B.) <i>vs.</i> Morey.....	44	La.....	311
Spink, Burleigh and, <i>vs.</i> Armstrong.....	42	Dak.....	278
Stallings, Clark <i>vs.</i>	55	Ala.....	554
Steele, Kidd <i>vs.</i>	49	Ind.....	422
Steward <i>vs.</i> Childs.....	53	Ill.....	493
Stewart, Craig <i>vs.</i>	52	Pa.....	472
St. Martin, Sypher <i>vs.</i>	41	La.....	241
Stokes, Johnston <i>vs.</i>	54	S. C.....	530
Stolbrand <i>vs.</i> Aiken.....	47	S. C.....	391
Stovell <i>vs.</i> Cabell.....	47	Va.....	393
Strader, Eggleston <i>vs.</i>	41	Ohio.....	256
Strait, Cox <i>vs.</i>	44	Minn.....	309
Strobach <i>vs.</i> Herbert.....	47	Ala.....	362
Sullivan <i>vs.</i> Felton.....	50	Cal.....	432
Swanson, Cornett <i>vs.</i>	54	Va.....	534
Swanson, Brown <i>vs.</i>	55	Va.....	578
Swanwick.....	4	Pa.....	46
Switzler <i>vs.</i> Anderson (2 cases).....	40	Mo.....	219
Switzler <i>vs.</i> Dyer.....	41	Mo.....	250
Symes <i>vs.</i> Trimble.....	40	Ky.....	218
Sypher <i>vs.</i> St. Martin.....	41	La.....	241
Sypher.....	42	La.....	283
Sypher, Lawrence <i>vs.</i>	43	La.....	300
Taliaferro <i>vs.</i> Hungerford.....	12	Va.....	62
Taliaferro <i>vs.</i> Hungerford.....	13	Va.....	63
Tarsney Van Horn <i>vs.</i>	54	Mo.....	515
Taylor <i>vs.</i> Reading.....	41	Pa.....	240
Ten Eyck, Hugunin <i>vs.</i>	19	N. Y.....	83

	Con- gress.	State or Territory.	Page.
Tennessee election	42	Tenn	261
Thayer (A. J.), Shiel <i>vs.</i>	37	Oreg	171
Thayer (M. Russell), Carrigan <i>vs.</i>	38	Pa	196
Thobe <i>vs.</i> Carlisle	50	Ky	423
Thomas <i>vs.</i> Arnell	39	Tenn	211
Thompson (Cyrus) <i>vs.</i> Shaw	54	N. C.	520
Thompson (William), Miller <i>vs.</i>	31	Iowa	130
Thorp <i>vs.</i> McKenney	54	Va	537
Thorp <i>vs.</i> Epes	55	Va	565
Thrasher <i>vs.</i> Enloe	53	Tenn	487
Threet <i>vs.</i> Clarke	51	Ala	450
Tillman (George D.), Smalls <i>vs.</i>	47	S. C.	381
Tillman (Lewis), Sheafe <i>vs.</i>	41	Tenn	257
Todd <i>vs.</i> Jayne	38	Dak	193
Tongue, Vanderburg <i>vs.</i>	55	Oreg	559
Trigg <i>vs.</i> Preston	3	Va	42
Trimble, Symes <i>vs.</i>	40	Ky	218
Trowbridge, Baldwin <i>vs.</i>	39	Mich	200
Trumbull, Fouke <i>vs.</i>	34	Ill	141
Tucker (George) <i>vs.</i> Booker	41	Va	250
Tucker (H. St. George), Yost <i>vs.</i>	54	Va	547
Turner (Charles) <i>vs.</i> Baylies	11	Mass	60
Turner (Oscar), Evans <i>vs.</i>	56	Ky	596
Turney <i>vs.</i> Marshall	34	Ill	141
Turpin, McDuffie <i>vs.</i>	51	Ala	454
Turpin, McDuffie <i>vs.</i>	52	Ala	477
Underwood, Aldrich <i>vs.</i>	54	Ala	509
Underwood, Crowe <i>vs.</i>	55	Ala	557
Upton	37	Va	174
Varnum	4	Mass	47
Vallandigham <i>vs.</i> Campbell	35	Ohio	151
Van Allen, Van Rensselaer <i>vs.</i>	3	N. Y.	42
Vanderburg <i>vs.</i> Tongue	55	Oreg	559
Vandever (Wm.), Byington <i>vs.</i>	37	Iowa	177
Vandever (Wm.), Lynch <i>vs.</i>	50	Cal	429
Van Horn (Robert T.), Burch <i>vs.</i>	40	Mo	215
Van Horn (Robert T.), Shields <i>vs.</i>	41	Mo	259
Van Horn (Robert T.) <i>vs.</i> Tarsney	54	Mo	515
Van Ness	7	N. Y.	49
Van Rensselaer <i>vs.</i> Van Allen	3	N. Y.	42
Van Wyck <i>vs.</i> Greene	41	N. Y.	239
Venable, Langston <i>vs.</i>	51	Va	458
Verree, Kline <i>vs.</i>	37	Pa	175
Voorhees, Washburn <i>vs.</i>	39	Ind	201
Waddill <i>vs.</i> Wise	51	Va	452
Walker <i>vs.</i> Rhea	56	Va	606
Wallace (A. S.) <i>vs.</i> Simpson (2 cases)	41	S. C.	235, 244
Wallace (A. S.), McKissick <i>vs.</i>	42	S. C.	281
Wallace (Jonathan H.) <i>vs.</i> McKinley	48	Ohio	406
Walls, Niblack <i>vs.</i>	42	Fla	282
Walls, Finley <i>vs.</i>	44	Fla	305
Walsh, Mitchell <i>vs.</i>	54	N. Y.	521
Ward, Fairchild <i>vs.</i>	55	N. Y.	559
Washburn (Henry D.) <i>vs.</i> Voorhees	39	Ind	201
Washburn (Reuel) <i>vs.</i> Ripley	21	Maine	91
Washburn (William D.), Donnelly <i>vs.</i>	46	Minn	355
Watson <i>vs.</i> Black	53	Ga	489
Watson <i>vs.</i> Black	54	Ga	513
Wayne (Anthony), Jackson <i>vs.</i>	2	Ga	39
Weaver, Campbell <i>vs.</i>	49	Iowa	417
Whatley <i>vs.</i> Cobb	53	Ala	483
Wheeler, Lowe <i>vs.</i>	47	Ala	365
White (James)	3	S. W. Ty. ..	43
White (James B.), Lowry <i>vs.</i>	50	Ind	426

	Congress.	State or Territory.	Page.
White (John D.), <i>vs.</i> Boreing.....	56	Ky.....	606
Whitfield, Reader <i>vs.</i> (2 cases).....	34	Kans.....	145, 149
Whittlesey <i>vs.</i> McKenzie.....	41	Va.....	246
Whyte <i>vs.</i> Harris.....	35	Md.....	156
Wigginton <i>vs.</i> Pacheco.....	45	Cal.....	322
Wilcox.....	56	Hawaii.....	601
Williams (A. H. A.) <i>vs.</i> Settle.....	53	N. C.....	484
Williams (Isaac) <i>vs.</i> Bowers.....	13	N. Y.....	65
Williams (J. S.), Ratliff <i>vs.</i>	54	Miss.....	540
Williamson <i>vs.</i> Sickles.....	36	N. Y.....	163
Willis <i>vs.</i> Handy.....	55	Del.....	557
Willoughby <i>vs.</i> Smith.....	14	N. Y.....	67
Wilshire, Gunter <i>vs.</i> (2 cases).....	43	Ark.....	286
Wilson (Benjamin), Davis <i>vs.</i>	43	W. Va.....	284
Wilson (Isaac), Adams <i>vs.</i>	18	N. Y.....	79
Wilson (James), Frederick <i>vs.</i>	48	Iowa.....	413
Wilson (Jeremiah M.), Goodings <i>vs.</i>	42	Ind.....	276
Wilson (John L.), Holmes and.....	46	Iowa.....	342
Wilson (Joshua E.) <i>vs.</i> McLaurin.....	54	S. C.....	541
Wimpy, Christy and.....	40	Ga.....	225
Wing (Austin E.), Biddle and Richard <i>vs.</i>	19	Mich.....	83
Wing (W. W.), McCloud and.....	37	Va.....	182
Wise (George D.), Waddill <i>vs.</i>	51	Va.....	452
Wise (John S.), Massey <i>vs.</i>	48	Va.....	410
Wise (Richard A.) <i>vs.</i> Young.....	55	Va.....	569
Wise (Richard A.) <i>vs.</i> Young.....	56	Va.....	611
Witherspoon <i>vs.</i> Davidson.....	47	Fla.....	368
Wood <i>vs.</i> Peters.....	48	Kans.....	401
Woodard, Cheatham <i>vs.</i>	54	N. C.....	521
Worthington <i>vs.</i> Post.....	50	Ill.....	427
Wright (Hendrick B.) <i>vs.</i> Fuller.....	32	Pa.....	137
Wright (Silas) <i>vs.</i> Fisher.....	21	N. Y.....	87
Yeaman, McHenry <i>vs.</i>	38	Ky.....	193
Yeates <i>vs.</i> Martin.....	46	N. C.....	349
Yell, Newton and.....	29	Ark.....	125
Yocum, Curtin <i>vs.</i>	46	Pa.....	350
Yost <i>vs.</i> Tucker.....	54	Va.....	547
Young (John D.), McKee <i>vs.</i> (2 cases).....	40	Ky.....	222
Young (John D.), Burns <i>vs.</i>	43	Ky.....	290
Young (William A.), Wise <i>vs.</i>	55	Va.....	569
Young (William A.), Wise <i>vs.</i>	56	Va.....	611
Zeigler <i>vs.</i> Rice.....	41	Ky.....	255

PART I.

ABSTRACT OF CASES BY CONGRESSES.

ABSTRACT OF CASES.

FIRST CONGRESS, 1789-1791.

Committee on Elections.

Mr. CLYMER,	Mr. WHITE,
AMES,	HUNTINGTON,
BENSON,	GILMER,
Mr. CARROLL.	

Cases.

- (1) David Ramsay *vs.* William Smith, *South Carolina.*
- (2) *New Jersey* members.

(1) RAMSAY *vs.* SMITH.

Question of eligibility. Decided in favor of sitting member.

William Smith, a minor, was sent from the colony of South Carolina, of which his ancestors were the first settlers, to Europe for his education in 1770. His father died five months after his departure. His mother had died in 1760. In 1778 he went from Geneva to Paris, where he resided two months as an American, being received as such by the American residents. In January, 1779, he attempted to return home, but failed. In January, 1782, he sailed for America, having studied law until that time in England, but not having taken any oath of allegiance to Great Britain. He was shipwrecked and did not reach South Carolina until 1783. After his return he was elected to the legislature, the privy council, and other public offices, and in 1788 to Congress. During his absence he had guardians and an estate in South Carolina. His seat in the House was contested on the ground that he had not been "seven years a citizen of the United States." The laws of South Carolina were not very definite upon the subject of citizenship, but, aside from the tacit recognition of Mr. Smith's citizenship by the people and legislature of the State, the status as citizens of youth sent abroad for their education had been recognized by implication in a law permitting them to remain freely until they had reached the age of twenty-two years, and after that on payment of a double tax.

The House decided, with only one dissenting vote, that the sitting member was eligible under the Constitution.

This being the first election case in the House of Representatives, the mode of procedure was debated at some length. The testimony was taken in the first instance by the Committee on Elections at the seat of government, the House to decide afterwards whether any further testimony was necessary. After the evidence had been taken it was sought to recommit it to the committee with instructions to

embody the facts established by the evidence in a report, but after some debate the House decided to examine the evidence itself, apparently on the ground that any other course would be a delegation of power.

[C. & H., 23-37.]

(2) NEW JERSEY MEMBERS.

Decision in favor of sitting members. (James Schureman, Lambert Cadwallader, Elias Boudinot and Thomas Sinnickson.)

Owing to the burning of the papers and documents of Congress from the First to the Sixth Congress by the British in 1814, it is impossible to ascertain precisely on what ground the election of the New Jersey members was contested. The matter appears to have come up first before the governor and privy council of New Jersey, where it was decided by the governor and a majority of the council, over the written protest of three members, that the persons above named had been elected, and a proclamation was accordingly issued to that effect.

The debate, so far as preserved, relates entirely to the mode of procedure. The evidence was first taken, under a resolution of the House, by the Committee on Elections, but it appearing that certain evidence could not be conveniently obtained except by proceeding to New Jersey, the committee asked instructions of the House. After debate, in which the proposition to send a commission to the State where the election occurred was characterized as a dangerous precedent, the matter was laid on the table, and some time later, the committee presenting another report, apparently based on the evidence first obtained, the House decided that the sitting members were entitled to their seats. The question of the propriety of hearing counsel was also raised, but no decision reached.

[C. & H., 38-44.]

SECOND CONGRESS, 1791-1793.

Committee on Elections.

Mr. LIVERMORE,
BOUDINOT,
GILES,

Mr. BOURNE, Rhode Island,
HILLHOUSE,
STEELE,
Mr. GERRY.

Cases.

- (1) John F. Mercer, *Maryland*.
- (2) James Jackson *vs.* Anthony Wayne, *Georgia*.

(1) MERCER.

Resignation sent to State executive.

William Pinkney had been returned as a member from Maryland, but the question of residence having been raised against him he sent his resignation to the governor, who thereupon issued a writ for an election to fill the vacancy. John F. Mercer having been returned as elected, it was decided after debate that he was entitled to the seat.

[C. & H., 44-46.]

(2) JACKSON *vs.* WAYNE.*Irregularities and corruption. Seat declared vacant.*

Contestant charged (1) "that the election in Effingham County was contrary to law, being held under the inspection of three persons, *one* of whom only was a justice of the peace, although the law requires that all three should be justices; (2) that there were 9 more votes given than there were voters duly qualified in the county; (3) that the votes of Glynn County were suppressed, the return of them having been committed to the Hon. Judge Osborne, who had undertaken to transmit them to the governor, but instead thereof had conveyed them to Anthony Wayne, the sitting member; (4) that after the closing of the legal poll of the county of Camden the return of the votes (being 15 for General Wayne and 10 for General Jackson, the petitioner) was delivered to Judge Osborne, the presiding officer, who, with some other persons, did afterwards hold a second election, and augmented the votes considerably in favor of General Wayne; (5) undue and corrupt practices at the election, as the setting down the names of persons as voters who were not present, and the keeping back of the tax return for the county of Camden, which was the only check upon persons offering to vote."

Testimony was taken by deposition for the first time in this case. The House passed a special resolution providing that depositions might be taken within a specified time and before specified officers, and that the evidence in behalf of the petitioner should be confined to the proof of the charges contained in his petition.

The trial proceeded in the House (sitting in Committee of the Whole), as in a court, and counsel were heard for both sides.

On the trial the petitioner offered in evidence the decisions and proceedings of the senate and house of representatives of Georgia in the impeachment of Judge Osborne, so far as they bore upon the matters complained of in this case, but the House refused to receive them, as well as certain other evidence offered which did not bear upon the specific charges made in the petition.

A resolution was first passed unanimously declaring that the sitting member was not elected, and then, after a long debate upon the right of General Jackson to the seat, a second resolution was passed declaring the seat vacant.

[C. & H., 47-68.]

THIRD CONGRESS, 1793-1795.

Committee on Elections, first session.

Mr. WILLIAM SMITH,	Mr. LEE,
SHEARJASHUL BOURNE,	DAYTON,
IRWINE,	GORDON,
Mr. MACON.	

Cases.

- (1) Henry Latimer *vs.* John Patton, *Delaware.*
- (2) Henry K. Van Rensselaer *vs.* John E. Van Allen, *New York.*
- (3) Abraham Trigg *vs.* Francis Preston, *Virginia.*

Committee on Elections, second session.

Mr. DRAYTON,	Mr. LEE,
HILLHOUSE,	MACON,
DENT,	HUNTER.

Cases.

- (4) James White, *Southwestern Territory.*
- (5) Benjamin Edwards, *Maryland.*

(1) LATIMER *vs.* PATTON.*Question of legal form of ballots. Decision in favor of contestant.*

The law of Delaware provided (the State being entitled to one member of Congress) that every person offering to vote "shall deliver in writing, on one piece of paper, the names of two persons, inhabitants of the State, one of whom, at least, shall not be an inhabitant of the same county with himself." The judges of election in some of the counties rejected ballots containing the names of two persons, neither of whom was an inhabitant of the same county with the voter, and in some of the other counties counted ballots containing but one name. The committee reported and the House held that the tickets rejected should have been counted, and the tickets containing only one name should have been rejected. This would give the majority to Latimer, and he was accordingly seated.

The testimony was taken by commissioners under a special resolution of the Committee on Elections. This seems to have been the first case where the trial first took place before the Committee on Elections. The testimony taken was transmitted to the committee instead of to the Speaker, and the committee for the first time reported a state of facts and their conclusions on them. Their report was committed to the Committee of the Whole House, accompanied with a written argument by the sitting member, and on the trial in the House the argument was based on the report of the committee and statement of the sitting member as well as on the depositions.

The decision of the committee was sustained by a vote of 57 to 31.
[C. & H., 69-72.]

(2) VAN RENSSELAER *vs.* VAN ALLEN.

Irregularities in the election and returns. Decision in favor of sitting member.

The seat was contested on the grounds that in one town more votes were actually cast for petitioner than were canvassed and returned for him; in another, the box was not locked as required by law, and in another, the ballot box was for some time in the possession of the sitting member without warrant of law.

The committee reported that, according to the law of the State of New York, the fact that more votes were cast for petitioner in a town than were returned for him could not, if proved, be sufficient to set aside the vote of the town, and that the other allegations were also immaterial, as even if the votes of these towns should be set aside there still remained a majority for the sitting member.

The House disagreed to the report of the committee, but on what ground it is difficult to tell, as a resolution embodying substantially the same findings was passed immediately afterwards.

The debate was largely upon the question of how far the laws of the State of New York were binding on the House, and what effect partial corruption, if proved, would have on the validity of the whole election. The opinion of the committee was stated to be that if the major part of the votes was unaffected by corruption the result should be determined from such major part.

[C. & H., 73-77.]

(3) TRIGG *vs.* PRESTON.

Irregularities and military interference. The committee recommended that the seat be vacated, but the House decided in favor of the sitting member.

The election was contested on the ground that the sheriffs in two counties had adjourned the poll for a day, and that in another county United States troops, under the command of a brother of the sitting member, had violently interfered with the election.

The committee found that the adjournment of the polls by the sheriffs was within the discretionary power given them by the Virginia law.

As to the county where military interference was charged, it appeared that Capt. William Preston, brother and agent at the election of the sitting member, was quartered near the voting place with 60 or 70 Federal troops, of which he had command. On the day of the election the troops were marched in a body twice or three times around the court-house, and paraded in front of and close to the door thereof. The troops were allowed to vote, and voted generally in favor of the sitting member, but their votes were thrown out by the returning officers. Some of them threatened to beat any person who should vote in favor of the petitioner. One of the soldiers struck and knocked down a magistrate. Three soldiers stood at the door of the court-house and refused to admit a voter because he declared he would vote for the petitioner. There were altercations between the soldiers and the country people, which terminated in a violent affray after the polls were closed. Most of the soldiers seem to have been unarmed, except the captain, who had his sword.

The only proof that anyone was actually prevented from voting was hearsay evidence, but the committee thought it very probable that some were, and, as the majority returned for the sitting member was only 10, recommended that the election be set aside.

The case was debated for three days, the arguments in favor of sitting member being chiefly that Southern elections should not be judged by the standard of the Eastern States; that riots and intimidation were an established custom and quite a matter of course in all Southern elections; and that the election in question was much less disturbed than many others in regard to which there was no question. (For a curious description by a Southern member of what he alleged to be the ordinary election practices in his section at this time, see the speech of Mr. Smith, of Maryland, quoted in C. & H., 82-83.)

The resolution reported by the committee was defeated, and the sitting member confirmed in his seat.¹

[C. & H., 78-84.]

(4) WHITE.

Question of right of Southwestern Territory to be represented by a Delegate. Delegate admitted.

By the ordinance of 1787 for the government of the Territory Northwest of the Ohio the Territory was given authority, so soon as it should have a population of 5,000 free male inhabitants, to elect a general assembly, which should elect a "Delegate to Congress," who should have a seat in Congress, with a right of debating but not of voting. By the act of 2d April, 1790, the same privilege was given to the Territory Southwest of the Ohio. Mr. White was elected a Delegate by the legislature of this Territory, and applied for a seat in the House of Representatives. The committee found his election in accordance with the ordinance for the government of the Territory, and recommended that he be admitted. After considerable debate the House sustained the report of the committee. There were objections to his admission on the ground of the unconstitutionality of the law, which provided for the creation of a new sort of member not provided for in the Constitution, and also on the ground that, having been elected by the legislature and as a "Delegate to Congress," his place was more properly in the Senate than in the House.

It was decided that the Delegate could not be required to take the oath exacted of members. During the session a bill was passed allowing him pay and the privilege of franking letters as a member.

[C. & H., 85-91.]

(5) EDWARDS.

Right of resignation to the governor, and question of credentials necessary to entitle one to take his seat as a member of the House.

Uriah Forrest, a member from the State of Maryland, sent his resignation to the governor of Maryland, and sent to the Speaker a letter informing him of his resignation, and of the election of Benjamin Edwards as his successor. This letter, and one from the clerk

¹ The House at the same session passed a bill designed to prevent military interference at elections, but it was rejected by the Senate.

of the council of Maryland to said Edwards, informing him that a certificate of election had been forwarded to the Speaker, were laid before the House and referred to the Committee on Elections, which reported that the credentials were insufficient. The report was laid on the table, and some time later, the certificate of election having arrived, it was referred to the committee, on whose recommendation Mr. Edwards was admitted to the seat.

[C. & H., 92-94.]

FOURTH CONGRESS, 1795-1797.

Committee on Elections.

Mr. VENABLE,	Mr. DEARBORN,
DENT,	HARPER,
KITTERA,	BLOUNT,
Mr. SWIFT.	

Cases.

- (1) John Richards, *Pennsylvania*.
- (2) John Clopton, *Virginia*.
- (3) Matthew Lyon vs. Israel Smith, *Vermont*.
- (4) John Swanwick, *Pennsylvania*.
- (5) Joseph B. Varnum, *Massachusetts*.
- (6) David Bard, *Pennsylvania*.

(1) RICHARDS.

Irregularities in returns. Seat given petitioner.

At the time of the election, in October, 1794, a large number of the inhabitants of Pennsylvania were absent on the "Western expedition." A special law was passed by the State legislature providing that elections should be held in the Army on the same day as in the districts, the returns to be sent to the prothonotaries of the respective counties by the 10th of November, and to be delivered by them on that day to the county judges, and that the district judges should meet on the 15th of November to canvass the county returns. On the 10th of November only one militia return had arrived. Counting this and the regular returns would give James Morris 1,648 votes and petitioner, John Richards, 1,635. But between November 10 and 15 another militia return was received and canvassed. If this were counted, the vote would be Morris, 1,706; Richards, 1,791.

Some months afterwards (January 18, 1795) papers were filed with the secretary of state purporting to be another regimental return, but unaccompanied by any list of voters and not appearing to have been examined by the county judges. If this should be counted with previous returns, the vote would be Morris, 1,797; Richards, 1,791.

In the first case Morris would be elected, in the second Richards, and in the third Morris.

The governor refused to decide the question, and no certificate was issued. Before the meeting of Congress Mr. Morris died, and Mr. Richards memorialized the House for the seat. The committee first reported that no returns not made within the time prescribed by law should be counted, and counting the vote regularly returned (according to first statement above) it would appear that Morris was elected, and accordingly a new election was recommended. The report was recommitted without specific instructions, and the committee made a second report recommending that the return received between November 10 and 15, and regularly examined, should be counted, but that the return received in January, being substantially defective, having

never been examined by the county judges, and being unaccompanied by a list of voters, should be rejected. This would give the seat to petitioner (see second statement above). In addition, 18 of the votes for Morris in the army return regularly made and first counted were illegal, 16 not appearing on the tax lists and 2 being given by proxy. The report was sustained, and Mr. Richards admitted to a seat.

[C. & H., 95-100.]

(2) CLOPTON (more properly BASSET *vs.* CLOPTON).

Decision in favor of sitting member.

The committee examined the question of illegal votes, and after deducting all the votes of unqualified persons from the respective candidates reported that Clopton had a majority of the remainder and was entitled to the seat. The House concurred.

There is no further information available in regard to this case.

[C. & H., 101.]

(3) LYON *vs.* SMITH.

Failure to notify certain towns of the election. Decision in favor of sitting member.

At the first election no candidate received a majority of the votes, and notice was accordingly given, under the Vermont statute, of a second election. The sitting member was elected at the second election by a majority of 21 votes, but two towns which had given 15 votes at the previous election—12 for the sitting member and 3 for his opponent—failed to receive notice of the election, which was contested on this ground. The committee reported that the votes of these towns being insufficient to change the result if all cast for the petitioner, the failure to notify them should not invalidate the election. It appeared that evidence had been taken *ex parte* by the petitioner tending to show that there were enough voters in these towns to have changed the result of the election, which evidence had been excluded by the committee. An effort was made to recommit the report to the committee for the purpose of instituting an inquiry into the facts sought to be established by the excluded testimony, and the case was finally postponed, apparently for the purpose of enabling the petitioner to present further testimony. On again taking up the case a "second report" (minority report?) of the committee was considered, in which it appeared that from the depositions on file there were shown to be 36 voters in the two towns. A petition had been received from 20 of these voters stating that they would have voted for the petitioner, but this would still leave the sitting member a majority of 1, and there were contrary affidavits from some of the voters. The title of Mr. Smith to his seat was finally confirmed.

[C. & H., 101-111.]

(4) SWANWICK.

A petition of sundry citizens of Philadelphia, contesting the election of John Swanwick, was presented, but the committee reported that the petitioners had entirely failed to support their allegations, and had formally abandoned them. It does not appear what were the grounds of contest.

[C. & H., 112.]

(5) VARNUM.

Illegal votes and votes by proxy. Question of certainty of allegations required. Decision in favor of sitting member.

The election of Mr. Varnum was contested by a petition from sundry citizens of Massachusetts on the ground that votes had been given for him by proxy and by persons not qualified to vote. The committee asked the House for instructions, and it was *resolved*, that the allegation that votes were given by proxy was sufficiently certain without giving the names of the voters, but that the allegation that votes were given by unqualified persons was not sufficient without the names.

It was moved that the Committee on Elections be instructed to prescribe a mode whereby evidence might be taken, but the motion was defeated. The next session a report was filed setting forth that the petitioners had failed to prosecute their case, but the sitting member had produced evidence to show that the election in the town complained of was conducted with the utmost fairness, and that the only irregularities were at other places and in the interest of another candidate. The report closed with a condemnation of the petitioners, as excited by malevolence in their contest. This was amended by the House by substituting expressions of compliment to the sitting member, and the report so amended was agreed to.

[C. & H., 112-116.]

(6) BARD.

Returns made after the legal time. Decision in favor of sitting member.

This case appears to have been the result of an *ex officio* investigation by the committee.

The district judges attempted to get together on the third Tuesday in October and the 15th of November, the legal times for the making of their returns, but, apparently owing to some misunderstanding, did not all meet until the 1st of May, when they returned David Bard as having the highest number of votes. On account of this informality in the time of the return, the committee obtained the original county returns, on which the district return was founded. These confirmed the district returns, and the committee accordingly reported that Mr. Bard was entitled to his seat. The House agreed to the report.

[C. & H., 116, 117.]

FIFTH CONGRESS, 1797-1799.

Committee on Elections.

Mr. COIT,	Mr. DENT,
VARNUM,	HARRISON,
JOHN WILLIAMS,	BALDWIN,
Mr. HARTLEY.	

(1) ROBERT RUTHERFORD *vs.* DANIEL MORGAN, *Virginia.**Illegal votes and bribery. Decision in favor of sitting member.*

The petitioner alleged that votes, illegal on account of the nonresidence of the voters, were given for sitting member sufficient in number to overcome the majority returned, and that money was promised by the sitting member or his friends for "meat, drink, wagon hire, and other acts of bribery and corruption," with the result that the freedom and purity of the election was greatly interfered with by disorder and carousals.

The committee prescribed a mode of procedure similar to that prescribed in the case of *Latimer vs. Patton*, with the additional provisions that the parties should give each other notice, at least ten days before taking any testimony, of the names of the persons to the legality of whose votes they meant to object, and that the testimony of the petitioner should be confined to the facts stated in the specification by him handed to the committee.

The testimony having been taken, the committee reported that it was wholly insufficient to support the allegations of the memorial. The House concurred in the report.

[C. & H., 118, 119.]

SIXTH CONGRESS, 1799-1801.

Committee on Elections.

Mr. DANA,	Mr. HENDERSON,
SUMTER,	GORDON,
KITTERA,	BAILEY,
Mr. NEW.	

There were no cases in the Sixth Congress.

SEVENTH CONGRESS, 1801-1803.

Committee on Elections, first session.

Mr. MILLEDGE,	Mr. HANNA,
TENNEY,	STANLEY,
CONDIT,	TALIAFERRO,
Mr. DENNIS.	

Case.

- (1) Narsworthy Hunter, *Mississippi Territory.*

Committee on Elections, second session.

Mr. BACON,	Mr. ELMER,
TENNEY,	STANLEY,
CONDIT,	NEW,
Mr. DENNIS.	

Cases.

- (2) John P. Van Ness, *New York.*
 (3) Paul Fearing, *Northwestern Territory.*

(1) HUNTER.

Right of Mississippi Territory to send Delegate to Congress. Delegate admitted to House.

By acts of 1798 and 1800 Congress extended the provisions of the ordinance of 1787 for the government of the Northwest Territory to Mississippi Territory, including the right to elect a general assembly, which should elect a "Delegate to Congress." Mr. Hunter, having been elected by the general assembly of Mississippi Territory, presented his credentials to the House of Representatives. They were referred to the Committee on Elections, which reported that the Territory had a right to elect a Delegate and that Mr. Hunter's credentials were regular. He was admitted to his seat.

[C. & H., 120, 121.]

(2) VAN NESS.

Acceptance by member of office under United States. Seat vacated.

Mr. Van Ness, a Representative from the State of New York, had, during the recess of Congress, accepted the office of major of the militia of the District of Columbia. On the reconvening of Congress the Committee on Elections were instructed, on motion of Mr. Davis, of Kentucky, to inquire whether the acceptance of such office did not vacate the seat of Mr. Van Ness. The committee reported that the acceptance of *any* office under the Government rendered a member incapable of further holding a seat in Congress. Mr. Van Ness argued that the provision of the Constitution was only intended to apply to civil officers, and should not deprive an officer of the Territorial mil-

itia of the privilege of membership which was not denied to officers of State militias. The House vacated the seat by a unanimous yea and nay vote.

[C. & H., 122-127.]

(3) FEARING.

Territory erected into a State. Delegate still retained his seat.

The Northwestern Territory had been erected into the State of Ohio, and the Committee on Elections were instructed to inquire whether the seat of the Territorial Delegate did not thereby become vacant. The committee reported that the Delegate was still entitled to his seat. The report was ordered to lie on the table, and the Delegate having already taken his seat, he was thus permitted to retain it.

[C. & H., 127, 128.]

EIGHTH CONGRESS, 1803-1805.

Committee on Elections, first session.

Mr. FINDLEY,	Mr. VARNUM,
GODDARD,	LIVINGSTON,
MATTHEW CLAY,	KENNEDY,
Mr. HUNT.	

Cases.

- (1) Andrew Moore *vs.* Thomas Lewis, *Virginia*.
- (2) Duncan McFarland *vs.* Samuel D. Purviance, *North Carolina*.
- (3) Samuel J. Cabell *vs.* Thomas M. Randolph, *Virginia*.

Committee on Elections, second session.

Mr. FINDLEY,	Mr. EPPES,
VARNUM,	CLAGETT,
LIVINGSTON,	ELMER,
Mr. KENEDY.	

Case.

- (4) John Hoge, *Pennsylvania*.

(1) MOORE *vs.* LEWIS.*Illegal votes. Seat given to petitioner.*

The committee reported that a large number of votes on both sides were given by persons not qualified to vote. What the disqualification was or by what evidence it was established does not appear. Deducting from the vote of each candidate the votes cast for him by unqualified voters, a majority of the remainder were cast for petitioner, and the committee reported that he was entitled to the seat. The House sustained the report and Mr. Moore took his seat. Counsel were heard at the bar of the House in this case.

[C. & H., 128-130.]

(2) MCFARLAND *vs.* PURVIANCE.

Oath not taken by officers of election, and other irregularities. Part of the testimony taken without legal notice. Sitting member retained his seat.

Petitioner charged that the officers of election in Montgomery County refused to take the oath prescribed by law, and that there were irregularities—of what nature does not appear—in Cumberland County. The testimony in regard to Montgomery County was legally taken under the act of 1797 in the presence of a voluntary agent of the sitting member. It established the fact that the election officers refused to take the oath, and the committee recommended that the vote of the county be thrown out. The first testimony in regard to Cumberland County was taken after legal notice and in the presence of the

same voluntary agent of the sitting member. It was not sufficient to overthrow the vote of the county. Notices to take further testimony were served on the agent of the sitting member who had previously attended, and were also forwarded to the sitting member himself, who was in Congress, but did not reach him in time for him to attend. His agent did not attend.

Part of the testimony was taken by magistrates not named in the notification, and was not properly certified. A part appeared to be in the handwriting of the petitioner. On these grounds the committee excluded the testimony, and the remaining evidence not being sufficient to overthrow the vote of Cumberland County the committee recommended that the sitting member be allowed to retain the seat in spite of the rejection of Montgomery County. No action was ever had on this case in the House.

[C. & H., 131-133.]

(3) CABELL *vs.* RANDOLPH.

Case dismissed because not prosecuted with reasonable diligence.

The election seems to have been contested on the ground of illegal votes. The memorial was presented October 18, 1803. On October 13 and November 3, 1803, and January 5, 1804, the petitioner, by letter, requested that the determination of the case be delayed until he could procure testimony. The land lists and most of the voting lists were missing. Afterwards he was notified to appear before the committee, but did not comply with the notification, and on March 9, 1804, the committee reported that there was nothing in the papers on file invalidating the right of the sitting member to his seat, and recommending that he be confirmed in his title. No action was taken by the House.

[C. & H., 134.]

(4) HOGGE.

Power of governor to prescribe time of holding election to fill vacancy. Decision in favor of sitting member.

William Hoge, a member from Pennsylvania, resigned his seat to the governor only a few days before the election for Presidential electors, in November, 1804. The legislature of Pennsylvania had prescribed no time for the holding of elections to fill vacancies, and so the governor issued writs for an election to be held at the same time and places, and by the same officers, as the election for Presidential electors. The notice was promulgated in the district only one day before the election, and most of the voters seem not to have received actual notice until the day of election at the polling places. It being generally understood that there was no doubt of the result of the election for Presidential electors, the number of voters attending at the polls, and consequently receiving actual notice of the election to fill the vacancy in Congress, was small. John Hoge received a majority of the votes cast, and claimed the seat. A memorial was presented contesting his election, and referred to the Committee on Elections, which reported in favor of giving the seat to Hoge.

The report contended that though it was the duty of the legislature to enact laws prescribing the time, manner, and place of holding elec-

tions to fill vacancies, no such law had been passed, and the governor, in Pennsylvania, as in other States, had been in the habit of fixing the time of election in the writs of election which he was required under the Constitution to issue. If this election was not valid, no election could be held to fill the vacancy until the legislature should pass a law providing for holding it. The law of the State required thirty days' notice for a regular election for members of Congress, and fifteen days' notice for filling vacancies in the State legislature. The notice in this case was much shorter than that required in either of these cases, and shorter than in ordinary cases would be considered reasonable, "yet, considering the special circumstances connected with the election of John Hoge, and particularly that the election took place on the day fixed by the State legislature for the appointment of electors for the State of Pennsylvania, the committee are of opinion that John Hoge is entitled to a seat in this House."

Against this report it was contended in debate that the Constitution in empowering the governor to issue writs to fill vacancies did not empower him to prescribe the time of election, for this would necessarily include also the power to prescribe the place and manner of election, which would be giving him a dangerous discretion. While the legislature had passed no law especially relating to the filling of vacancies in Congress, the laws providing for the regular elections ought to control elections to fill vacancies, at least so far as prescribing the place and manner of election and the length of notice to be given. In this case the notice given was unreasonably short and there were strong grounds for believing that if more ample notice had been given the result would have been different.

After being fully debated, the report of the committee was sustained by a vote of 69 to 38, and Mr. Hoge was admitted to his seat.

[C. & H., 135-156.]

NINTH CONGRESS, 1805-1807.

Committee on Elections.

Mr. FINDLEY,	Mr. SCHUNEMAN,
ELMER,	BIDWELL,
EPPEs,	ELLIS,
Mr. CHITTENDEN.	

Cases.

- (1) Thomas Spaulding *vs.* Cowles Mead, *Georgia*.
- (2) Michael Leib, *Pennsylvania*.

(1) SPAULDING *vs.* MEAD.

Votes not returned as the State law required counted by the House and the seat given to petitioner.

The law of Georgia provided that the returns of Congressional elections should be forwarded to the governor within twenty days after the election, and the result certified by him within five days thereafter. In this case the returns from three counties did not reach the governor within twenty-five days, and he issued his certificate at the proper time on the basis of the returns received, which showed a majority for Cowles Mead. Some time later returns were received from the other three counties. They were in regular form, the elections seemed to have been regular, and if the votes were counted the petitioner, Thomas Spaulding, would have a majority in the district. *Ex parte* testimony was presented by the petitioner to show that the cause of the delay in transmission of the returns was a hurricane, which rendered the roads impassable. This testimony being excluded by the committee, the petitioner offered to procure legal evidence of the same fact, and the sitting member offered to procure evidence to the contrary, but the committee, deeming the question immaterial, declined to receive further evidence. The conclusion of the committee was that the returns of State officers are only *prima facie* evidence of the result of an election, and not conclusive on the House; that under the constitutional power of the House to judge of the elections, qualifications, and returns of members it had the right to count these votes, though not returned in due time; and that as there was no fraud claimed, and no irregularity except the delay in transmission of the returns, the votes ought to be counted.

As this was the first case in which it was proposed to change the result of an election by counting votes which could not be counted under the State law, an elaborate debate ensued upon the question of the power of the House in the premises. Against the report it was argued that the right to judge and the rule of decision are distinct things. In this case the right to judge resided in the House, but the rule of decision must be the regulations prescribed by the States. Congress has the power, if it chooses, to make or alter regulations for holding elections for members of Congress, but not for making returns, which are under the exclusive control of the States. From which it

was argued that the right of the House to judge of the returns of its members must be exercised in obedience to the fixed rules of the States prescribing the manner and time of making these returns.

The arguments in favor of the report were that if the power of judging of returns were confined to the mere judging of the authenticity of the certificate of the final returning officer, it would be nugatory. Under "returns" are included everything required to be done by way of ascertaining and proclaiming the result from the moment the election is closed, and the power to judge of returns must be a power to judge of the whole process. The proposition to count these votes was not a proposition to set aside the law of Georgia, for that did not say that the House should not count the votes, but only that the governor should not; but it was rather giving effect to the provisions of the Georgia law where it had failed to be executed by the State officers. The final power of judging of the whole question of returns must reside in the House or nowhere.

The report of the committee was sustained by a vote of 66 to 52 and Mr. Spaulding took his seat.

[C. & H., 157-165.]

(2) LEIB.

Petition should be specific. Case dismissed.

A petition was presented praying for the appointment of a commission to investigate the election of Michael Leib. No specific charges of any illegality in the election were made, and the committee reported that on such a petition there could be no satisfactory trial of the merits of the election in question and recommended that the petitioner have leave to withdraw his papers. The report was agreed to without debate or division.

[C. & H., 165, 166.]

TENTH CONGRESS, 1807-1809.

Committee on Elections.

Mr. FINDLEY,	Mr. BLAKE,
D. R. WILLIAMS,	STURGES,
MATTHEW CLAY,	ELLIOTT,
Mr. LAMBERT.	

(Mr. Williams and Mr. Blake having obtained leave of absence, Messrs. Marion and Kirkpatrick were, on the 26th of January, 1808, substituted in their places on this committee.)

Cases.

- (1) Joshua Barney *vs.* William McCreery, *Maryland.*
- (2) Duncan McFarland *vs.* John Culpepper, *North Carolina.*
- (3) Philip B. Key, *Maryland.*

(1) BARNEY *vs.* MCCREERY.

Power of the State to superadd qualifications to those prescribed by the Constitution. Decision in favor of the sitting member, but direct decision of the constitutional question avoided.

Under the law of Maryland the town and county of Baltimore constituted one district, which was entitled to send two Representatives to Congress, one of whom was required to be a resident of the city and the other of the county of Baltimore. Mr. Barney and Mr. McCreery were the candidates from the city, and Mr. McCreery having received the most votes held the seat. The seat was contested on the ground that he was not a resident of the city. He had formerly resided in the city of Baltimore, but some years previous to this election had removed his family to his estate in the country. His family had been in the habit of living on the estate in the summer and in Washington in the winter. He himself had an office in Baltimore where he occasionally slept, and had also a room reserved for him in the house of a friend. For a few days before the election he had slept in Baltimore, one night in his office.

The committee did not decide the question whether or not his legal residence was in the city of Baltimore, but held that the law of Maryland, superadding the qualification of residence in a specified place to those prescribed by the Constitution of the United States, was unconstitutional, and that Mr. McCreery, having received the highest number of legal votes and possessing all the qualifications prescribed by the Constitution, was entitled to his seat.

This being the first occasion on which it was proposed in Congress to declare a State law unconstitutional a very voluminous debate took place. When it came to a decision of the question it appeared that a large majority favored the right of Mr. McCreery to his seat, but many were unwilling to vote explicitly that a State law was unconstitutional, so that the final vote by which Mr. McCreery was confirmed in his title to his seat by a vote of 89 to 18 was simply on the question

of his title to the seat, expressly avoiding all decision of the grounds of the title.

Against the report it was argued that the provision of the Constitution prescribing the qualifications for membership was negative in its form. No person was to serve as a Representative who did not possess certain qualifications, but this did not forbid the requirement of additional qualifications. Under the provision that all powers not expressly delegated to the United States are reserved to the States themselves, or to the people, the power to require these additional qualifications was reserved to the States. If this power did not reside in the States then the power to divide themselves into districts was also wanting and the laws of most of the States must be held to be unconstitutional and the election of most of the members invalid. The proposition was characterized as an entering wedge, the final outcome of which would be the overthrow of the sovereignty of the States and the destruction of a republican form of government. It was suggested as among the dangers to be feared, if no power existed to require other qualifications than those prescribed by the Constitution, that the time might come when persons of color would be elected to the House, a "monstrous and abominable conclusion." The previous case of *Spaulding vs. Mead* was explained not to involve the setting aside of a State law, for in that case the execution of the law had been prevented by an act of God.

In favor of the report it was urged that the enumeration by the Constitution of certain qualifications excluded by implication all other qualifications. If any such power as was claimed existed in the States great inconvenience would result from lack of uniformity, and the States would have the power practically to annul many provisions of the Constitution. The powers not delegated to the United States are reserved to the States *or to the people*. Powers originally residing in the States are reserved to the States, those originally residing in the people to the people. Congress was the creation of the people, not of the States, and the States can have no powers in regard to its election not expressly delegated by the Constitution. Any addition by the States to the constitutional qualifications would be an infringement on the reserved right of the people to elect any person to Congress not disqualified by the Constitution. The only power over the election of Representatives which the people have not reserved is the power to prescribe the time, place, and manner of the election, which is granted to the State legislatures or to Congress by express delegation.

As above stated, Mr. McCreery was confirmed in his title to his seat by a large majority, but an explicit decision of the constitutional question was avoided. It seems probable, however, that a majority of the House believed the law to be unconstitutional, but hesitated to declare it so by the action of the House. (See Story, Commentaries on the Constitution, secs. 625, 627, vol. 2, p. 101, and Kent's Commentaries, vol. 1, p. 288, note.) On another occasion, in 1856, it was decided by an almost unanimous vote (125 to 5) that such a State law was unconstitutional (*Turney vs. Marshall and Fouke vs. Trumbull*, Thirty-fourth Congress, 1 Bart., 167. See, also, case of *Wood vs. Peters*, Forty-eighth Congress). But for a recent case, in which the rule was reversed and an elaborate presentation of all the precedents given, see the case of *Roberts*, Fifty-sixth Congress.

[C. & H., 167-221.]

ELEVENTH CONGRESS, 1809-1811.

Committee on Elections.

Mr. FINDLEY,	Mr. TAYLOR,
CLAY,	VAN RENSSELAER,
STURGES,	GARNETT,
Mr. TROUP.	

(Mr. Findley served only during the first session.)

Cases.

- (1) Charles Turner, jr., *vs.* William Baylies, *Massachusetts.*
- (2) Thomas Randolph *vs.* Jonathan Jennings, *Indiana Territory.*

(1) TURNER *vs.* BAYLIES.

Ballots rejected by State officers because of the omission of the word "junior." Seat given to petitioner.

According to the returns of the selectmen of the various towns, Charles Turner, *junior*, esq., received 1,443 votes at the first election, and Charles Turner, esq., 430. A majority of all the votes cast, or 1,860 votes, was necessary to a choice at this election. The governor counted the votes as given for different candidates and ordered a new election, at which William Baylies, the sitting member, received a majority of the votes. The election was contested on the ground that the votes for Charles Turner, junior, esq., and Charles Turner, esq., were intended to be cast for the same man and should be counted for him, which would give him a majority on the first election. Testimony was offered by petitioner to establish the fact that he was generally known by the name Charles Turner, both with and without the addition "junior," and that there was no Charles Turner, senior, or any other Charles Turner in the district and qualified to be a candidate for Congress. This testimony had not been taken under any act of Congress, there being none in force at the time, but it had been taken after due and reasonable notice to the sitting member, who had refused to attend, regarding the proceeding as illegal. The sitting member requested that the case be postponed until the next session of Congress, that he might have time to prepare his case, and the committee recommended the postponement, but the House recommitted the report. The committee made a second report, outlining the testimony, which sustained the claims made by the petitioner and recommending that the petitioner be declared entitled to the seat. The House agreed to the report by a vote of 62 to 41.

The debate was chiefly on the question whether or not testimony taken *ex parte*, but on reasonable notice, in the absence of any statutory method of taking testimony, could be considered.

[C. & H., 234-239.]

(2) RANDOLPH vs. JENNINGS.

Election not held by authority of law, and irregularities complained of. The committee recommended that the seat be declared vacant, but no final decision was reached by the House.

After the State of Ohio had been separated from the Northwest Territory the remainder, under the name of Indiana Territory, had a governor, judicial officers, and a general assembly of eight members. On October 26, 1808, the governor lawfully dissolved the legislature. On February 3, 1809, Congress enacted a law dividing the Territory into Indiana and Illinois. The act contained a saving clause, providing that nothing herein contained should be construed to affect the government then in force in the Indiana Territory. On February 27, 1809, a law was passed authorizing the general assembly of Indiana to apportion members to a new house of representatives, to consist of not less than nine nor more than twelve members. A Delegate to Congress was to be elected at the same election with the new legislature.

There being no legislature in existence, the governor issued his proclamation on April 4, 1809, for the election of an additional number of members of the legislature, sufficient to supply the place of those struck off by the division of the Territory. This legislature was elected and met, but did nothing but provide for the election of an additional member to make up the number of nine required to organize under the law of Congress. Mr. Jennings was elected Delegate to Congress at the same election.

The election was contested by Thomas Randolph, who did not claim the election for himself, he having received only a minority of the votes, but asked that it be set aside on the ground of irregularities. The return from one of the precincts, which gave a majority for the sitting member larger than his whole majority in the Territory, was not signed by the poll keepers, and in one county the sheriff had failed to appoint deputies to hold the election in two precincts in which the petitioner claimed he would have received votes enough to give him a majority in the Territory.

The petitioner did not press the question of lack of authority to order the election, but the committee decided it on that ground alone. They found that when the law dividing the Territory was passed there was no legislature in existence, and so the saving clause could not affect it. The law providing for the election of a new legislature and Delegate to Congress required that this election was to be ordered by the old Territorial legislature. This legislature did not exist and could not be called into existence by the governor's proclamation, hence the law was fatally defective, and no legal election could be held in Indiana Territory until Congress passed a law curing the defect. Such a law had been passed at the present session.

The report of the committee was approved by the Committee of the Whole, but rejected by the House, after debate, by a vote of 30 to 83. A motion to declare Mr. Jennings entitled to the seat was proposed and withdrawn, but, no further action being taken, he still continued to hold the seat.

[C. & H., 240-245.]

TWELFTH CONGRESS, 1811-1813.

Committee on Elections.

Mr. FINDLEY,	Mr. PLEASANTS.
STURGES,	EMOTT.
MACON,	FISK.
Mr. TROUP.	

(1) JOHN TALIAFERRO *vs.* JOHN P. HUNGERFORD, *Virginia.*

Illegal votes. Land lists as evidence. Seat given to petitioner.

The sitting member received a majority of 6 votes on the returns, but an examination of the land lists showed a large number of votes cast for both candidates by persons whose names did not appear on the land lists. If all these votes should be deducted petitioner would have a majority of 121 votes. The committee held that the land lists were conclusive only in the absence of all other testimony, and that it was competent for the parties to establish or overthrow the right of persons to vote by other evidence that they were or were not freeholders.

The petitioner had, on May 7 and 28, given the sitting member notice of his intention to contest the election, and on September 27 given notice to take testimony on October 10, 17, and 22. The testimony was taken, but the sitting member refused to attend. He asked for further time to take testimony, which request was opposed by the petitioner on the ground that he had already had a reasonable time. The committee held that he could not have been expected to procure his testimony before the petitioner had taken his, and, as the time then remaining before the session of Congress was insufficient, recommended the postponement. The House refused to grant the request, and, by a vote of 66 to 19, gave the seat to the petitioner.

[C. & H., 246-249.]

THIRTEENTH CONGRESS, 1813-1815.

Committee on Elections.

Mr. FISK, of Vermont,	Mr. CONDUCT,
BURWELL,	AVERY,
DAVENPORT,	PICKERING,
Mr. ANDERSON.	

Cases.

- (1) John Taliaferro *vs.* John P. Hungerford, *Virginia.*
- (2) Burwell Bassett *vs.* Thomas M. Bayley, *Virginia.*
- (3) William Kelly *vs.* Thomas K. Harris, *Tennessee.*
- (4) Isaac Williams, jr., *vs.* John M. Bowers, *New York.*
- (5) Blydenburg and Jay *vs.* Sage and Lefferts, *New York.*

(1) TALIAFERRO *vs.* HUNGERFORD.

Illegal votes and irregularities. Committee reported the election void, but the House retained the sitting member in his seat.

The sitting member was returned as having received a majority of 24 votes. The election was contested on the grounds that more votes were cast for sitting member than for petitioner by persons not freeholders, and that the election in several counties was void for irregularities. The petitioner, in the first instance, seems to have pressed only the latter claim, and the first report of the committee discussed it alone. The law provided that the clerks of the poll should enter in distinct columns, under the name of each candidate, the names of the persons voting for him. In some counties the names were all written in one column, and numbers or marks placed under the candidates' names to indicate the votes. In two counties the Christian names of the voters (or the candidates—the report is ambiguous) were not entered, but only the initials. In four counties there was no certificate that any oath had been administered to the clerks of the poll.

The committee were of the opinion that such violations of positive law in regard to the manner of holding elections should be as fatal as violations of the law in regard to time or place, and recommended that the election be set aside. The House, by a vote of 78 to 82, refused to concur, and recommitted the case.

The committee then submitted a second report, dealing with the question of illegal votes. The land lists were held to be *prima facie* evidence of the qualifications of voters. If all the votes cast for both candidates by persons whose names did not appear on the land lists were deducted, the petitioner would have a majority of 17 votes. But a number of the votes above deducted were shown by other evidence to be legal votes. Eliminating these, the sitting member had a majority of 11 votes. But of these votes, the proof in regard to some of them only went to show that the voters had *possession* of land for the required six months before election, but did not show whether the freehold title was acquired six months before or not. Again, deducting these votes would show a majority of 4 for the petitioner. The com-

mittee seems to have favored the second of the above statements, and reported that "the petitioner has not supported his petition." The case was postponed until the next session of Congress, when the committee made a third report, stating that by testimony taken in the meantime the sitting member had established the qualifications of 11 more voters who voted for him, which, with the 11 majority reported for him at the last session, gave him a majority of 22 votes. But the committee were of opinion that the election ought to be held void on account of the irregularities detailed in the first report. The House refused to concur, and confirmed the right of the sitting member to his seat. So the House seems to have decided that the irregularities were not fatal; that other evidence might be received to establish the right to vote of persons not on the land lists, and that this evidence need establish no more than the possession of land the required six months, with a freehold title at the time of the election.

[C. & H., 250-254.]

(2) BASSETT *vs.* BAYLEY.

Right of the sheriff to continue the poll beyond the first day, and illegal votes. Sitting member retained the seat.

The sitting member was returned as receiving a majority of 57 votes. The election was contested on the ground of illegal votes and an illegal adjournment by the sheriff of the poll of one county.

The law provided that the sheriff could adjourn the poll in case of rain, rise of water courses, or the attendance of more voters than could be polled in one day. The petitioner contended that if there was no proof of the occurrence of any of these contingencies an adjournment should be presumed to be illegal, but the committee unanimously held that the action of the sheriff was *prima facie* legal.

The taking of testimony having been interfered with by the presence of the enemy's cruisers, the parties were given five weeks to procure testimony. When it had been taken, the committee reported that the evidence showed that there had been no rain or rise of water courses in the county when the election was adjourned; that the day was a fine one, and the voting rapid and continuous during the first part of the day, but very slow toward the last; that during the last half hour only 2 votes were polled, and at sunset only 4 persons were present who had not voted, 2 of whom were deputy sheriffs who had been in attendance all day. The committee held that the question whether more voters appear than can be polled in one day is a mere question of fact, admitting of no discretion in the officer, and in this case the contingency provided for in the law not having in fact occurred, the adjournment was illegal, and all votes taken on the second and third days should be excluded.

The report was recommitted, and the second report of the committee stated that 64 votes of unqualified persons should be deducted from the poll of sitting member and 63 from petitioner, and that 2 votes tendered for petitioner by qualified voters and rejected by the officers of election should be counted for him. This would leave a majority of 54 for sitting member. At the illegally adjourned poll 53 votes were given for sitting member and 4 for petitioner after the adjournment. Deducting these, the sitting member was still entitled

to his seat by a majority of 5 votes. The House concurred, after debate, and the title of the sitting member was confirmed.

[C. & H., 254-259.]

(3) KELLY *vs.* HARRIS.

Incorrect returns and illegal votes. Sitting member retained the seat.

The sitting member received a majority of 1 vote on the returns as counted by the governor. The law of Tennessee provided that the election inspectors should make two copies of their returns and forward one to the governor and file the other with the clerk of the county court. In one county the return forwarded to the governor contained 2 more votes for the sitting member than that filed with the county clerk, and on the return counted by the governor it appeared by adding together the votes credited to all the candidates that there were 2 more than the total number certified to have been given.

The sitting member had not been notified of the contest until after his arrival in Washington, and asked that time be allowed to take testimony. This was granted. At the next session it appeared that Mr. Kelly had declined to prosecute the case further. The general opinion being that it should not be allowed to abate for want of prosecution, the report of the previous session was recommitted to the committee. They reported that the correction of the incorrect return described in the first report would give the seat to the petitioner by a majority of 1, but that the sitting member, besides some testimony tending to indicate a false return in favor of the petitioner in one county, had proved 2 votes illegal. One was cast by a minor, the other by a person who had not resided six months in the county where he voted. The law provided that every freeman, etc., "possessing a freehold in the county wherein he may vote, and being an inhabitant of this State, and every freeman being an inhabitant of any one county in the State six months immediately preceding the day of election" may vote. This was held to mean that persons voting under the second qualification must vote in the county where they resided, and nowhere else.

These 2 illegal votes counteracted the 2 votes wrongly returned for sitting member, and left him still a majority of 1 vote. The House confirmed his title.

[C. & H., 260-262.]

(4) WILLIAMS *vs.* BOWERS.

The word "junior." Petitioner given the seat.

John M. Bowers was returned as having received 4,287 votes, John M. Bowey 1, Isaac Williams, *junior*, 4,129, Isaac Williams 434, and other persons 17. The committee reported that the votes for Isaac Williams were all from four towns, in which no votes appear to have been cast for Isaac Williams, *junior*; that there were three persons by the name of Isaac Williams in the district, but the only one who was a candidate for Congress was the one known by the addition of "*junior*," and that it seemed probable that the votes given for John Bowers and John M. Bowey were intended for John M. Bowers, and those for Isaac Williams for Isaac Williams, *junior*, which would give petitioner a majority of 205 votes. But the committee were of opinion that more

testimony was needed, and recommended a postponement to the next session of Congress. This being agreed to, the committee, at the next session, reported that by evidence taken during the recess it appeared that the votes in three of the towns returned for Isaac Williams were in fact cast for Isaac Williams, junior, and wrongly returned by mistake of the returning officers. This would give Mr. Williams a majority of 164.

The House unanimously voted Mr. Williams entitled to the seat.
[C. & H., 263-264.]

(5) BLYDENBURG and JAY *vs.* SAGE and LEFFERTS.

The election of Ebenezer Sage and John Lefferts, of New York, was contested by a petition from Benjamin B. Blydenburg and Peter A. Jay, on what grounds it does not appear. The committee reported that further time would be necessary to come to a just decision, and it was postponed to the next session of Congress, when nothing appears to have been done with it.

FOURTEENTH CONGRESS, 1815-1817.

Committee on Elections, first session.

Mr. TAYLOR, of New York.	Mr. VOSE,
PIFER,	BARBOUR,
SHARPE,	LAW,
Mr. PICKERING.	

Cases.

- (1) Westel Willoughby *vs.* Wm. S. Smith, *New York.*
- (2) Robert Porterfield *vs.* William McCoy, *Virginia.*
- (3) Erastus Root *vs.* John Adams, *New York.*

Committee on Elections, second session.

Mr. TAYLOR, of New York.	Mr. VOSE,
PICKERING,	LAW,
KERR,	THOMAS,
Mr. HAHN.	

Case.

- (4) Rufus Easton *vs.* John Scott, *Missouri Territory.*

(1) WILLOUGHBY *vs.* SMITH.*The word "junior." Seat given to petitioner.*

The returns showed 2,510 votes for William S. Smith, 2,466 for Westel Willoughby, junior, 309 for Westel Willoughby, and 7 scattering. The committee reported that the evidence showed that 299 of the 309 votes returned for Westel Willoughby were cast for Westel Willoughby, junior, but the "junior" was omitted from the returns by mistake of the returning officers. The House gave the seat to Mr. Willoughby.¹

[C. & H., 265, 266.]

(2) PORTERFIELD *vs.* MCCOY.*Illegal votes and irregularities. Sitting member retained the seat.*

The sitting member had a majority of 53 votes, after counting for the petitioner a vote cast for him but counted for the sitting member by mistake, and for the sitting member 3 votes offered for him and illegally rejected by the election officers. The election was contested on the grounds of illegal votes and irregularities. The irregularities were: In one county the poll clerks were not sworn until after the election, and in another the names of voters were set down in a single column, and the votes carried forward and marked under the names of

¹Mr. Smith did not appear nor claim the seat, and it was given to Mr. Willoughby on the ninth day of the session. (See report in *Hammond vs. Herrick*, Fifteenth Congress. C. & H., 293).

the candidates, instead of the names being in separate columns as the law required. The committee held that these irregularities related more to form than substance, and as there was no claim that the result had been affected, disregarded them.

There had been an agreement between the candidates as to what classes of votes were to be admitted, but the committee held that the agreement of parties could not enlarge nor diminish the rights of voters, and decided the votes legal or illegal according to the Virginia law. They held that votes must be given in the county where the land of the voter was situated, and that all votes given by virtue of title bonds not conveying a legal freehold estate were illegal. The land lists were held to be satisfactory evidence of the qualifications of voters unless disproved by other evidence. The affidavit of a voter might be read in evidence to prove his vote.

Applying these rules to the testimony, 171 votes for petitioner and 149 for sitting member were illegal, leaving a majority of 75 for the sitting member. The evidence in the case was not taken by petitioner until four months after he had notified the sitting member of his intention to contest the election, and it was objected to by the sitting member on the grounds that it was not taken within the period prescribed by the Virginia law for contested elections for members of the general assembly; and that the delay of four months was unreasonable. This was overruled by the committee.

The House confirmed the title of Mr. McCoy without division.

[C. & H., 267-270.]

(3) ROOT *vs.* ADAMS.

Mistake in returns. Seat given to petitioner.

The deputy clerk of one of the counties, in making out a transcript of the returns to be forwarded to the secretary of state, wrote the name *Root* by mistake as *Rott*. On proof of the error the votes were counted by the committee for Mr. Root, and it appearing that he had then a majority of all the votes he was given his seat.

[C. & H., 271.]

(4) EASTON *vs.* SCOTT.

Prima facie right, irregularities, and illegal votes. The committee recommended that the petitioner be given the seat, but the House declared it vacant.

According to the returns as counted by the governor, the sitting member had a plurality of 15 votes, but the petitioner contended that he had a majority of 15 votes on the legal returns, counting those not returned within the time prescribed by law, and that on all the abstracts of votes, legal and illegal, he had a majority of 7 votes, not counting a certain paper from the precinct of Côte Sans Dessein. He also charged irregularities and illegal voting.

The committee decided that they would not inquire into the question of the qualifications of voters, for the election being by ballot the right of the voter to secrecy must be preserved; he could not be compelled to disclose for whom he voted, and without such disclosure it would be vain to inquire into his qualifications for the purpose of purging the poll. The decision of the judges of election upon the qual-

ifications of voters must be considered final, and if they have exercised their authority arbitrarily or corruptly the remedy must be in their punishment under the laws of the Territory.

The alleged return from the precinct of Côte Sans Dessein was unanimously rejected by the committee on the ground (1) that the election was held *viva voce*; (2) but two persons acted as judges (the law requiring three), and neither of them was sworn; (3) but one person acted as clerk, and he was not sworn; and (4) the votes were rejected by the county returning board and not included in the abstract of votes sent to the governor; and the paper which was sent to the governor was sent him irregularly, and appeared on its face to be defective in many important particulars.

This precinct being rejected, it appeared that the petitioner had a majority of 7 votes on the returns which the governor properly should have counted, and he asked accordingly to be admitted forthwith to the seat, so that if the election was to be contested on its merits he might hold his proper position as sitting member pending the contest. This was refused by the committee, and they proceeded to investigate the main question. Several precincts were objected to by the sitting member on various grounds, all of which were overruled either as not being supported by evidence or as not being sufficient to cause the rejection of the votes. Various charges of irregularities brought by the petitioner were also overruled as unsupported or insufficient. The sitting member then asked for time to procure copies of the poll books in a number of townships which he alleged were irregular, but the application was refused on the ground that he had already had sufficient time to procure them if he had desired it. Thereupon it was contended by the sitting member that by rejecting the vote in the township of Côte Sans Dessein the candidate would become entitled to a seat who had not a majority of votes in his favor, and therefore the election should be set aside and a new one ordered. The committee did not concur in the opinion, and submitted resolutions declaring petitioner entitled to the seat.

The report was opposed on the ground that the committee had declined to inquire into the qualifications of voters, and on motion of Mr. Webster it was recommitted to the committee with instructions "to receive evidence that persons voting for either candidate were not entitled to vote on the election."

The committee made a second report, stating that the notices to take testimony in regard to the qualifications of voters had not been specific, neither the names of the voters objected to nor the particular qualifications alleged to be lacking having been given. Such testimony as had been taken must for this reason be excluded, and it being practically impossible, on account of the remoteness and extent of the territory, to procure evidence in time to be of any service, the committee asked to "be discharged from further investigation into the qualifications of the said electors." The House substituted a resolution declaring the election illegal and the seat vacant.

[C. and H., 272-286.]

FIFTEENTH CONGRESS, 1817-1819.

Committee on Elections.

Mr. TAYLOR, of New York,	Mr. ROSS,
TAYLOR,	WHITMAN,
MERRILL,	STRONG,
Mr. SHAW.	

Cases.

- (1) Charles Hammond vs. Samuel Herrick, *Ohio*.
- (2) Elias Earle, *South Carolina*.
- (3) George Mumford, *North Carolina*.

(1) HAMMOND vs. HERRICK.

Whether a Representative-elect, holding an office under the United States after his election, and after the 4th of March on which the previous Congress expired, vacated his seat. Sitting member retained the seat.

The sitting member was elected to the Fifteenth Congress in October, 1816, holding at that time the office of district attorney of the United States. The Fourteenth Congress expired March 4, 1817. Mr. Herrick continued to hold his office as district attorney until November 29, 1817, when he resigned it, and on December 1 took his seat. A memorial was presented from Charles Hammond, contesting the election on the ground that the Representatives-elect to the Fifteenth Congress became *members* on March 4, 1817, the day the preceding Congress expired, and that the sitting member, having held an incompatible office after that date, had vacated his seat. A resolution was presented, and adopted by the casting vote of the Speaker, directing the Committee on Elections "to inquire and report what persons, elected to serve in the House of Representatives, have accepted, or held, offices under the Government of the United States since the 4th day of March, 1817; and how far their right to a seat in this House is affected by it."

Two days afterwards (December 12, 1817), Mr. Taylor, the chairman of the Committee on Elections, reported a resolution requesting the President to communicate to the House the names of any Representatives in the list annexed (a list of the members of the Fifteenth Congress) who had held any office under the United States since March 4, 1817, designating the offices, the time of appointment and acceptance, "whether the same are now held, and, if not, when the same were severally resigned."

The resolution having been concurred in by the House, the President, on December 26, sent to the House a message containing a list of nine members who had held various offices, all of which had been resigned before the meeting of the Fifteenth Congress, on December 1, 1817, except that of Mr. Mumford (see case of George Mumford, *post*). This message was referred to the Committee on Elections, which, on January 5, 1818, presented an elaborate report sustaining the right of Mr. Herrick to his seat.

The facts in the case were reported as above stated, showing that Mr. Herrick had continued in office more than nine months after March 4, 1817, and two months after (on September 30, 1817) he had received the certificate of his election.

The sixth section of the first article of the Constitution provides that "no person holding any office under the United States shall be a member of either House during his continuance in office." The incompatibility is not limited to *exercising* an office, and, at the same time, being a member of either House of Congress; but it is equally extended to the case of *holding*; that is, having, keeping, possessing, or retaining an office under such circumstances. If the membership of Mr. Herrick commenced either on the 4th of March, or the 30th of September, 1817, he has vacated that membership by holding an office incompatible therewith.

The report then discusses the cases of Van Ness (Fourth Congress) and Key (Tenth Congress) and several cases in the House of Commons. The American rule, differing from the English, is found to be that a member elect may decline his election at any time before taking his seat.

Our rule in this particular is * * * better, for it makes our theory conform to what is fact in both countries, that the act of becoming in reality a *member of the House* depends wholly upon the will of the person elected and returned. *Election* does not of itself constitute membership, although the period may have arrived at which the Congressional term commences. This is evident from the consideration that all the votes given at an election may not be received by the returning officer in season to be counted, whereby a person not elected may be returned and take the seat of one who was duly elected. Neither does a *return* necessarily confer membership; for if he in whose favor it be made should be prevented taking a seat at the organization of a House of Representatives, he might find upon presenting himself to qualify that his return had been superseded by the admission of another person into the seat for which he was returned.

This is illustrated by the cases of Spaulding *vs.* Mead and Willoughby *vs.* Smith, and the report proceeds:

Neither do *election* and *return* create membership. These acts are nothing more than the designation of the individual, who, when called upon in the manner prescribed by law, shall be authorized to claim title to a seat. This designation, however, does not confer a perfect right; for a person may be selected by the *people* destitute of certain qualifications, without which he can not be admitted to a seat. He is, nevertheless, so far the Representative of those who elect him, that no vacancy can exist until his disqualification be adjudged by the House, yet, it would be easy to state cases where he would not be permitted for a moment to occupy a seat, notwithstanding the regularity of his election and return. To no practical purpose could he ever have been a member. So, also, if a person duly qualified be elected and returned, and die before the organization of a House of Representatives, we do not think he could be said to have been a member of that body, which had no existence until after his death. We say which had no existence; for we consider that conceit altogether fanciful which represents one Congress succeeding to another as members of the same corporation. It has no foundation, either in fact or in the theory of our Government. Each House of Representatives is a distinct legislative body, having no connection with any preceding one. It commences its existence unrestrained by any rules or regulations for the conducting of business, which were established by former Houses, and which were binding upon them. It prescribes its own course of proceeding, elects its officers, and designates their duties. Even joint rules for the government of both Houses of Congress are not binding upon a new House of Representatives, unless expressly established by it. Although the Fourteenth Congress had never assembled, the Fifteenth would have met, under the Constitution, clothed with every legislative power as amply as it was enjoyed by the Thirteenth. The Constitution does not define the time for which Representatives shall be chosen. It is satisfied provided the choice take place at any time in every second year. The rest is left to the discretion of each State.

The privileges of exemption from arrest and of franking letters granted—the first by the Constitution and the second by law—to Rep-

representatives before a meeting of the House and after its adjournment, furnish no argument in favor of their membership at such times, for such a construction might make the members of one Congress continue in office not only after the Congress had expired, but also after the next Congress was actually in session.

In regard to the danger apprehended from Executive influence in the concerns of legislation, we might rest satisfied with the remark that the business of *forming* a Constitution is not confided to us. Ours is a more humble duty; it is to expound the text by a fair interpretation. We can neither add nor diminish. The object of our inquiry is not what ought to be, but what is.

Whoever looks into the Constitution will find provisions to guard the entrance of the legislative hall against those whose personal and immediate interest would be advanced by perpetuating offices and increasing salaries, but he will find none for the purpose of excluding the influence of Executive patronage. The framers of the Constitution either did not apprehend danger from that source, or they thought it impracticable to prevent it without hazarding still greater mischief. The great offices of the Union * * * are left as open to the members of this House as to others, and they can only be obtained through Executive favor. Nay, laws may be passed on the last day of a Congress, creating offices and fixing their salaries, and, on the next day, the members by whose votes they were created may be appointed to fill them. The only antidote provided against an abuse of this pervading influence is the elective franchise. * * * If this remedy fail it will be vain to look for another. * * * This is the only constitutional answer we can give to the suggestion of possible danger from Executive influence.

In fine, we have examined the memorial of Mr. Hammond with deliberate attention, and are of opinion that Mr. Herrick has not rendered himself incapable of being a member of this House by reason of having held the office of attorney of the United States after the 4th of March and until the 29th of November last.

On account of the importance of this case in thus settling for the first time an important question of constitutional interpretation, it has seemed proper to quote thus fully from the report.

The memorial of Mr. Hammond, subjoined to the report, contains the arguments which may be inferred from the answers to them contained in the report. He contended that the Congress of the United States is a political institution of continual duration. The House of Representatives, one branch of the Congress, is disorganized every two years, but the other branches are in full organization, and the members of the representative branch are in existence, ready to be organized if need be. All the rights and privileges of their station—exemption from arrest, the franking privilege, and exemption from militia service—attach to the members elect the moment their term commences. Either Mr. Herrick was a member on March 4, 1817, or he was not. If he was, he was disqualified; and if he was not, and had died before the meeting of Congress, it is difficult to see how his death could have created a vacancy in a body of which he had never been a member. But unless it did create a vacancy, no other election could be held for two years under the laws of Ohio. This shows the untenable character of the position that membership does not commence until the member has qualified by taking the oath. The purpose of the Constitution is plain; it is “to close the doors of the legislature against undue Executive influence.”

The answer of Mr. Herrick and argument of his attorney presented much the same arguments used by the committee. Mr. Herrick contended that the election, return, and qualification by taking the oath were all essential to making one a member, and until the last was completed he could not be considered a member. Numerous quotations from the Constitution were given to show that the word “Representative” is uniformly used when a person not yet qualified is meant, the

word "member" never, unless the context shows that he must be a fully qualified member. (The memorial and answer will be found more fully outlined in Paine on Elections, § 161, Note.)

The report was discussed for two days in Committee of the Whole House, and on motion of Mr. Adams, of Massachusetts, the committee by a vote of 67 to 66 nonconcurrent in the report of the Committee on Elections. In the House, by a yea-and-nay vote of 73 to 77, the recommendation of the Committee of the Whole was disagreed to, and by a vote of 77 to 70, the resolution proposed by the Committee on Elections was passed:¹

[C. & H., 286-314.]

(2) EARLE.

Same issue and decision as in next preceding case.

Mr. Earle held the office of postmaster at Centerville, S. C. Soon after his election to the Fifteenth Congress he sent his resignation to the Postmaster-General and his successor was appointed, but the latter having failed to qualify, Mr. Earle remained in charge of the office until June 12, 1817, when another successor was appointed. The committee reported these facts, and a resolution declaring the sitting member entitled to the seat, which was passed by the House at the same time as that in the case of Mumford.

[C. & H., 314, 315.]

(3) MUMFORD.

If an office has expired by the completion of its duties it need not be formally resigned. Sitting member retained the seat.

Mr. Mumford had held the office of principal assessor of direct taxes in the Tenth collection district of North Carolina, under the act of July 22, 1813, and had never resigned the office. He was elected to Congress in August, 1817, and on December 1, 1817, qualified as a member of the House. The Committee on Elections, to whom the case was referred among others by the reference to them of the President's message on the subject, reported that if the act of 1813 under which Mr. Mumford was appointed had neither expired nor been repealed, Mr. Mumford was still in office and could not rightfully be a member of the House. This act, when passed, was prospective and without limitation. No law then existed for laying a direct tax, but as Congress intended doing so, it provided, by this law, for the officers and machinery which would be necessary to collect it. The act approved January 9, 1815, by which the direct tax was levied, repealed all of the former act except the portions providing for collection districts, internal duties, and the appointment of assessors. These provisions were to remain in force only for the purposes of the last-mentioned act, and therefore were limited in duration to its duration. On March 5, 1816, it was enacted that the direct tax should be reduced from six millions to three, and should continue for only one year. The provi-

¹ The House refused to excuse those members from voting whose own cases would be affected by the decision of this one, and in subsequent Congresses members opposed to the doctrine of this case attacked it as a precedent, on the ground that the resolutions were carried by a less majority than the number of those voting whose cases were affected by the decision.

sions of the previous act were made to apply to this, and continue in force for its purposes. The whole direct tax system, and all the machinery created for its collection, was thus to go out of existence when the taxes for the year 1816-17 had been collected. From a certificate of the Commissioner of Internal Revenue appended to the report (not printed in C. & H., see original report), it appeared that the tax in Mr. Mumford's district had all been collected and accounted for previous to December 1, 1817, and that on or after that date no official duty had been performed nor remained to be performed by Mr. Mumford. From Mr. Mumford's own statement it appeared that he had spent the summer before taking his seat in New Hampshire, remote from the district in which the duties of his collectorship had been exercised. The committee were of the opinion that his office had thus expired before he had taken a seat in the House, and presented a resolution declaring him entitled to the seat. The report, with a communication from Mr. Mumford, was referred to the same Committee of the Whole House to which had been committed the cases of Herrick and Earle. The committee agreed to the resolutions of the Committee on Elections in the cases of Earle and Mumford, and they were passed by the House.

The communication of the sitting member, in addition to the points stated by the committee, argued that a formal resignation of his office would not have been necessary, even if it had still continued to exist. He states the true doctrine to be that if a person holding an office is appointed to an incompatible one under a different authority, it is his duty to resign the former office, that notice may be taken of the vacancy; but if he is appointed to a new and incompatible office under the same authority, the acceptance of the second office, by qualification and entrance upon its duties, is a vacation of the former office; notice is presumed, and a formal resignation is merely a matter of courtesy. The committee apparently did not assent to this doctrine, but it is approved by Judge McCrary in his treatise on elections (sec. 243), and a similar doctrine was approved by the committee and House in the Thirty-eighth Congress. (See report of Mr. Dawes on the military appointment of Hon. F. P. Blair, jr., found in volume 8, McKee's compilation, and curiously omitted from First and Second Bartlett.)

[C. & H., 316-327.]

The cases of the other members of the Fifteenth Congress mentioned in the President's message all corresponded to the cases of Herrick and Earle, and nothing further seems to have been done about them.

SIXTEENTH CONGRESS, 1819-1821.

Committee on Elections.

Mr. TAYLOR,	Mr. BROWN,
WHITMAN,	TUCKER,
MERRILL,	SLOAN,
Mr. TARR.	

Cases.

- (1) Rollin C. Mallary *vs.* Orasmus C. Merrill, *Vermont.*
 (2) James Guyon *vs.* Ebenezer Sage, *New York.*

(1) MALLARY *vs.* MERRILL.*Irregularities in returns. Seat given to petitioner.*

Under the law of Vermont, members were elected on a general ticket. The law provided that a record of the vote in each town should be made in the town clerk's office, and a certificate of the vote, in a prescribed form, should be made out by the presiding officer, sealed, and delivered by him to the representative of the town, or an adjoining town, who should deliver it to a canvassing committee to be chosen by the general assembly. This committee seems to have had judicial as well as ministerial powers, and was required to certify the names of the six persons having the highest number of legal votes to the governor, who was to issue certificates of election to them.

According to the votes as counted by the canvassing committee, Mr. Merrill was the sixth in order and Mr. Mallary the seventh, and the former accordingly held a seat. Mallary contested on the ground that he had actually received a majority of the votes *cast*, which seems to have been conceded. The canvassing committee had rejected one return because it was not sealed, and another because it was informally certified; some returns were not presented to the committee through the neglect of representatives whose duty it was to have so presented them; and in one return, by mistake, the names of certain candidates for State officers were inserted as having received the votes for Congress which were in fact, as shown by the record in the town clerk's office, cast for the candidates for Congress.

The committee found that no fraud was alleged in the case of the unsealed return; that the certificate on the one rejected for informality was in sufficient compliance with the law, and that the votes not returned or wrongly returned were sufficiently proved by the records in the town clerks' offices and should be counted. This would give a majority to petitioner, and the committee recommend that he be given the seat. After considerable discussion the resolutions presented were passed by a vote of 116 to 47, and Mr. Mallary took his seat.

Appended to the report are arguments by the sitting member and petitioner. The petitioner contended that an election was complete the moment the last vote had been taken, and all that took place thereafter was merely the ascertainment and proclamation of the result of that election. The House, under its power to judge of the election of

its members, had the power to ascertain, by whatever evidence it chose to admit, how the votes were actually cast, and to count them as cast. Previous cases in Congress were discussed as sustaining this position.

The sitting member, in a voluminous reply, contended that the right of the House to judge the elections and returns of its members must be exercised in subordination to the State laws prescribing the manner of these elections and returns, until such time as Congress should by law alter the laws of the States. The only question for the House to decide is whether or not these laws have been complied with. The act of returning officers in making and transmitting certificates of the result is as much the act of the electors as the depositing of the votes; and if these officers have neglected in any particular to comply with the provisions of the law the voters have lost their votes by their own *laches*.

[C. & H., 328-348.]

(2) GUYON *vs.* SAGE.

The word "junior." Seat given to petitioner.

According to the returns, Ebenezer Sage received 2,085 votes, James Guyon, junior, 1,701, and James Guyon, 396. From the testimony of the inspectors and clerks of election it appeared that 391 of the votes returned for James Guyon were cast for James Guyon, junior. Counting these for him would give him a majority of 7 votes. Mr. Sage had not appeared to claim the seat, and the committee recommended and the House voted that Mr. Guyon was entitled to it.

[C. & H., 348-352.]

SEVENTEENTH CONGRESS, 1821-1823.

Committee on Elections.

Mr. SLOANE,	Mr. WALWORTH,
EDWARDS,	RODGERS,
TUCKER,	SMITH,
Mr. MOORE.	

Cases.

- (1) Philip Reed *vs.* Jeremiah Cosden, *Maryland.*
- (2) Cadwallader D. Colden *vs.* Peter Sharpe, *New York.*
- (3) Matthew Lyon *vs.* James W. Bates, *Arkansas Territory.*

(1) REED *vs.* COSDEN.

In case of a tie, the result not to be decided by lot. Double ballots and illegal votes. Seat given to petitioner.

The petitioner and sitting member were returned as receiving an equal number of votes, and the governor and council, acting under a Maryland law passed in 1790 or 1791, proceeded to determine between the candidates, and gave the certificate to Cosden. It is not mentioned in the report, but appears from the letter of the sitting member that this determination was required to be and was by lot. The committee expressed an opinion that the law under which the governor and council acted had been repealed by the act of January 2, 1806, but considered it unnecessary to argue this point, as the law in question was clearly unconstitutional. The Constitution provides that Representatives in Congress shall be elected by the people, and if the people fail to elect the State executive can have no power to appoint, by lot or otherwise.

Petitioner, however, claimed that there was no tie of the votes as cast, but that he had received a majority. In one of the precincts two tickets folded together, both containing the name of petitioner, had been thrown away by the judges under the statute providing for the rejection of double ballots. On completing the count it appeared that there were 2 votes less than the number of names on the poll book. Considerable testimony of a somewhat conflicting nature was produced bearing upon the question whether the tickets in question actually had the appearance of having been "deceitfully folded together." It appeared that a discrepancy between the number of votes and the number of names on the poll book was common, and all of the judges seem to have agreed at the time that the ballot was double and should be rejected. But the committee determined that it should be counted.

The sitting member charged that illegal votes had been cast for petitioner, and that he had been credited with one vote on a ticket containing his name and four others with the single designation "for Congress." The committee rejected this latter vote, but expressed a doubt as to entering into the question of the qualifications of voters when the election was by ballot. Not wishing to agitate this question, they had examined the testimony presented and found it insufficient.

The testimony was all somewhat irregularly taken, but, as both parties showed a disposition to waive matters of form, the committee admitted it. Adding to the votes of petitioner the two votes rejected as

a double ballot and deducting the ballot containing five names, he would have a majority of 1 vote, and the committee recommended that he be given the seat. After some debate in the Committee of the Whole an amendment was reported to the resolution of the Committee on Elections inserting the word "not," so as to give the seat to neither party. The amendment was agreed to in the House by a vote of 73 to 71. A few days later the resolution declaring the sitting member not entitled to the seat was passed. After several other motions had been made and defeated, the question being on the resolution as amended, declaring petitioner *not* entitled to the seat, there appeared yeas 74, nays 75.

The Speaker (Mr. P. P. Barbour) voted in the affirmative, thereby making an equal division; and so, under the rule which declares that in "all cases of ballot the Speaker shall vote, in other cases he shall not vote, unless the House be equally divided, or unless his vote, if given to the minority, will make the division equal, and, in case of such equal division, the question shall be lost," he decided that the resolution was lost, and, as a necessary consequence thereof, that the converse of the proposition contained in the said resolution was affirmed, to wit, "that Philip Reed *is* entitled to a seat in this House." This decision being appealed from was overruled by the House, but a resolution was immediately passed by a vote of 82 to 77 giving the seat to Mr. Reed.

[C. & H., 353-369.]

(2) COLDEN *vs.* SHARPE.

Mistakes in returns corrected, and seat given to petitioner.

According to the returns, Peter Sharpe had received 3,369 votes, Cadwallader D. Colden 3,339, Cadwallader D. Colder 220, and Cadwallader Colden 395. Mr. Sharpe had presumably received the certificate, but had not appeared to claim the seat nor resist the claim of Mr. Colden. The clerks of the counties in which the votes were credited to Cadwallader D. Colder and Cadwallader Colden testified that they had been returned by the precinct inspectors as cast for Cadwallader D. Colden, and had been wrongly returned to the governor by mistakes in making out the county transcripts. The committee recommended, and the House decided, that Mr. Colden was entitled to the seat.

[C. & H., 369-371.]

(3) LYON *vs.* BATES.

No testimony produced. Case dismissed.

The petitioner contested the seat on the ground that a number of the county returns were irregular and that large numbers of illegal votes had been cast. He asserted that he had applied to the acting governor and secretary of the Territory for permission to inspect the returns, or for copies of them, but both these requests had been refused; and as there was no law of the Territory whereby he could compel the attendance of witnesses to testify in the case, he waived what he considered his just right, and asked that a new election take place. The committee reported, that inasmuch as the petitioner had presented no testimony whatever in support of his memorial, the committee ought to be discharged from further consideration of the case, and the House concurred.

[C. & H., 372.]

EIGHTEENTH CONGRESS, 1823-1825.

Committee on Elections.

Mr. SLOANE,	Mr. STANDIFER,
BALL,	MALLARY,
TUCKER, South Carolina,	THOMPSON, Kentucky,
Mr. HALL, North Carolina.	

Cases.

- (1) *Parmenio Adams vs. Isaac Wilson, New York.*
- (2) *John Biddle vs. Gabriel Richard, Michigan Territory.*
- (3) *Sundry electors vs. John Bailey, Massachusetts.*
- (4) *John Forsyth, Georgia.*

(1) ADAMS vs. WILSON.

Mistakes in returns, double ballots, erased ballot. Seat given to petitioner.

According to the returns, Isaac Wilson had received 2,093 votes and Parmenio Adams 2,077. The petitioner rested his claim entirely on the claim that in the town of China, by mistake of the returning officers, both candidates had been returned as receiving 67 votes, when the vote in fact was 67 for the petitioner and 45 for the sitting member. The sitting member claimed that the evidence did not fully establish this mistake, but seems practically to have conceded it, and set up counter claims, viz: That a similar mistake of 5 votes in favor of petitioner had occurred in the town of Attica; that a ballot containing the printed name of sitting member struck through with one stroke of the pen but perfectly legible, had been considered a blank by the officers of election, and that 6 votes for him rejected on the ground of being folded together should not have been rejected. The committee found the charges of mistakes in the returns on both sides proved, which would leave a majority of 1 vote for petitioner. The judges of election who had the folded ballots and the erased one before them were much better judges of their condition than any other body could be from a mere description, and the committee were not inclined to overturn their decision. This leaving a majority of 1 for petitioner, the committee recommended that he be given the seat, in which conclusion the House after full discussion concurred, by a vote of 116 to 85.

The testimony, with statements of both parties, is printed with the report. The mistakes in returns are proved by the recollections of the officers, in one case aided by a written memorandum taken down at the time; but circumstances are shown which make it clear that such mistakes might easily have occurred. The fact is brought out that in the two towns where folded ballots were rejected, if each of the folded ballots had been counted as one vote, the number of votes would have corresponded to the number of names on the poll lists. On the other hand, an attempt is made to prove that they might have slipped together in the box, and that discrepancies between the ballots and the number of names on the poll list were not uncommon.

The ballot rejected as a blank contained no other name or writing, and it was the opinion of the board that the person who cast it "did not intend to have it count." If it were counted the number of votes and of names on the poll list would correspond. One of the clerks of the election, a brother-in-law of the sitting member, had contended that it should be counted. The testimony develops no other details of importance.

[C. & H., 373-406.]

(2) BIDDLE *vs.* RICHARD.

Legality of naturalization. Length of citizenship required in Michigan. Sitting member retained the seat.

The sitting member, who was born in France, but had lived in the United States since 1792, was naturalized by the court of Wayne County, in the Territory of Michigan, less than a year before his election to Congress. His election was contested on the grounds (1) that the court before which he was naturalized had no authority to confer naturalization, and he was consequently still an alien, and (2) that even if the naturalization were legal he could not hold office under it in Michigan until he had been one year a citizen.

The act of Congress of April 14, 1802, had provided that aliens might be admitted to citizenship by the "supreme, superior, district, or circuit court of some one of the States, or of the Territorial jurisdictions of the United States, or a circuit or district court of the United States." A later section of the same act declared—

That every court of record, in any individual State, having common-law jurisdiction, and a seal, and clerk or prothonotary, shall be considered as a district court within the meaning of this act.

The petitioner contended that the court of Wayne County was not a district court, and being in a Territory and not "in any individual State," could not be considered a district court under the last-quoted section. The committee held this section to be merely declaratory of what should be considered a district court, and the court in question coming within the description, except in being in a Territory instead of a State, was authorized to grant naturalization.

As to the second question, the law provided that every free white male citizen of said Territory, above the age of 21 years, who shall have resided therein one year next preceding the election, "should be entitled to vote for Delegate to Congress." A subsequent law provided that anyone qualified to vote for Delegate to Congress should be eligible to any office in the Territory. Without deciding the question whether the office of Delegate to Congress was an office in the Territory, the committee concluded that the law only required a *residence* of one year with citizenship at the time of the election.

The petitioner was subsequently given leave by the House to withdraw his papers, thereby confirming the sitting member in his seat.

[C. & H., 407-410.]

(3) BAILEY.

Meaning of the word "inhabitant." Seat vacated.

The sitting member when elected was and for six years had been a clerk in the State Department in Washington. His election was contested by

a petition from seventeen citizens of Massachusetts, on the ground that he was not at the time of his election an inhabitant of the State within the meaning of the Constitution. The petitioners presented no testimony, but testimony was procured by the committee, under authority of a resolution reported from the committee and passed by the House. It appeared that Mr. Bailey had been appointed a clerk in the State Department on October 1, 1817, and had held his position until October 21, 1823, when he resigned it. On September 8, 1823, he had been elected to Congress from the district in Massachusetts from which he was appointed, and to which he claimed it was his intention to return. While in Washington he had lived in a public hotel until about a year previous to his election, when he had married in the city and had since resided with his wife's mother. During the time he was in the city he had exercised none of the political privileges of residents of the District of Columbia, and it seems to have been conceded that his residence here was *animo revertendi*.

The committee presented an elaborate report, holding that there is a marked difference between the words "inhabitant" and "citizen," and that Mr. Bailey could not be considered an inhabitant of Massachusetts. It was argued, from the presence of a strong States rights party in the constitutional convention, and their reluctance to concede anything to the other parties, that the word inhabitant, as used in the Constitution, is to be strictly construed. The danger that Congress would be filled with persons whose habits had made them strongly under Executive influence was doubtless one of the reasons for the insertion of this provision. The word in the earlier drafts of the Constitution was "resident," but "inhabitant" was substituted as a stronger term. The word inhabitant is first defined by the committee as comprehending those who "should be *bona fide* members of the State, subject to all the requisitions of its laws, and entitled to all the privileges and advantages which they confer." It is thus distinguished from the word citizen:

The word inhabitant comprehends a simple fact—locality of existence; that of citizen—a combination of civil privileges, some of which may be enjoyed in any of the States of the Union. The word citizen may properly be construed to mean a member of a political society; and although he might be absent for years, and cease to be an inhabitant of its territory, his rights of citizenship may not be thereby forfeited, but may be resumed whenever he may choose to return.

The case of ministers of the United States representing the Government at foreign courts presents no analogy, for by international law the ministers carry with them the sovereignty of the government to which they belong. Persons in the employ of the United States within its limits are not in an analogous situation, and may acquire inhabitancy in the District of Columbia in the same way as in any of the States.

The resolution appended to the report, after a long debate in the Committee of the Whole, passed that body by a vote of 105 to 55, and being reported to the House, passed by a vote of 125 to 55; so the seat became vacant.

The argument of Mr. Bailey, submitted to the committee, and the speeches in the House and Committee of the Whole, contain an elaborate discussion of both sides of the question. Against the report it was urged that the whole question was one of *intention*, that the temporary presence of Mr. Bailey in Washington, however long continued, did

not operate a loss of his inhabitancy in Massachusetts, so long as he retained his intention to return. A liberal construction of the meaning of the Constitution is called for, not only by the character of our institutions, and especially the peculiar nature of the District of Columbia, but also by the fact that in this case it will operate to carry out instead of to defeat the expressed will of the people.

The case of foreign ministers was claimed to be analogous, in its essentials, to the present case, for the privileges of the minister in the country to which he is accredited are the result of international law, which apply only so long as he is out of his own country. If inhabitancy, in the words of the committee, merely "comprehends the simple fact, locality of existence" it is impossible that the principles of international law should give locality of existence in one of the States of the Union to a person actually outside of it. If locality of existence constituted inhabitancy, a person happening to be in a State on the day of election might be returned from it, in express opposition to the purpose which it is claimed this clause of the Constitution was intended to carry out.

On the other hand, besides an elaboration of the arguments of the report, it was contended that if the District of Columbia were entitled to a delegate in Congress, Mr. Bailey would be eligible to the position, and hence could not be eligible to a similar position from Massachusetts.

[C. & H., 411-496.]

(4) FORSYTH.

Residence as United States minister at a foreign court no disqualification. Sitting member retained the seat.

Mr. Bailey, the sitting member in the preceding case, introduced a resolution requiring the Committee on Elections to report whether any other members of the House were not, at the time of their election, inhabitants of the States from which they were returned, defending his resolution on the ground that if mere being in a place constituted inhabitancy, foreign ministers could be no exception to the rule. The resolution was passed, and the committee reported that Mr. Forsyth had been elected to Congress while acting in the capacity of minister to Spain. He had resigned the latter office before March 4.

The committee are of opinion that there is nothing in Mr. Forsyth's case which disqualifies him from holding a seat in this House. The capacity in which he acted excludes the idea that, by the performance of his duty abroad, he ceased to be an inhabitant of the United States; and, if so, inasmuch as he has no inhabitancy in any other part of the Union than Georgia, he must be considered as in the same situation as before the acceptance of the appointment. The committee respectfully ask leave to be discharged from the further consideration of the subject referred to them.

The report was committed to the same Committee of the Whole to which Mr. Bailey's case was committed, and after the decision of the latter case the committee was discharged from further consideration, thus confirming the right of Mr. Forsyth to his seat.

[C. & H., 497-500.]

NINETEENTH CONGRESS, 1825-1827.

Committee on Elections.

Mr. SLOAN,
HAYDEN,
TUCKER, South Carolina,
Mr. PHELPS.

Mr. HOFFMAN,
POWELL,
BRYAN,

Cases.

- (1) Daniel Hugunin *vs.* Egbert Ten Eyck, *New York*.
(2) John Biddle and Gabriel Richard *vs.* Austin E. Wing, *Michigan Territory*.
(3) Sundry citizens *vs.* John Sergeant, *Pennsylvania*.

(1) HUGUNIN *vs.* TEN EYCK.

The word "junior" omitted. Seat given to petitioner.

According to the returns, Daniel Hugunin, jr., had received 5,188 votes; Egbert Ten Eyck, 5,484, and Daniel Hugunin, 470. Of the votes returned for Daniel Hugunin, 412 were proved to have been cast for Daniel Hugunin, jr., and this giving him a majority of 116 votes, the committee recommended that he be given the seat. The resolutions passed without opposition.

[C. H. 501-503.]

(2) BIDDLE AND RICHARD *vs.* WING.

Intimidation, irregularities, and illegal voting. Sitting delegate retained the seat.

Of the votes cast at the election, John Biddle had 732, Austin E. Wing 732, and Gabriel Richard 710, but certain votes had been rejected by the inspectors, so that the vote as returned to the Territorial board of canvassers was: Biddle, 731; Wing, 724, and Richard, 710. Before the Territorial board of canvassers Mr. Wing objected to the counting of certain votes given at the Sault de Ste. Marie, on the ground of illegality, and presented affidavits to sustain his charge. After several days' argument the board decided to receive testimony, and, at the request of Mr. Biddle, adjourned to give him time to procure rebutting testimony. When the board reconvened it examined the *ex parte* testimony thus collected by both, and decided the votes illegal. They were chiefly for Mr. Biddle, and being rejected, gave the majority to Mr. Wing, to whom the certificate was given. The committee were unanimous in their opinion that in this proceeding the board had exceeded their powers, and that they ought to have adjudged the certificate to Mr. Biddle. But the committee held that this was no reason for giving him the seat in advance of a full determination of the case on its merits. An error had been committed to the prejudice of Mr. Biddle in the unauthorized assumption of jurisdiction by the board of canvassers, but the committee would not presume that equally impor-

tant errors to the prejudice of other candidates had not been committed by the same or other officers, and as the House has jurisdiction over the whole matter, with power to correct the mistakes of all officers, the right to the seat can not be settled until the whole case has been examined.

As the case came before the committee both Mr. Biddle and Mr. Richard claimed the seat held by Mr. Wing. The claim of Mr. Richard was based not on any allegation that he had actually received the greatest number of votes, but on the claim that he would have received the greatest number had not his friends, at the election held in Detroit, been intimidated from voting by the interference of deputy sheriffs and constables. The committee were unanimous in reporting adversely to the claim of Mr. Richard.

The committee are of opinion that the duty assigned to them does not impose on them an examination of the causes which may have prevented any candidate from getting a sufficient number of votes to entitle him to the seat. They consider that it is only required of them to ascertain who had the greatest number of legal votes actually given at the election. An election is the act of selecting, on the part of the electors, a person for an office of trust. The inspectors of election are constituted judges of the qualifications of the electors, and exercise, from necessity, a discretionary power; if they err and reject a legal vote,¹ or an elector, from any cause, should fail in presenting his vote for their reception, the nature of the case precludes it from entering into the consideration of the general result of the election; unless, indeed, corruption should appear, sufficient to destroy all confidence in the purity and fairness of the whole proceedings. It is properly a proceeding between those officers and the injured party. * * * In case of the application of the contrary doctrine, the greatest uncertainty must necessarily prevail, and should it be established, it would be placing in the hands of a few riotous individuals the power of defeating any election whatever. The law appoints a particular time and place for the expression of the public voice; when that time is past, it is too late to inquire who did not vote, or the reasons why.

But in justice to the citizens of Detroit the committee presented a brief statement of facts, showing that the election was held under circumstances which made disturbances almost inevitable, and that although the friends of Mr. Richard alone entered complaint, it was by no means certain that the attention of the sheriff and constables in preserving order was directed entirely to them; indeed, the fact that they were nearly as numerous as the other two parties combined made it improbable that any serious intimidation could have been practiced on them.

The committee being unanimous in the opinion that Mr. Richard was not elected, the question remained between Messrs. Biddle and Wing, on which latter question they were not unanimous, though what the conclusions of the minority were does not appear.

The testimony was, in part at least, that on which the Territorial board of canvassers had acted. It was all taken *ex parte*, but the committee were of opinion that inasmuch as Mr. Biddle had procured *ex parte* testimony to rebut that produced by Mr. Wing, he could not be heard to object to the introduction of such testimony.

First counting for the respective candidates the votes improperly rejected by the inspectors, it appeared that the vote as it should have been returned and canvassed was: Biddle, 732; Wing, 728; Richard, 722. To overcome the plurality thus shown for Mr. Biddle, Mr. Wing alleged that of the 61 votes cast at the Sault de Ste. Marie 51 were

¹ But the committee in this case seem to have overruled themselves, so far as the rejection of legal votes is concerned, by receiving testimony as to votes rejected by the inspectors, and counting such as the testimony showed ought to have been received.

illegal, never having paid the county or Territorial tax required by law as a qualification for voting. Twelve of these illegal votes were also claimed to be illegal because the voters were soldiers discharged from the United States Army less than a year before the election, 3 because the voters were aliens, and 3 because of nonresidence. Ten also were said to be cast by half-breed Indians.

The committee found all the charges to be sustained except that in regard to the Indians. The 51 voters whose qualification was attacked on the ground of nonpayment of taxes did not appear on any tax list and had never paid a tax in money, but had turned out a few days before the election and voluntarily worked a road never established by law. This the committee held was not a payment of taxes. The soldiers had been long quartered in the Territory, but had been discharged less than a year before the election, and their residence could not have begun until their discharge.

Ten half-breed Indians were proved to have voted. As to them the committee said:

With respect to the first class the committee are sensible that it presents a question very delicate and important. In deciding on it they would be governed by two facts—the mode of life and the society to which the party, by his own voluntary act, attaches himself. If, by his manner of living and place of abode, he was assimilated to and associated with the great body of the civilized community; had never belonged to any tribe of Indians, as a member of their community, and being possessed of the other necessary qualifications, no good reason is perceived against such a person being considered as a qualified elector.¹ But, on the other hand, if he belongs to any of the tribes of Indians, or, being an outcast, uncivilized in his deportment, and not approaching the manners of other citizens, it would be a prostitution of the character of an American citizen to attempt to clothe such a person with it.

The testimony in regard to these Indians being conflicting, the committee did not decide the question of their qualifications.

Taking the view of the question most favorable to Mr. Biddle, and deducting from his vote only the votes of discharged soldiers, aliens, and nonresidents, there was still a majority of 11 for Mr. Wing, and the committee recommended that he be confirmed in his seat. The case was discussed one day, but no vote was taken in the House, so the sitting member retained his seat.

[C. & H., 504-515.]

(3) SERGEANT.

Power of candidates to waive rights under a tie election. Sitting member retained the seat.

At the regular election the result was a tie. The governor, not considering that he could call a new election without a relinquishment by both candidates of their claims under the first election, waited until the receipt of letters from both candidates relinquishing their claims. He then proclaimed a second election, at which Mr. Sergeant was elected. A petition was presented alleging that from certain votes found in the coroner's and other boxes for Henry Horn it appeared that the intention of a plurality of the electors was to choose Henry Horn at the first election. No testimony accompanied the memorial, and in answer to requests from the committee the only testimony pre-

¹This under a law providing that "every free *white* male citizen" possessing certain qualifications should be entitled to vote.

sented was taken *ex parte* and apparently without notice. These depositions the committee considered "entirely insufficient to invalidate the rights of the sitting member;" and they moreover did not consider it necessary to investigate the rights of the parties under the first election, "because, whatever these rights were, they have been voluntarily relinquished." They presented a resolution declaring Mr. Sergeant entitled to his seat, which was passed without debate or division.

[C. & H., 516, 577.]

TWENTIETH CONGRESS, 1827-1829.

Committee on Elections.

Mr. SLOAN E,	Mr. CLAIBORNE,
ANDERSON,	PHELPS,
ALSTON,	STOWER,
Mr. TUCKER,	South Carolina.

There were no cases in the Twentieth Congress.

TWENTY-FIRST CONGRESS, 1829-1831.

Committee on Elections.

Mr. ALSTON, South Carolina,	Mr. JOHNSON, Tennessee,
TUCKER,	BEEKMAN,
CLAIBORNE,	COLMAN.

Cases.

- (1) Silas Wright, junior, *vs.* George Fisher, *New York.*
- (2) George Loyall *vs.* Thomas Newton, *Virginia.*
- (3) Thomas D. Arnold *vs.* Pryor Lea, *Tennessee.*
- (4) Reuel Washburn *vs.* James W. Ripley, *Maine.*

(1) WRIGHT *vs.* FISHER.

Mistakes in returns, and omission of the word "junior." Seat given to petitioner.

Report by Mr. Alston.

According to the returns George Fisher received 8,939 votes, and Silas Wright, junior, 8,932, but a number of votes cast for Silas Wright, junior, were returned, by mistake of the inspectors, as cast for Silas Wright, and in two returns the votes cast for Wright were omitted by mistake. The committee corrected these mistakes, and recommended that the seat be given to petitioner. The resolution was passed, but Mr. Wright did not appear to take the seat, and some time later resigned it.

[C. & H., 518, 519.]

(2) LOYALL *vs.* NEWTON.

Power of mayors of cities in Virginia to adjourn the poll. Illegal votes. Seat given to petitioner.

Report by Mr. Alston.

According to the returns the vote was: Loyall, 935; Newton, 948; majority for Newton, 13. Loyall contested on the ground of illegal votes, alleging that 184 votes had been cast for the sitting member by persons not qualified under the laws of Virginia. Newton replied by charging that 384 votes of unqualified persons had been cast for

petitioner, and that all the votes, being 93 for Loyall and 59 for Newton, cast in the city of Norfolk on the second and third days of the election were illegal. The election had been adjourned by the mayor, and it was contended that by the laws of Virginia the mayors of cities did not have the power possessed by sheriffs of counties to adjourn the poll, and in any case, the contingencies under which a sheriff might adjourn the poll did not exist.

The committee were of the opinion that the adjournment in Norfolk was legal, and that of the 184 votes charged as illegal by petitioner the charges were sustained as to 93, and of the 384 votes charged as illegal by the sitting member the charges were sustained as to 50. This would leave a majority for petitioner of 30 votes.

To reach this result the rules adopted in *Porterfield vs. McCoy* were applied. The oath of the voter, or his friends, was permitted to establish the fact of his naturalization, or possession of a freehold. The committee were of the opinion that this was not in accordance with the rule of law that the best evidence the case admits of should be required, but if this rule should be applied, and only documentary evidence of naturalization or title received, the case of sitting member would be still worse. Under this strict rule 113 of the exceptions of petitioner and only 42 of those of sitting member would be sustained, leaving petitioner a majority of 58.

All the testimony taken by petitioner was excepted to on the ground that it was not legally taken. There was no law of Congress in force providing a method of taking testimony, and the petitioner had proceeded after the method prescribed for contests for seats in the general assembly of Virginia as being the most nearly analogous case. He had had a commission appointed by the courts, consisting of three justices of the peace or notaries public. He gave notice to the sitting member to attend, specifying the names of the voters attacked and the objection to each. The sitting member refused to attend on the ground that the commission had no authority of law. The sitting member likewise gave the petitioner due notice, specifying the names of voters attacked and the charges, and took his testimony before two justices of the peace. The petitioner, being absent as a member of the constitutional convention, did not attend. The petitioner presented certified copies of the land lists, the sitting member the parol testimony of persons who had examined the lists. The committee received the testimony of both parties, as the officers taking it in each case were authorized to administer oaths, and it was taken on due notice.

After being much debated, a motion to recommit the report to the Committee on Elections was defeated by a call for the previous question, and the resolution presented by the committee, declaring Mr. Loyall entitled to the seat, was passed by a vote of 97 to 84. Mr. Loyall took the seat the next day.

In the letters of the sitting member presented to the committee, and in the debate, all the questions involved were elaborately argued. There was no law of Virginia expressly empowering the mayors of cities to adjourn an election. In the counties the sheriffs presided, and were given the power, in certain contingencies, to adjourn the poll, through not more than four days. In cities the election was to be presided over by the mayor. In several statutes in regard to the conduct of elections the sheriffs and mayors were both mentioned, and similar provisions made in regard to both. From this it was argued

that it had been intended to give the mayors all the powers possessed by the sheriffs, including that of adjourning the poll, and the committee seems to have so decided. But it was objected that so important a power as this could not be granted except by express delegation; that the circumstances which rendered it necessary in the counties did not exist in cities, and that it was a power which no mayor before had assumed to exercise. As to whether the contingency of there being more voters present than could be polled had occurred, the evidence was conflicting. The opening of the election had been considerably delayed (until 2 p. m.) by speeches by the candidates; persons appeared as the polls were closing, asking to vote, and a considerable number of votes was cast on the two succeeding days.

Upon the question of illegal votes a heated discussion took place in which the fairness of the committee was attacked, because they had merely announced the number of votes decided as illegal on each side, and had not presented any list of their names or brief of the testimony. The testimony was so voluminous and confused (it covered 800 pages) that no member could be expected to make anything out of it without some aid from the committee, and the fact that the committee had sustained about one-half of the exceptions of Mr. Loyall and only about one-sixth of those of Mr. Newton was sufficient ground for asking at least that they give their reasons in each individual case. The committee were not unanimous in their report, though what the position and arguments of the minority were can only be inferred from the debate.

[C. & H. 520-600.]

(3) *ARNOLD vs. LEA.*

Fraud and irregularities. Sitting member retained the seat.

Report by Mr. Alston.

In his memorial to the House the specifications of petitioner were:

That perjury and subornation of perjury were resorted to; that bribery, direct and indirect, were resorted to, and, in short, to insure the defeat of your memorialist, the laws of Tennessee, which prescribe in a special manner the mode of holding elections, were completely prostituted and trampled under foot by the official authorities who conducted the election, and their own partial, prejudiced, and malignant passions substituted in place of the laws of the land.

The petitioner announced his belief that if the election had been legally conducted he would have been elected, but asked only that the seat be declared vacant. The specifications in the notice of petitioner to sitting member were:

1. Because the laws of this State, which prescribe the mode of holding elections, have been most flagrantly violated on the days of election by the official authorities who conducted the election. 2. A vast number of illegal and spurious votes have been given for you in the election without as well as with the connivance of the official authorities employed in holding the election. 3. Perjury and subornation of perjury have been employed to give you your boasted majority of 217. 4. Bribery, it is believed, has been employed to insure your success. (See p 3, documents printed with report 32, Twenty-first Congress.)

In spite of these manifestly insufficient allegations the committee "chose to go into an examination of the documents submitted to them."

The specific charges as brought out by the evidence were:

(1) That at Tazewell, Claiborne County, all the officers of election were partisans of the sitting member; that after the polls were closed

on the evening of the first day the inspectors sealed up the box, and instead of taking charge of it, as the law required, turned it over to the sheriff, who locked it up in a trunk in a store, where it had been customary to keep it. On learning of this the friends of petitioner complained, but, the inspectors having dispersed, the sheriff declined to interfere further with the box. The next morning the trunk was unlocked by the sheriff in the presence of one of the inspectors and an elector, and the box showed no appearance of injury. To avoid suspicion the votes taken the second day were deposited in a separate box. When the ballots were counted they corresponded in number to the names on the poll list, and the petitioner was found to have received a majority of 142 votes in the first day's box, and of 14 votes in the other.

(2) In the precinct of Berry's, Claiborne County, a large gourd was used as a box; on the evening of the first day it was stopped and tied with a handkerchief and taken charge of by one of the inspectors, who locked it in his house over night. There was no evidence of fraud, and the officers of election were proved to be men of good character.

(3) In Knoxville, a witness swore that he heard Isaac Jonas say that he had been hired to vote for sitting member. Another witness swore that two years before the election he had heard the grandmother of Eli Hill say that he was sixteen years old. Hill swore to the officers of election that he was of age.

(4) At McGinniss's, the officers of election were not sworn. A majority of them were in favor of petitioner, and he received a large majority of the votes.

(5) At Tazewell the inspectors had deducted a few votes as illegal, but more from Lea than from Arnold.

(6) At McFarlands the officers of election were distantly related to the sitting member. The box was kept over night in the sheriff's house. One of the inspectors remained in the house with it, and the key was taken home by another inspector.

(7) At Unita one of the inspectors was a justice of the peace, and he swore the other officers and himself. The box was locked up in a store over night.

The irregularities detailed in the first, second, fifth, sixth, and seventh counts above the committee found to be insufficient to overthrow the returns, the election having been honestly conducted by qualified officers according to the spirit, if not the letter, of the law. The evidence in regard to the third charge is inadmissible and insufficient. The fact that the officers of election at McGinniss' (fourth charge) were not sworn would not vitiate the whole election, and the committee did not decide whether the precinct election was vitiated or not, as it would not affect the result.

The committee have not discovered the slightest ground for the imputation of "perjury," or "subornation of perjury," "bribery, either direct or indirect," or "corruption," or any species of fraud whatever, either to the officers holding the election or the voters, and that a full and fair expression of public opinion has been obtained. The committee are therefore unanimously of the opinion that the seat of Pryor Lea ought not to be vacated.

Against the petitioner it was proved that he had loaned his horse to a minor to go to another precinct and vote, his vote having been refused at his home precinct.

Certain printed papers, appearing to be campaign documents, were excluded by the committee on the grounds that they had no connection with the case, and that there was no evidence of their publication

and no notice to the sitting member of an intention to use them as evidence.

In the course of the hearing before the committee there was such an exhibition of feeling between the parties that they were required to present their arguments in writing. Similar heat was exhibited by both parties in the debate, and it was explained by the petitioner that they "were not upon terms even of common civility."

It was ordered by the House that all the written testimony of both parties should be printed, with such of the printed documents as should be selected by either party, and adjudged by the Committee on the Judiciary "to be in any wise applicable to the case before the House."

The Committee on the Judiciary reported that all the documents were wholly irrelevant, and they were not printed.

After several days discussion in the Committee of the Whole and in the House, the resolutions presented by the Committee on Elections were passed by a vote of 149 to 20, and the sitting member was accordingly confirmed in his seat.

The speeches made in the House by Mr. Arnold and Mr. Lea are very long, but deal almost entirely with personalities, and the documents declared irrelevant by the Committees on Elections and the Judiciary. These documents were campaign circulars charging bribery against Mr. White, United States Senator from Tennessee, and implicating Mr. Lea as his agent. It is unnecessary to outline the argument upon them. As to the issues of the case, Mr. Arnold's contention was that any violation of the laws of Tennessee by the election officers should vitiate an election, and that the irregularities in this case were such as indicated fraud. Mr. Lea contended that the irregularities were of form only, that fraud could not be presumed, and that there was nothing in the evidence to prove it, but rather everything tended the other way. Mr. Ellsworth announced the true principle of decision to be, whether the *electors* had complied with the law, and what was the result of their vote. If the electors had complied with the law, no irregularity on the part of the officers charged with the election and returns should defeat their choice, if by any means that choice could be ascertained.

Mr. Huntington delivered an elaborate legal argument to show that the irregularities proved were sufficient to vitiate the election. [C. & H., 601-678.]

(4) WASHBURN *vs.* RIPLEY.

Where a majority vote is required for a choice, votes for candidates for other offices, evidently placed in the Congressional box by mistake, are nevertheless to be counted in reckoning the whole number of votes of which a majority is necessary. Decision in favor of sitting member.

Report by Mr. Alston.

Under the laws of Maine a majority of all the votes cast was necessary to a choice, and if no candidate received a majority at the first election it was the duty of the governor and council to order a new election. At the first election, held on the second Monday in September, 1828, Reuel Washburn received 2,495 votes, and James W. Ripley, 2,180, but scattering votes were returned sufficient to make the whole vote 4,994. Washburn had thus 2 votes less than were necessary for a choice, and a new election was ordered at which Ripley was elected.

Washburn contested on the ground that most of the persons for whom scattering votes were returned were candidates for other offices, some of them were ineligible to Congress, and the votes for all of them put in the Congressional box were evidently so placed by mistake. He proved that in one precinct a ballot containing the names of two candidates for the State senate was placed in the Congressional box by mistake, and the voter, discovering his mistake, requested to have it changed, but the selectmen refused him permission and counted the ticket as 2 votes. A majority of the committee were in favor of counting it as 1 vote, a minority in favor of not counting it at all. In another precinct it was charged that a ballot containing three names was similarly deposited and counted, but the proof did not satisfy a majority of the committee. It was also proved that a vote intended to be cast for petitioner for Representative in Congress was by mistake put into the box for the election of State senator. As to this ballot and the ballots in the Congressional box alleged to have been placed there by mistake, the committee were *unanimously* of the opinion—

That when the votes are taken by ballot and separate boxes used, after they are deposited in the box it is not competent or proper for the voter or selectmen to alter or change the ballot as delivered into the boxes, and that the intention of the voter is to be ascertained alone from the box in which his ticket is deposited, and that the *selectmen* conducting the elections at the places above specified acted correctly in making out their return to the governor and council of all the ballots they found in the box which was used for the reception of tickets for a member of Congress, and in refusing to count the votes they found in other boxes with the name of Washburn on it and adding them to his list of votes given for him as a member to Congress. The adoption of any other rule would be fraught with danger to the purity of the elective franchise.

This whether the persons whose names were on such ballots would have been eligible to Congress or not.

The sitting member insisted that, inasmuch as the whole matter had been referred to the people by the governor and council, it was incompetent for the House to go behind the last election. A majority of the committee overruled this objection.

It was further insisted that Mr. Washburn had waived any rights he might have had under the first election by accepting the office of one of the counselors of the State of Maine, from which office, by the constitution of Maine, a member of Congress was disqualified. He had accepted this office in January, 1829, and resigned it in February, and as the term of service as a Member of Congress, to which he claimed to have been elected in September, did not commence until March 4, 1829, a majority of the committee were of the opinion that any rights he may have had were not destroyed.

The whole number of votes cast being 4,994, necessary to a choice 2,497; if the double ballot counted as 2 votes he counted as one, the number of votes cast would be 4,993, necessary to a choice still 2,497. But if the fact of a ballot with three names on it having been counted be taken as proved, then 2 more votes will have to be deducted from the total number, and 2,496 votes will be necessary to a choice, one more than Mr. Washburn received. A minority of the committee were of the opinion that all 5 of these votes should be deducted, which would leave 2,495 votes—just the number received by Mr. Washburn—sufficient to a choice.

After being several days discussed in the Committee of the Whole, the resolution appended to the report was passed by the House by a vote of 111 to 79.

Mr. Washburn, in his argument to the committee, rested his case on the ground that the intention of the voters who cast the votes being plain, and the mistake by which they were placed in the wrong box evident, the votes should be counted according to the plain intention of the voters. In answer to the argument that the question had been referred to the people and settled by them, he answered: (1) That the new election had been ordered without his knowledge or consent, and he had yielded none of his rights; (2) according to the usage of former executives, returns not properly certified or otherwise informal should not have been counted in making up the final canvass; if the precinct returns containing fatal informalities had been rejected there would have been a choice, and the second election ought never to have been ordered; (3) in a memorial to the governor and council he had claimed at their hands a certificate of election, and they had virtually admitted that if he could establish the facts claimed in his memorial he would be entitled to the certificate. But while they received evidence to cure irregularities in the returns, they did not consider themselves authorized to go into the investigation of charges such as those made by the petitioner.

Mr. Ripley, in his answer, conceded that the votes for candidates for various other offices found in the Congressional box were probably placed there by mistake, but claimed that such mistakes occurred in every election, and it would be a very dangerous practice to attempt to determine the intention of the elector from anything but the ballot itself and the box in which it was deposited. The propriety of entering into an inquiry in regard to the tickets said to have contained two and three names was doubted; but if it were to be entered into, the proof in regard to the one said to contain three names was entirely insufficient, and the ballot containing two names should at least be counted as one vote, which would not affect the result. He also charged that petitioner was disqualified by accepting the office of one of the counselors of the State of Maine for a term which if he had served it out would have extended into the Congressional term, and which he had resigned on account of sickness in his family and without reference to the Congressional contest.

Mr. Ripley asked for time to procure further testimony, which the committee refused, on the ground that, having already decided the case in his favor, it was unnecessary.

[C. & H., 679-701.]

TWENTY-SECOND CONGRESS, 1831-1833.

Committee on Elections.

Mr. CLAIBORNE, Virginia, RANDOLPH, HOLLAND,	Mr. BETHUNE, COLLIER, ARNOLD,
Mr. GRIFFIN.	

Cases.

- (1) David Crockett *vs.* William Fitzgerald, *Tennessee*,
- (2) Joseph Draper *vs.* Charles C. Johnston, *Virginia*.

(1) CROCKETT *vs.* FITZGERALD.

Case dismissed.

The Speaker laid before the House certain depositions in regard to the election of William Fitzgerald, of Tennessee, taken on behalf of David Crockett. No memorial was presented by Crockett. The papers, whose object seems to have been to prove certain irregularities at the polls and a disregard of the law in regard to the custody of the ballot box, were referred to the Committee on Elections, but no report was ever made, and on February 6, 1832, the committee was, by order of the House, discharged from the further consideration of the subject.

[C. & H., 703.]

(2) DRAPER *vs.* JOHNSTON.

Illegal votes and irregularities. The committee recommended that the seat be declared vacant, but the House confirmed the title of sitting member.

Report by Mr. Collier.

The grounds upon which the election was contested were:

First. That the petitioner received a greater number of votes from voters legally qualified.

Second. That, by the laws of Virginia, an election can only be continued for three days, whereas, in the county of Washington, in said district, the polls were kept open for four days; and that if the votes given on the fourth day were excluded, the petitioner would have a majority over the sitting member.

Third. That the officers conducting the election in that county were not duly qualified according to law.

Fourth. That the polls in Washington County were not adjourned from day to day, by proclamation, as required by law.

Fifth. That the superintendents of the different precinct elections in Washington, Russell, Lee, and Scott counties were not legally appointed and sworn.

Sixth. That the poll books in Russell County were not returned to the clerk's office of that county according to law.

Seventh. That the mode of conducting the election in Washington County was not uniform, for at the court-house and at the Three Springs persons residing out of the county were permitted to vote, although not freeholders in the county, while at the precinct election in another part of the county persons similarly situated were not permitted to vote.

Eighth. That, by the laws of Virginia, when voters fail to appear and give their votes, proclamation having been made three times at the door of the court-house, or other place of holding such election, by the officers, requiring those who had not

been polled to come in and give their votes, it is the duty of the officers to conclude the poll. That on the *fourth day* of election in Washington County, after 12 votes had been polled, more voters failed to appear, and the officer conducting the election, although requested, refused to close his poll, at which time the petitioner had a majority.

According to the returns, 2,749 votes were cast for Mr. Johnston, and 2,671 for Mr. Draper, a majority of 78 for sitting member.

In all the counties except Washington the polls were closed on or before the evening of the third day, but in Washington, on the *fourth day*, 86 votes were cast for Mr. Johnston and 1 for Mr. Draper. The law (passed in 1831) provided that, in certain contingencies, the sheriff might adjourn the poll "until the next day, and so from day to day for three days * * * but if the poll * * * is not closed on the first day the same shall be kept open two days thereafter."

Another section of the same act provided that the election for members of Congress should be held "in the manner and according to the principles prescribed by the law *now* in force in relation thereto." According to the law in force previous to the passage of the act of which this was a section, elections might be kept open for four days, and the sitting member contended that even if (which he denied) the act of 1831 must be construed to prohibit the adjournment of the polls beyond the third day, the elections for member of Congress were excepted and to be held under the old law. The committee held that it was not the intention of the legislature to authorize the polls for Representative in Congress to be kept open longer than those for the election of State officers chosen at the same election, and that under the law of 1831 the first day was to be counted in computing the three days on which the election could be held. They were strengthened in this conclusion by another section of the same act, providing that canvassers in certain special elections were to meet on the *fourth day* and canvass the votes, and by the fact that the Virginia senate, in a recent case, had decided that polls could be kept open only three days.

If this were the only question involved the seat would be given to the petitioner, but both parties had attacked many votes for illegality and some polls for irregularity. Eliminating the illegal votes, petitioner would be entitled to the seat; but excluding, also, the irregular polls, the sitting member has the most votes remaining.

The decision of the question of illegal votes was complicated by a false assumption of the parties. It was assumed by them that if a vote was charged to be illegal the burden was on the party claiming the vote to prove it legal. Written stipulations were entered into as to two counties, admitting all votes charged to be bad until proved to be good, and in the other counties there was no reservation, and the votes were unconditionally admitted to be bad. The committee were of the opinion that all votes received by the election officers should be taken as *prima facie* good, but as the testimony had been taken on the contrary assumption, the votes had to be estimated in a different way. It was found that Mr. Johnston had admitted 307 votes to be illegal and Mr. Draper 313. Upon agreed statements of cases the committee further rejected 23 votes from Mr. Johnston's poll and 27 from Mr. Draper's. The committee were of the opinion that in spite of the stipulations of the parties, if evidence could be produced showing that any of the votes rejected were in fact cast by qualified voters, they should be counted. Time was accordingly given to the parties to take testimony, and the committee found that this testimony established the legality of 54

votes for Mr. Johnston and 82 for Mr. Draper of those previously deducted upon the admission of the parties.

The objections made by the petitioner to various polls were all overruled. The officers of election in certain counties were charged not to have been sworn and appointed according to law. The fact of taking the oath was affirmatively shown in all these counties except one, and in that one, there being no proof either way, it was presumed to have been taken. The committee did not examine into the regularity of the proceedings by which the officers had been appointed, as they had acted *colore officii*, and had been appointed, regularly or irregularly, by a court having the general power to make such appointments. The objection to the regularity of the adjournment on the fourth day, in Washington County, was no longer material, as the votes had already been rejected for another reason. The neglect to return the poll books of Russell County within the legal time was held not to vitiate the election.

The petitioner would thus have a majority of the votes were it not for the irregularities charged by the sitting member. Of these objections, the only ones considered by the committee were (1) that the deputy sheriff conducting one of the elections was not sworn, and (2) that at another poll the deputy sheriff conducting the election, during a portion of the time, when the clerk or "writer" was absent, performed the duties of the writer as well as those of his own office.

The deputy sheriff, who was proved by his own deposition not to have been sworn, swore in the same deposition that he had "conducted the election impartially and legally, according to the best of his knowledge," but the committee held that his failure to be sworn vitiated his proceedings, "a decision which they suppose to be in conformity with the previous decisions of this House." They also held that when the sheriff was required to appoint a clerk or "writer" to take down the names, the requirement was imperative, and all votes taken by the sheriff in the absence of the writer should be rejected. Rejecting these votes would give a majority to the sitting member.

It will be perceived that, from the erroneous principle assumed by the parties in the outset, disfranchising, by stipulation, upward of 600 voters in a closely contested election, many of whom are now proved to have been duly qualified, and a majority of whom *may* have been, and by reason of the technical objections upon which 185 votes have been rejected, exclusive of the votes polled on the fourth day in Washington County, giving the seat to either of the candidates might be doing injustice to the electors of the district, for it is impossible to determine which of the candidates did, in fact, receive a majority of the legal votes.

A majority of the committee therefore recommended that the seat be declared vacant. A minority, while free to confess that under the peculiar circumstances in this case they would be better satisfied with such a result, were nevertheless of the opinion that the sitting member, having receiving a majority of the legal votes, upon the principle adopted, should retain the seat. The House, after much debate, agreed with the minority and confirmed the title of the sitting member by a vote of 85 to 35.

The report contains a full statement of all the legal principles involved in the decisions of the committee, but these being given in full elsewhere (see under proper heads in Part II), it is not necessary to abstract them here.

[C. & H., 702-714.]

TWENTY-THIRD CONGRESS, 1833-1835.

Committee on Elections.

Mr. CLAIBORNE, Virginia.	Mr. JONES, Georgia.
GRIFFIN,	PEYTON,
HAWKINS,	HAMER,
BANKS,	HANNEGAN,
Mr. VANDERPOEL.	

Cases.

- (1) William Allen, *Ohio*.
- (2) Robert P. Letcher *vs.* Thomas P. Moore, *Kentucky*.

(1) ALLEN.

Testimony taken ex parte, and upon unreasonable notice. Case dismissed.

Report by Mr. Claiborne.

This case is, by a curious oversight, omitted from Clarke and Hall's compilation. The only document ever printed in connection with it is the report (House Report 110, first session Twenty-third Congress), and as this report does not state the grounds of the contest, and the case was not debated, it is impossible to tell upon what grounds the election was contested. From the Journal of the Twenty-third Congress it appears that on December 11, 1833:

The Speaker presented a memorial of Abraham Hyler and John Mace, on behalf of themselves and others, residents of the Seventh Congressional district, in the State of Ohio, complaining of illegality in the election and return of William Allen as the member for said district, and declaring that Duncan McArthur received a majority of the legal votes in said district, and praying that said Duncan McArthur may be declared entitled to the seat now held by said William Allen.

The memorial was referred to the Committee on Elections. On December 23 and 30 Mr. Vance presented documents in relation to the case, which were also referred to the Committee on Elections, and on December 30 the committee reported that the election was held on the second Tuesday in October, 1832, and that some time later the governor, agreeably to law, examined the votes in the presence of the senate and declared William Allen elected by a majority of 1 vote. After the election, and before the declaration of the result, notices were served on Mr. Allen notifying him that in the event of his being declared elected his election would be contested, and that depositions would be taken at specified times and places. These times were all previous to the declaration of the result, and the times were so close together, and the places so far apart, that it would have been physically impossible for Mr. Allen to have attended. Indeed, depositions were in some cases being taken in two places remote from each other at the same time. Depositions were taken at the times specified, but Mr. Allen did not attend at the taking of any of them. The committee considered it extraordinary that notice should be served on a candidate that in the event he should be declared elected his seat would be

contested and that depositions should be taken before the declaration of the result, but would nevertheless have examined the testimony were it not for the circumstances of time and place above mentioned. The committee unanimously recommended resolutions declaring the testimony *ex parte* and inadmissible, and that William Allen, being duly returned, was entitled to his seat unless it should afterwards appear, by competent testimony, that he had not received a majority of the qualified votes. The report was laid on the table, and no further action had, so Mr. Allen retained the seat.

[House Report No. 110, first session Twenty-third Congress; Journal Twenty-third Congress, pp. 49, 114, 138, 146.]

(2) LETCHER *vs.* MOORE.

Prima facie case, irregularities, and illegal votes. The parties waived a decision on the prima facie case; the committee unanimously found that Mr. Letcher had a majority on the face of the returns; the majority found that Mr. Moore had the majority after eliminating illegal and irregularly received votes; the minority found that Mr. Letcher had the majority after the elimination. The House disregarded both reports, attempted to decide the case itself from the evidence, and finally ordered a new election, it being impossible to determine which candidate was elected.

Majority report by Mr. Jones, of Georgia; minority report by Mr. Banks.

Under the laws of Kentucky it was the duty of the sheriffs of the several counties of a district to meet at a specified time and place, with the poll books of the several elections, "and there, by faithful comparison and addition, ascertain the person elected in their districts." It was further provided that:

After having ascertained, as before directed, the person elected in such district, the sheriffs thereof shall make out a certificate of the election of the person in their district, which shall be signed by all the sheriffs of the district, and which shall be lodged with the sheriff of the county wherein the polls are compared, and by him, together with a copy of the polls, transmitted to the secretary of state.

On the appointed day the sheriffs of all the counties met. Mr. Letcher had a majority of 44 or 49 votes on the face of the poll books. So far as can be gathered from the evidence and the statements of the parties (it is not described in the reports), their proceedings were about as follows: In one of the precincts of Garrard County there had been irregularities (to be hereafter described), which, in the opinion of many, ought to cause the rejection of part or all of the poll. If this rejection were made, Mr. Moore, instead of Mr. Letcher, would have the majority. When the sheriffs met, the question seems to have been discussed for two or three days, and a majority coming to the conclusion that they had no right to inquire into the irregularities complained of, the sheriff of Lincoln County left the meeting, carrying away with him the poll books of his county. Mr. Moore had a majority of the votes in the remaining counties, and a certificate of his election was made out. It began by describing the "undersigned sheriffs," naming all the counties, as if it were to be signed by all five, but one of the four remaining sheriffs refused to sign it, and another refused to sign it until the words "the vote of Lincoln County not taken into calculation" were written in just above the signatures. This certificate was

deposited with the secretary of state and forwarded by the governor to the Clerk of the House.

On the first day of the session, when the Clerk was in process of calling the roll, when the State of Kentucky was reached considerable discussion arose as to the right of Mr. Moore to take his seat upon the certificate in the Clerk's hands. Mr. Letcher and Mr. Moore finally agreed to withdraw until the completion of the roll and the election of a Speaker. Two days afterwards the discussion was renewed, the right of Mr. Moore to be sworn in being opposed on the two grounds, (1) that the certificate was signed by only three sheriffs, whereas the law expressly required it to be signed by all, and (2) that it showed upon its face that the votes of only four counties were included in it, and therefore, even if it should be considered competent for the three sheriffs to sign for five, the certificate only purported to show that Mr. Moore had a majority of the votes in a portion of the district, and there was no *prima facie* evidence to show who had the majority in the whole district. On the other hand, it was contended that whenever any power was confided to a board of officers a majority constituted a quorum and its acts were binding. On a *prima facie* question the House had no right to go behind the face of the returns, and while the certificate did show on its face that the vote of Lincoln County was not included, it did not show that any votes were cast in Lincoln County which could have been included or that the sheriff had been present with the poll books. After two days had been spent in debate and many motions had been made and withdrawn or defeated, the House finally agreed to resolutions instructing the Committee on Elections, when appointed, to inquire and report which party was the member elected and to receive as evidence all testimony which had been or should be taken by either party on due notice to the other. The resolutions also provided that pending the investigation neither of the parties should be qualified as a member. The committee instructed the parties to procure their testimony prior to the 1st of January, and about the middle of January, the testimony having been received, the parties were given leave to take the papers from the committee room and prepare abstracts and briefs. About the middle of March the abstracts and arguments of the parties were presented, and on May 6 and 9 the majority and minority reports were respectively presented. As stated above, the majority report was in favor of Mr. Moore and the minority report in favor of Mr. Letcher, though both reports agreed that upon the face of the poll books, which the sheriffs ought to have counted, Mr. Letcher would have been entitled to the certificate. The House disregarded both reports and attempted to go into a detailed examination of the evidence. The case was debated most of the time from May 13 to June 12, when the seat was declared vacant, the House being unable to decide between the parties.

The majority report, after condemning the action of the sheriff of Lincoln County in withholding the poll book of his county and describing the times and manner in which the testimony had been taken, proceeds to state eight principles which the committee had agreed upon to guide them in the determination of illegal votes. (These are given in full elsewhere.) Upon these principles 81 votes must be rejected from the poll of Mr. Letcher and 26 from that of Mr. Moore, leaving a majority for Mr. Moore of 6 or 11 votes, according to whether the original vote be counted, as shown by the certificates of the sheriffs or by certified copies of the poll books. In addition to

the above, the committee deducted 54 votes cast for Mr. Letcher, and 16 for Mr. Moore at Lancaster, in Garrard County, on account of the following-described irregularities:

According to the law of Kentucky—

The justices of the county court shall at their court next preceding the first Monday in August in every year appoint two of their own body as judges of the election then next ensuing, and also a proper person to act as clerk.

And in case the county court shall fail to make such appointments, or the persons appointed, or any of them, fail to attend, the sheriff shall immediately preceding every election, appoint proper persons to act in their stead.

The sheriff or other presiding officer shall on the day of every election open the polls by 10 o'clock in the morning.

The judges of the election and clerk, before they proceed to the execution of their duty, shall take the oath prescribed by the Constitution. They shall attend to the receiving until the election is completed and a fair statement make of the whole amount thereof.

The persons entitled to suffrage shall, in the presence of said judges and sheriff, vote personally and publicly *viva voce*.

One of the judges selected by the county court declined to serve, and the sheriff appointed a substitute. About 9 o'clock on the morning of the first day of the election, the other appointed judge not having appeared, the sheriff appointed a substitute for him also and opened the polls. About 10 o'clock, after twenty or thirty votes had been taken, the regularly appointed judge appeared and served through the rest of the election, the first judge giving way to him. The return and poll books were signed by the judge appointed by the court.

On the second day of the election, shortly after 10 o'clock, the sheriff was called away by the sudden and severe illness of his wife, and the deputy sheriff being absent the duty of crying the votes, which the sheriff had been performing, was performed by two other persons, one of whom had formerly been deputy sheriff. About 1 o'clock the deputy sheriff arrived and presided at the rest of the election.

The committee rejected all the votes taken previous to the arrival of the judge appointed by the court on the first day and during the absence of the sheriff or his deputy on the second day.¹ While the law only provided that the polls should be opened "by 10 o'clock," and it had been customary for the sheriffs to open them before that time, and on that account the committee would not be inclined to reject votes taken before 10 o'clock by the judges appointed by the court, yet as the power of the sheriff to appoint was conditioned on the failure of the regularly appointed judges to appear, and they could not be said to have failed to appear until 10 o'clock, any appointment by the sheriff before that time was manifestly illegal. But the committee might even yet have counted the votes were it not that in this case the other judge did appear at 10 o'clock and acted during the remainder of the election. Both judges could not have been legally appointed.

Under the law providing that the voters should, "in presence of said judges and the sheriff, vote personally and publicly *viva voce*," the presence of the sheriff is indispensable, and all votes taken in his absence must be rejected.

It is unnecessary to inquire whether the persons thus voting were qualified and entitled to vote if the officers or persons presiding were not qualified to hold the

¹ Although, as appeared from the minority report, there was proof that most of them had been cast by legally qualified electors.

election and receive the votes. The State has the right to *prescribe the manner* of holding the election, and those votes were not taken in the *manner* prescribed by the laws of Kentucky, and were therefore illegally received.

The cases of *Jackson vs. Wayne*, *Latimer vs. Patton*, *John Richards, Lyon vs. Smith*, *McFarland vs. Purviance*, *Spaulding vs. Mead*, *McFarland vs. Culpepper*, *Bassett vs. Bayley*, and *Easton vs. Scott* were cited as confirming similar views.

Deducting these votes, in addition to those already deducted, would give a majority to Mr. Moore of 44 or 49 votes, just the amount shown for Mr. Letcher on the face of the returns.

The minority report, by Mr. Banks, is signed by him and Mr. Griffin, and was also understood to represent in general the views of the chairman, Mr. Claiborne, who was prevented from drawing it up by serious illness. It contains an elaborate argument (a portion of which will be quoted) against the doctrine that irregularities on the part of ministerial officers, not affecting the substance of the election, can cause the rejection of the votes of qualified electors. Mr. Letcher is shown to have a majority on the poll books, and—

This majority appearing on the poll books is decisive in favor of Mr. Letcher's right permanently to occupy the seat as the chosen representative of the district, unless, from the facts proved in the case, the House should decide that there has been no election, or should determine to make such deductions from the poll as will leave the majority of legal voters in favor of Mr. Moore.

It is difficult to perceive the exact ground on which the votes given at Lancaster before 10 o'clock on the first morning of the election are rejected by the majority.

The majority say they would not reject them on the ground that they were given too early if the judge appointed by the court had attended when the polls were opened, and intimate that they would not have rejected them if the judge appointed by the sheriff had served throughout the election. On this basis it is difficult to see why the votes given after 10 o'clock ought not just as reasonably to be rejected as those given before 10 o'clock. Under the law the sheriff had discretion to open the polls before 10 o'clock, which in this case was exercised in good faith. On account of the prevalence of the cholera it was thought advisable not to collect large crowds, and the sheriff very properly opened the polls early so as to give the voters as much time as possible. To say that the sheriff had discretionary power to open the polls before 10 o'clock, but could not exercise his power of appointment unless he waited to open them until 10 o'clock, was to limit his power in a way not intended by the laws. And even if the sheriff had opened the polls at an unreasonably early hour or from less laudable motives, this could not make illegal the votes of duly qualified electors unless the circumstances were such as to vitiate the whole election.

The motives of the officers of the election can have no effect upon the rights of the electors; and it is difficult to conceive how their rights could be affected even by the conduct of the officers, unless that conduct had defeated, or was at least calculated to defeat, the great object of the law—a full, fair, and free election.

If the subject of controversy were a dispute as to some of the emoluments of the judges, the dispute as to which judge had the technically legal appointment might be important.

But neither the right of election nor the right of the person elected is derived from the sheriff. The election itself is not his act, but the act of the people, who have a preexisting right to make the election. And the agency of the sheriff, judges, and clerk is created for the sole purpose of enabling them to exercise that right in a regu-

law and orderly manner, and to make out and preserve the proper evidences of their act. The subject of inquiry is an election by the people; the fact to be ascertained is who has been chosen by the majority of the qualified electors.

All but one or two of the votes received before 10 o'clock are found to have been cast by legally qualified electors. Now, if the judge had been the merest usurper instead of, as in this case, acting at least under color of authority, the effect of his action could have been no more than to destroy the *prima facie* character of the record made under his supervision. Even then actual proof of the legality of the votes would be all that could be required to sustain them. But the majority of the committee have decided the votes void and incapable of being made valid by proof.

But whether the proceedings of the sheriff were strictly regular or not, we had not anticipated that the legal votes given before 10 o'clock on the first day, or those given in the absence of the sheriff on the second day, would be rejected by the committee, because the alleged irregularities, if, indeed, they were irregularities, did not affect the substance of the election nor the rights of the electors, while the rejection of these votes would affect the substance of the election, and vitally affect the elective franchise, because the disfranchisement of these legal voters would change the majority in the present case. It would thereby defeat the whole object of the constitution and laws of Kentucky, and of the right of suffrage itself, by giving the choice of the Representative to the minority of the qualified electors who actually voted; and because if it did not change the majority, and therefore would not affect the result in the present case, it would establish a precedent by which that effect might be produced in future, and one by which the officers of election, the mere instruments of the law for giving facilities and effect to the right, might at any time, by an accidental or, what is worse, by an intentional variation from the law in some formal particular, unobserved or deemed unimportant by others, virtually disfranchise a portion of the electors, and at their pleasure give the choice to the minority, by which means the election would, in effect, be taken out of the hands of the people and placed wholly in the power of the ministerial officers.

The votes given on the second day, during the temporary absence of the sheriff, ought equally to be considered legal. All but one or two of these are also proved to have been cast by qualified electors. The presence of the sheriff is not in any case essential. He is not required to be especially sworn. He is not expressly required to attend throughout the election, as the judges are. The only duty expressly enjoined on him is that of opening and closing the polls and appointing judges in case of vacancy. The voters are required to give their votes in the presence of the judges and the sheriff, which shows that the presence of the sheriff is presumed, but does not imply that it is essential. It is provided that unless the sheriff or one of the judges knows the voter to be qualified he shall take a certain oath. The presence of the sheriff as an accredited witness is thus convenient, but not imperative. In his capacity as sheriff there is no imperative reason why the sheriff may not be temporarily absent, and if he is to be construed as constituting, with the two judges, a board of election officers, a majority of the board can act in the absence of one member.

A further answer to the objection is that we are not merely to inquire what are the strictly legal duties of the several officers of the election, and whether they have performed them with exactness, but that a far more important part of the inquiry is to determine what effect a departure from the formal line of their duty by the officers is to have upon the rights of electors whose votes have been given at the times and places and substantially in the manner prescribed by the constitution and laws. The true question is not whether every officer appointed to give security and convenience to the exercise of the right of suffrage has done everything that by law he ought to do, but whether everything has been done that was in fact necessary to secure the full and free exercise of the right; whether the right has been, in fact, so exercised. If it has been so exercised, and the

suffrages of a majority of qualified electors have been given in favor of any individual, an election has been made, and that individual is the person elected. His right is identified with the election itself and the right of the electors; all must be sustained or sacrificed together. If, then, in an ordinary transaction it is a maxim of reason and of law that a thing fairly done and lawful in itself is entitled to a favorable construction, that it may rather prevail than perish, how strong is our obligation, when an election has been fairly made by the full and free exercise of the elective franchise, to sustain it even by the most favorable constructions, rather than to destroy it, and with it the most important of human rights, and by nice and technical objections? When such an election has in fact been made, no decision which sustains the election, and the individual rights of the electors, and the choice of the majority can furnish so dangerous a precedent as that will afford which defeats all or any of their rights on account of a mere technical breach of duty on the part of the officers or of any minute variation from the formal requisitions of the law.

As this is the first case in which the effect of technical violation of the law on the validity of the election was elaborately discussed, and as the decision of the minority on this point was adopted by the House (though neither report was adopted as a whole) and has been followed in the majority of subsequent decisions, it has been thought proper to quote thus fully.

The minority report then goes into an elaborate review of all the illegal votes charged, and comes to the conclusion that after the proper deductions have been made on both sides, Mr. Letcher's true majority is 105.

All the testimony was ordered printed, and the House proceeded to an examination of the details of the case. The votes taken in Lancaster, Garrard County, before 10 o'clock on the first day, and in the absence of the sheriff on the second, were declared legal, on motion of Mr. Banks. The votes of theological students in Centre College, which had been rejected by the majority of the committee, were also counted. The committee had held that where persons who appeared on the polls as voting for Moore made oath that they voted for Letcher, "votes recorded upon the poll books as given to one candidate can not be changed and transferred to the other by oral testimony." This decision was overruled by the House, and the votes counted for Letcher. The committee had refused to reject votes upon the testimony of one witness that a voter was unknown in the county, but had rejected a number on the testimony of more than one witness. These were all restored by the House. The decisions of the committee in regard to a large number of individual cases were also overruled. Finally, on the 11th of June, Mr. McKay, of North Carolina, moved that the report of the Committee on Elections be committed to a Committee of the Whole House, with instructions "to report a resolution for a new election for a member of this House from the Fifth Congressional district in Kentucky, it being impracticable for this House to determine with any certainty who is the rightful Representative of the said district." This resolution was passed, after a debate of two days, by a vote of 114 to 103, so the seat was declared vacant.

Among the many motions made during the last two days' debate was one to prefix to the resolution a preamble reciting that—

Whereas on the face of the returns Mr. Letcher had a majority of 49 votes, and the Committee on Elections had reported a majority for Mr. Moore of 44 votes;

And whereas this House, by sundry resolutions, has added to and subtracted from the votes of each party in the following manner, to wit: [giving a detailed tabular statement showing that up to the present point of consideration Mr. Letcher had a majority of 11 votes];

And whereas it appears, by motions now pending before this House, that sundry

other votes are yet in controversy between the parties, and the House having stopped the investigation upon those votes which were alleged to have been illegally received by T. P. Moore.

This motion was characterized as "a direct insult upon the majority of the House," but the accuracy of the table given was not disputed. So it seems to have been charged that the majority, finding the detailed investigation too favorable to Mr. Letcher, determined to cut the matter short. The parties submitted voluminous arguments to the committee, but they contain nothing important to an understanding of the merits of the case beyond the facts and arguments here given.

[C. & H., 715-850.]

TWENTY-FOURTH CONGRESS, 1835-1837.

Committee on Elections.

Mr. CLAIBORNE, Virginia,	Mr. KILGORE, Ohio,
GRIFFIN, South Carolina,	A. BUCHANAN, Pennsylvania,
HAWKINS, North Carolina,	MAURY, Tennessee,
HARD, New York,	BOYD, Kentucky,
Mr. BURNS, New Hampshire.	

Case.

David Newland v. James Graham, *North Carolina.*

NEWLAND vs. GRAHAM.

Illegal votes. Ballots in wrong boxes. Time of service of notice of contest, and application for extension of time to take testimony. Committee report for petitioner. Seat declared vacant.

Report by Mr. Boyd.

The sitting member objected to the depositions on the ground of the lateness of the service of notice of contest and the insufficiency of the notices to take depositions; but the committee held that as the proceedings had been in accordance with the law of North Carolina, and both sides had taken testimony in the same way and had been represented at the taking of all the testimony the depositions ought to be received.¹ The sitting member then asked for an extension of time to take testimony, but as it appeared to the committee that he had already had enough time the application was refused.

The majority of 7 votes returned for the sitting member was attacked chiefly on the ground of illegal votes. The only evidence that 35 of these voters voted for the sitting member consisted of proof of statements made by the voters after the election. As under the law of the State the election was by ballot, and voters could not be compelled to testify how they voted, contestant contended that this was the best evidence the case admitted of; but the committee held that it was inadmissible. On the other evidence the committee found enough illegal votes to give the petitioner a majority of 4 votes, and by counting votes illegally rejected this majority was increased to 12. Certain ballots for Congress were alleged to have been placed by the voters in the legislative box, and ballots for candidates for the State legislature in the Congressional box. The judges of election, deeming the matter a mere mistake, changed the ballots to the proper boxes and counted them. The committee found that the precedents favored not interfering with the decision of the judges in such cases, and argued that this was the proper course, but left the question to the House to decide.

In the House a motion to extend the time for taking testimony was lost. The case was debated at various times for several months. On the final vote the resolution declaring the sitting member not elected was passed by a vote of 114 to 87. The resolution declaring petitioner elected was defeated, 99 to 100. The seat was then declared vacant.

[1 Bart., 5-9.]

¹There was no law of Congress on the subject in force at this time.

TWENTY-FIFTH CONGRESS, 1837-1839.

Committee on Elections.

Mr. A. BUCHANAN, Pennsylvania, GRIFFIN, South Carolina, HAWKINS, North Carolina, KILGORE, Ohio,	Mr. TOWNES, Georgia, BRONSON, New York, PENNYBACKER, Virginia, HASTINGS, Massachusetts, Mr. MAURY, Tennessee.
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(At the third session Messrs. RIVES, of Virginia, and SWEARINGEN, of Ohio, took the places of Messrs. KILGORE and PENNYBACKER.)

Cases.

- (1) Samuel J. Gholson and John F. H. Claiborne, *Mississippi*.
- (2) James D. Doty *vs.* George W. Jones, *Wisconsin Territory*.

(1) GHOLSON and CLAIBORNE.

Called election to fill vacancy pending regular election. The committee reported and the House voted that the members elected at the called election were members of the Twenty-fifth Congress, but at the second session this decision was rescinded, and the seat vacated, the House refusing also to seat the persons elected at the regular election.

Reports by Mr. Buchanan.

Under the laws of Mississippi Representatives in Congress were elected in November of the odd-numbered years, and there were consequently no regularly elected Representatives from the expiration of a Congress on March 3 until shortly before the usual time of the meeting of the next Congress in December. The Twenty-fifth Congress, however, was called by the President to meet in extra session in September, and the governor, deeming the existing vacancy one which he was authorized by the Constitution to issue writs of election to fill, issued writs in due form, appointing an election for members of the Twenty-fifth Congress, to serve until superseded by the members elected at the regular election in November. The members elected at this election were sworn in, but at their own request the question of the regularity of their election was referred to the Committee on Elections. The committee reported the above facts, and also that they were (with one exception) of the opinion that the governor in restricting the election to the time remaining before the regular election had transcended his power, and that if the members were elected at all they were elected for the whole term. The restricting words in the writ might, however, be regarded as mere surplusage, and did not invalidate the election. The election was valid if a vacancy had "occurred" so as to authorize the governor to issue writs of election to fill it. A majority of the committee were of the opinion that the election was valid, and reported resolutions, which were passed by the House by a vote of 118 to 101, declaring that the sitting members were elected members of the Twenty-fifth Congress, and were entitled to their seats.

On account of this decision of the House, Messrs. Gholson and Claiborne announced to the people of Mississippi that they would not be candidates at the November election. When that election was held, however, about half of the voters cast votes for Congress, and Messrs. Prentiss and Ward, having received a majority of these votes, presented their credentials and applied for seats. The committee reported the facts in the case, without any conclusions. The only new fact brought out in this report was that the proclamation of the secretary of state and the credentials of Messrs. Gholson and Claiborne had only declared them elected "for the called session." The committee, however, said that this would not have changed their former report. After a somewhat lengthy debate the House "rescinded" its former resolution, and declared—

That Messrs. Gholson and Claiborne are not duly elected members of the Twenty-fifth Congress.

This resolution was passed by a vote of 119 to 112. A resolution was then passed by a vote of 118 to 116 declaring that Messrs. Prentiss and Ward were not entitled to seats. This latter decision was apparently based on the ground that, owing to misunderstanding, the election at which these gentlemen had been elected was not a full expression of the popular will. The governor of Mississippi was notified that the seats were vacant.

[1 Bart., 9-16.]

(2) DOTY *vs.* JONES.

Date of commencement of term of Delegate from Wisconsin. Report for contestant. Contestant seated.

In October, 1835, Mr. Jones was elected a Delegate from Michigan Territory, for a term of two years, and took his seat in the December following, at the first session of the Twenty-fourth Congress. In 1836 Michigan became a State and the Territory of Wisconsin was created. Mr. Jones was elected Delegate from the new Territory, for a term of two years, and in December, 1836, after having served only one year as Delegate from Michigan, he qualified as Delegate from Wisconsin. Under this election he served two years—the last year of the Twenty-fourth Congress and the first year of the Twenty-fifth. In September, 1838, Mr. Doty was elected Delegate from Wisconsin, for a term of two years, and in December at the third session of the Twenty-fifth Congress he presented his credentials and asked to be qualified immediately for his two years term, which would thus run until the middle of the Twenty-sixth Congress. There was no question of his election and of his right to serve for two years, but the question was whether his term began immediately or not until the beginning of the next Congress. If his term did not immediately begin, either Mr. Jones would have to serve three years from the date of his qualification, under one election, or the Territory would have to go for a year unrepresented. Mr. Jones claimed that although he had qualified as Delegate from Wisconsin in December, 1836, he had at that time still one year to serve as Delegate from Michigan, and that his term as Delegate from Wisconsin did not really begin until the following March. Counting from this time, he could serve through the Twenty-fifth Congress without going beyond the two years. But the committee held that the corporation of the Territory of Michigan

having expired in 1836, all the offices connected therewith expired, and that Mr. Jones had already served two years as Delegate from Wisconsin. The office of delegate was wholly a creation of law, and there was no necessity for the term to begin and end at the same time as the terms of Representatives. It was claimed that the act of 3d of March, 1817, which provided that Territorial Delegates should be elected "every second year for the same term of two years, for which members of the House of Representatives of the United States are elected," required that the term should begin at the same time as that of Representatives. The committee were (but somewhat doubtfully) of the opinion that this was merely a requirement that the terms of Delegates should be of the same length as those of Representatives, and not that they should begin and end at the same time. But at any rate the act of 1817 was simply legislation, and might be superseded by subsequent legislation, and the committee were of the opinion that the act creating the Territory of Wisconsin contemplated that the Territory should have immediate representation in Congress. Mr. Jones's term thus began legally on the date on which he actually qualified, December, 1836; he had served two years, and his term had consequently expired and that of his successor begun. The committee accordingly recommended resolutions declaring Mr. Doty entitled to the seat, which, after a short debate, were passed by the House by a vote of 165 to 25.

[1 Bart. 16-18.]

TWENTY-SIXTH CONGRESS, 1839-1841.

Committee on Elections.

Mr. CAMPBELL, South Carolina,	Mr. BROWN, Tennessee,
RIVES, Virginia,	FISHER, North Carolina,
FILLMORE, New York,	SMITH, Connecticut,
MEDILL, Ohio,	BOTTS, Virginia,
Mr. CRABBE, Alabama.	

Cases.

- (1) *The New Jersey case.*
- (2) *C. J. Ingersoll vs. Charles Naylor, Pennsylvania.*

(1) THE NEW JERSEY CASE.

Right to seats pending contest. Illegal votes; irregularities. Contesting members admitted pending the contest, and their title confirmed on final determination.

This celebrated case has a historical importance and interest out of all proportion to its value as a legal precedent, and to treat it in a manner at all commensurate with that historical importance would require more space than the purposes of this work would justify. No attempt will therefore be made to outline the facts and history of the case in much more detail than has been done with other cases; and the quotations from the reports will be chiefly confined to the legal questions involved. The importance of this case is not derived from any particular novelty or importance in its issues, but simply from the fact that the political control of the House turned on its determination, and that on this account it received a more elaborate discussion, both in the committee and in the House, than has ever been given to any other case. It is interesting also to note that this is the first case in which the charge, now so common, that the majority of the committee were controlled in their determinations by partisan considerations, was solemnly and directly made by a minority of the committee in a report to the House.¹

The State of New Jersey was entitled to six Representatives in Congress, which, under the State law, were elected from the State at large. At the election for members of the Twenty-sixth Congress, Joseph F. Randolph received an undisputed majority as one of these Representatives, but as to the other five there was a dispute. Counting the votes as actually cast at all the various voting places in the State the Democratic candidates, Messrs. Vroom, Dickerson, Kille, Cooper, and Ryall had majorities ranging from 30 to 200 votes. But the county clerks of Middlesex and Cumberland counties refused to in-

¹ A similar charge had been publicly made in debate against the majority of the House (but not of the committee) in the elaborately discussed case of *Letcher vs. Moore*, in the Twenty-third Congress; but otherwise the custom of imputing none but judicial motives to the committee seems to have been studiously followed. Since this case the partisan element has generally been frankly conceded, and in recent times, as is well known, even greatly exaggerated.

clude in their certificates of the votes of their counties the votes returned to them from the townships of Millville and South Amboy. As these townships gave the Democratic candidates majorities of about 350 votes, the Whig candidates, Messrs. Aycrigg, Maxwell, Halsted, Stratton, and Yorke, had majorities of 200 or 300 votes in the rest of the State. These gentlemen presented themselves to the House with the usual certificates of election from the governor; the rival delegation presented certificates from the secretary of state certifying that they had received a majority of the votes cast. The House at the time was so closely divided politically that if either set of claimants was admitted it would give the majority to the party to which they belonged; if neither set was admitted the Democrats would have a majority. The House remained unorganized for two weeks, with the question of the titles of the New Jersey claimants continuously under debate. At the end of this time it was decided to permit neither set of claimants to be recognized by the clerk as members, thus giving the organization of the House to the Democrats. A Committee on Elections was appointed, and on January 13, 1840, the committee were instructed "to inquire and report who are entitled to occupy, as members of this House, the five contested seats from that State," and given power to send for persons and papers.

The parties presented to the committee written arguments and statements of the facts they expected to prove and also a large amount of testimony. The committee examined this testimony with reference to its competency, and threw out a large portion of it as being *ex parte* and taken without notice. It was then proposed to make a preliminary report upon the question of the right to the seats pending the final determination of the case on its merits, and 8 of the 9 members were in favor of this proposition, but it was found that there was a majority of 5 to 4 against reporting in favor of each set of claimants, and it was therefore determined to set the second Monday in April, 1840, for proceeding to a final determination of the case on the merits, the parties in the meanwhile going to New Jersey to take testimony.

On February 28, 1840, the House instructed the committee—

To report *forthwith* which 5 of the 10 individuals claiming seats from the State of New Jersey received the greatest number of *lawful* votes from the whole State for Representatives in the Congress of the United States at the election of 1838, in said State, with all the evidence of that fact in their possession: *Provided*, That nothing herein contained shall be so construed as to prevent or delay the action of said committee in taking testimony or deciding the said case upon the merits of the election.

The words "*forthwith*" and "*lawful*," italicised above, were the subjects of a heated controversy in the House. The word "*lawful*" was not in the resolution as originally introduced in the House, and was introduced by a vote of 97 to 96, decided by the casting vote of the Speaker. An unsuccessful attempt was also made to strike out the word "*forthwith*."

The committee were divided upon the question of the proper construction to be given to this resolution. The majority were of the opinion that the introduction of the word "*lawful*," especially in view of the retention of the word "*forthwith*" and the proviso, could not under all the circumstances make the resolution simply mean that the original intention of the committee was to be adhered to and no decision reached until all the questions of illegal votes were settled. The House certainly could not intend a purgation of illegal votes in advance

of the reception of the testimony which would enable that purgation to be thorough and just.

There is but one other basis left, and that is the *prima facie* case upon the returns of the local officers of the several polls; and, the nature of the controversy taken into consideration, it can scarcely be doubted that to this basis the resolution looked.

But, on the other hand, the committee could not "entirely overlook" the word "lawful." On this subject they said:

The committee are therefore of opinion that they correctly construe that word with the context when they limit its signification to that *prima facie* lawfulness which arises upon their reception at polls held in conformity with law.

Upon this basis they proceeded to examine the questions raised against the counting of the two precinct returns not certified by the county clerks and one other precinct return asked to be rejected for fraud. If these returns were rejected the commissioned (Whig) members would have a majority of the votes; otherwise, the contesting (Democratic) members received the majority. An examination of the testimony so far presented showed that it was insufficient to establish any of the charges, and the committee therefore reported that the contesting (Democratic) delegation appeared *prima facie* to have "received the greatest number of lawful votes."

The minority protested against any report or determination of the case while the parties were still engaged in taking testimony, under an express understanding that no further action would be had until the date fixed for closing the taking of testimony, and insisted that the instructions of the House to report who had "received the greatest number of *lawful* votes" could not be carried out by reporting who received the greatest number of *actual* votes in advance of any determination or opportunity for determining the legality of any of them. But the House, on March 16, 1840, by a vote of 111 to 80, admitted Messrs. Dickerson, Vroom, Ryall, Cooper, and Kille, the contesting delegation, to hold their seats without prejudice to the final rights of the other claimants.

On April 16 the testimony taken by the parties was laid before the committee, but as it was exceedingly voluminous and not arranged with reference to the issues to which it referred it was delivered to the parties to be prepared and arranged. It was subsequently printed, and on June 8 the committee proceeded to the final examination. Besides the charges against the validity of the returns from two polls there were some 600 charges of illegal votes, and the committee treated each of these individual votes as a distinct controversy. The testimony was examined, and separate arguments heard and separate votes taken on the question whether each voter voted, whether his vote was illegal, and whether it was shown for which candidates he voted. As a result of all the findings of the majority of the committee upon these individual questions the majorities for each of the members now holding the seats were increased. As a result of the findings of the minority the majorities of three of them were overcome and majorities shown for their opponents, while the majorities of the other two were decreased. The largest differences in the findings of the two portions of the committee were based on a difference over the law of evidence in regard to alien votes. The committee unanimously held that votes received by the election officers were *prima facie* legal, and could not be thrown

out until their illegality was affirmatively shown. The majority held that this illegality must be shown to the exclusion of a reasonable doubt. Applying these principles to alien votes, the majority held that the burden was on the parties attacking the votes to show not only that the voters were foreign born, but also that they had never been naturalized. To this the minority objected that it was requiring the proof of a negative, and that unless the voter chose to testify and incriminate himself this negative could only be proved by searching the records of every court in the United States competent to grant naturalization. They held that the fact of foreign birth being proved the burden shifted to the party sustaining the vote to show naturalization. They complained that the majority of the committee, knowing that a rule attaching undue importance to the reception of a vote at the polls would necessarily result more favorably to the candidates having the *prima facie* majority, had not only adopted such a rule, but had also applied it unfairly and with even more severity than its terms required. Referring to the rules of evidence which they alleged the majority had disregarded, they said:

To suppose any member of the committee to be ignorant of a rule of law so old and universal, and founded in so much good sense, would be to justify his integrity, and maintain his impartiality at the expense of his judgment and of every qualification required for the proper discharge of the duties of a committee on elections. We disclaim all design of charging the course adopted by the majority to corrupt intentions, but we are very reluctant to embrace the other branch of the alternative, and conclude, therefore, that some strange prejudice must have taken possession of the mind and led the judgment captive at will.

It is not necessary to give in detail the other rules adopted in regard to illegal votes; they are all referred to elsewhere. One precinct return was objected to on the ground that one of the officers of election was not qualified, but the preponderance of the evidence seemed to show that he probably was qualified, and his failure afterwards to return the regular certificate of his qualification ought not to disfranchise the voters. The other precinct was asked to be rejected on the ground that the officers of election had fraudulently failed to count 8 votes as they were cast. The testimony to account for the discrepancy was not in all respects conclusive, but it appeared so fully that the election was honestly and fairly conducted that the committee would not reject the return. The committee were unanimous in counting these returns.

The report of the committee was adopted on July 17, 1840, *without debate*, by a vote of 101 to 22—just a quorum, many members refusing to vote.

None of the debates or proceedings of the committee, and only portions of the reports in this case, are given in 1 Bartlett, and the above facts have been largely derived from the original documents.

[1 Bart., 19-33, also Report 506, first session Twenty-sixth Congress.]

(2) INGERSOLL vs. NAYLOR.

Fraud; election officers not sworn. Report for contestee. Contestee retained the seat.

Report by Mr. Fillmore.

The contestant asked that the returns of seven precincts, which gave an aggregate majority for the sitting member larger than his majority

in the district, be thrown out for fraud. The charge against six of these precincts was that the registering officers fraudulently added to the registry lists a large number of names of persons either not in existence or not having a right to vote. The testimony to sustain this charge was chiefly hearsay, and was thrown out by the committee on this ground. The rest was very remotely inferential, or based on a so-called political census, which the committee found to be "too vague and uncertain to lay the foundation for any judicial decision." If any names were improperly added to the registry list, the wrong was corrected before the election, and no evil resulted.

The only other important charge was that in one precinct the judges of election, instead of being properly sworn to perform their duties, were sworn upon a Philadelphia directory instead of the Bible, and were sworn "to do justice to their party." The only evidence of this mock oath was the testimony of one of the election officers, who was three times sworn in the case. The first time he refused to testify on this question on the ground that he might incriminate himself, the second time he did not mention it, and the third time he read his testimony from a paper which he refused to allow to be inspected. His conduct in this and other respects tended to discredit his testimony. He was directly contradicted by all the other officers of election and by the justice of the peace who administered the oath. There was no oath on file in the prothonotary's office, but it appeared that the papers in this office had been very carelessly kept. All the election papers had been taken to the State capital once, and some of them had been taken out at various times by other persons. The resolution reported by the committee, sustaining the right of Mr. Naylor to his seat, was passed by the House after a brief debate.

[1 Bart., 33-37.]

H. Doc. 510—8

TWENTY-SEVENTH CONGRESS, 1841-1843.

Committee on Elections.

First session.

Mr. HALSTED, New Jersey, BLAIR, New York, CRAVENS, Indiana, BORDEN, Massachusetts,	Mr. GAMBLE, Georgia, A. V. BROWN, Tennessee, MEDILL, Ohio, J. W. WILLIAMS, Maryland, Mr. SUMMERS, Virginia.
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Second session.

Mr. HALSTED, New Jersey, BLAIR, New York, CRAVENS, Indiana, BORDEN, Massachusetts,	Mr. BARTON, Virginia, TURNEY, Tennessee, HOUSTON, Alabama, REYNOLDS, Illinois, Mr. RANDALL, Maine.
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Cases.

- (1) Joshua A. Lowell, *Maine*.
- (2) David Levy, *Florida Territory*.

(1) LOWELL.

False returns. Report for sitting member. Sitting member retained the seat.

Two petitions were received asking for an inquiry into the election of Mr. Lowell. A majority vote was required in Maine to constitute an election, and at the first trial no election was had. At the second trial Mr. Lowell was returned as receiving a majority of 4 votes over all and given the certificate of election. The petitioners alleged and offered to prove that in one precinct the returns showed 63 votes for the sitting member and none for any other candidate, whereas another candidate did receive 29 votes. Other but less important allegations were also made. The sitting member denied the allegations and objected to all the evidence as *ex parte*. The committee considered the evidence, but it seems to have been insufficient to sustain the charges, as the committee, without formal report, merely recommended a resolution declaring the sitting member entitled to his seat, which was adopted without division.

[1 Bart., 37-41.]

(2) LEVY.

Citizenship of sitting member. First report to vacate seat. Second majority report for sitting member; minority report to vacate seat. No action by the House.

First report by Mr. Halsted; second majority report by Mr. Barton; minority report by Mr. Halsted.

A remonstrance from citizens of Florida was presented protesting against the right of Mr. Levy to sit as Delegate from Florida, on the

ground that he was not a citizen of the United States. It appeared that Moses Levy, the father of the sitting member, was a native of Morocco, but that at the date of the birth of his son he was a subject of the King of Denmark. David Levy was born in the West Indies. In 1820 Moses Levy purchased a large tract of land in Florida, with the intention of settling upon it. His son was then but a child. In the early part of 1821 the father came to Philadelphia, and took out his declaration of intention to become an American citizen. He then sailed for Florida, and arrived in St. Augustine subsequent to July 10, 1821. Florida was formally transferred to the United States on July 17, 1821, and there was a dispute as to whether he had arrived in Florida before that date, or not until a few days later. He had received a certificate of inhabitancy, and a certificate of naturalization had been issued to him by Governor Jackson. David Levy, the son, attended school in Norfolk until 1827, when, still under age, he went to Florida. He claimed citizenship under the naturalization of his father, and this claim had been sustained by a recent decision of the court of appeals of the Territory.

The committee reported that the sitting member was not a citizen of the United States, and was therefore disqualified to sit. The House had the undoubted right to inquire into the qualifications of a Delegate, as well as of a Representative, and while the statute did not disqualify an alien from sitting as a Delegate, the common law and the usage of nations undoubtedly did. The certificate of naturalization issued to Moses Levy by Governor Jackson, was under a statute subsequently declared void, and was plainly in excess of his powers. The recent decision of the court of appeals, not being made by a court of concurrent jurisdiction, nor in a case between the same parties, was not conclusive on the House of the citizenship of David Levy. Moses Levy not having been a subject of the King of Spain at the time of the transfer of Florida, no treaty action between Spain and this country could have transferred his allegiance. His only right to citizenship, then, must be based on the laws granting citizenship to all who were inhabitants of Florida on July 17, 1821. The testimony indicated that he was not an inhabitant of Florida until a few days after that date, and, consequently, neither he nor his minor son was naturalized.

When the report was presented to the House Mr. Levy moved that he have until the first day of the next session to take further testimony. This was granted, and on examination of the additional testimony the majority of the committee reversed the former decision, and reported in favor of the right of Mr. Levy to the seat. The new evidence went chiefly to establish the fact that Moses Levy was actually in Florida on July 17, 1821. The evidence was very contradictory and not fully conclusive, but the committee thought that it fairly established the fact. In a case like this the leaning ought to be in favor of the claimant of citizenship. He had resided in this country since he was 9 years old, had always considered himself a citizen, and the question of his citizenship had been passed upon by the courts of Florida, by the executive department of the United States, and in effect by the people. If he was not a citizen, the lack at most was a very technical one.

The minority reported that a large part of the additional evidence ought to have been thrown out, as being taken without notice, and

after the time fixed by the House. But considering it, the preponderance of it showed that Moses Levy did not arrive in Florida until after July 17, 1821, and hence neither he nor his son were citizens.

No action was had upon this case in the House, so Mr. Levy retained his seat.

[1 Bart., 41-47 (only one of the three reports is given in 1 Bart.); see also Report No. 10, first session Twenty-seventh Congress, and No. 450, second session.]

TWENTY-EIGHTH CONGRESS, 1843-1845.

Committee on Elections.

Mr. ELMER, New Jersey,	Mr. DOUGLAS, Illinois,
CHAPMAN, Alabama,	DAVIS, Kentucky,
NEWTON, Virginia,	SCHENCK, Ohio,
HAMLIN, Maine,	A. V. BROWN, Tennessee,
M. ELLIS, New York.	

Cases.

- (1) Members elected by general ticket.
- (2) Wm. L. Goggin *vs.* Thomas W. Gilmer, *Virginia*.
- (3) John M. Botts *vs.* John W. Jones, *Virginia*.

(1) MEMBERS ELECTED BY GENERAL TICKET.

Majority report that they were entitled to their seats; minority report that they were not entitled to their seats. The House sustained their right to their seats.

Majority report by Mr. Douglas; minority report by Mr. Davis. The majority and minority reports in this case, written by Mr. Stephen A. Douglas and Mr. Garrett Davis, contain exhaustive arguments upon the constitutional principles involved. Only a very unsatisfactory outline of these arguments can be given without going beyond the limits of space necessary to be observed. The Twenty-seventh Congress, in the second section of the apportionment act made necessary by the Sixth Census, had provided that—

In each case where a State is entitled to more than one Representative, the number to which each State shall be entitled, under this apportionment, shall be elected by districts composed of contiguous territory, equal in number to the number of Representatives to which said State shall be entitled—no one district electing more than one Representative.

All the States but four, either under previously existing laws or under laws passed in accordance with this provision, elected their Representatives by districts, but the States of New Hampshire, Georgia, Mississippi, and Missouri elected the Representatives to which they were entitled by general ticket from the State at large.¹

The majority of the committee reported in favor of the validity of the elections in these States, arguing substantially as follows:

There is a direct conflict between the second section of the apportionment act and the election laws of the States in question.

The conflict is so clear, so palpable, so direct, that both can not stand; one or the other must yield. Either the State laws and all the proceedings under them are void, or the second section of the apportionment act is invalid and inoperative.

There is not only a conflict of law, but a conflict of right, of power, of sovereignty, between the Federal Government and four of the independent States of this Union.

The sixth article of the Constitution provides that this Constitution, and the laws of

¹ At the last session of the Twenty-seventh Congress, when it became evident that the failure of these States to comply with the law of Congress would produce a bitter contest in the House, the committee reported favorably a bill suspending the operations of the law so far as it applied to the Twenty-eighth Congress, in the hope that before the next election all the States would voluntarily comply with it; but the bill did not become a law.

the United States which shall be made in pursuance thereof, shall be the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. This brings us directly to the point at issue. Is the second section of the apportionment act a *law*, which has been made in pursuance of the Constitution of the United States valid, operative, and binding upon the States? If the affirmative of this proposition can be successfully maintained, the State laws must yield to the paramount authority, and the elections under them be declared void.

Under the Constitution the State legislatures are *required* to prescribe the times, places, and manner of holding elections for Senators and Representatives, but Congress is *permitted* at any time to "make or alter such regulations." The State legislatures have an imperative duty in this matter, but they are intrusted with an unlimited discretion in the manner of its performance. But—

The privilege allowed Congress of altering State regulations or of making new ones, if not in terms is certainly in spirit and design dependent and contingent. If the legislatures of the States fail or refuse to act in the premises or act in such a manner as will be subversive of the rights of the people and the principles of the Constitution, then this conservative power interposes, and, upon the principle of self-preservation, authorizes Congress to do that which the State legislatures ought to have done.

The history of the adoption of this provision and of its ratification by the States shows that it was introduced for this purpose alone, and was ratified by the States only upon the understanding that it would never be used for any other purpose.

But the question now to be considered is one of power and not of the propriety of its exercise; and if it is conceded that the power of Congress in the premises is as plenary as that of the States, the question still remains "whether the second section of the apportionment act is an exercise of this power in a manner contemplated by the Constitution and binding upon the States." This provision is of itself nugatory and inoperative without the aid of State legislation. It does not provide the districts in which the election is to be held or furnish any of the necessary regulations. It is said to be a direction to the State legislatures to enact laws of a certain sort; but the Constitution gives to Congress no power to command the States.

The right to change State laws, or to enact others which shall suspend them, does not imply the right to compel the State legislatures to make such changes or new enactments. Whatever power the legislatures possess over elections they derive from the Constitution and not from the laws of the United States.

Congress has the right to enact its own laws and to enforce them by its own agencies, and hence there is no necessity or implied power to require the States to enact or enforce laws. The very feature of the old confederation which made the Constitution necessary was the fact that the laws of Congress operated upon the States and not upon the people, and hence were only enforceable by the consent or coercion of sovereign States. In some cases, under the Constitution, the States and the Federal Government have concurrent powers, but in the case of bankruptcy laws, one of these concurrent powers, it would not be contended that Congress would have the right to lay down certain abstract principles and require the States to pass bankruptcy laws conforming to these principles. Congress has the undoubted power to prescribe the *times* of elections, but no one would contend that a valid law could be passed requiring the elections to be held on the same day in all the States without fixing that day.

Hence we are brought irresistibly to the conclusion that a fair interpretation of this clause of the Constitution requires that Congress shall either designate the time, specify the places, and prescribe the manner, by law, or leave it to the wisdom and discretion of the several State legislatures.

Congress need not exercise all of its powers at once, but whenever it does assume

the power over one branch of the subject its legislation must be complete to that extent, so as to execute itself without the intervention of the State legislatures, and the residue must be left to the States to be exercised according to their discretion under the Constitution.

The committee recommended resolutions declaring the second section of the apportionment act void, and that all the members of the House (except the two contested cases from Virginia) were duly elected.

The minority held that the second section of the apportionment act was a valid law, and the elections held in the four States in question consequently void. The Government of the United States, under the Constitution, is a government complete in itself. No State officer or legislature, in performing any function of the Federal Government, does so by any authority residing in the States, but by the authority of the Constitution, and by virtue of an agency created by the Constitution. The only authority the State legislatures have over Federal elections is derived from the Constitution, and is granted by a provision which gives Congress, at its option, a coextensive and paramount authority. Unless the power to prescribe that elections for Representatives shall be by general ticket, or by districts, is given to the legislatures by this section of the Constitution, they do not possess it at all. If they do possess it, the same section which gives it to them gives it to Congress. That the powers of Congress are thus as complete as those of the legislatures is shown not only by the history of the adoption of this provision, but also by the protests of several of the States, made at the time, and based upon exactly this interpretation of the section as it stands.

Congress has power to *alter* State regulations, and it is upon this power that the validity of the second section of the apportionment act rests. No State can prevent or circumscribe the action of Congress in this respect. Congress may alter the State regulations to any extent it chooses, leaving those parts not altered still in force. Any alteration that the State legislatures themselves could make Congress can make, and it becomes immediately a part of the State laws, just as if it had been made by the legislatures of all the States. If Congress should pass a law fixing the *time* of Federal elections, it would immediately alter such provisions of the State laws as fixed a different time; but the other provisions would remain in force, and the election would be held under the State laws, altered in respect to time by the law of Congress. But the constitutionality of this Congressional alteration would not depend on the fact that the other portions of the State regulations were so constructed that with this alteration a complete system, capable of being executed without further legislation, would remain. A law is constitutional if it is not contrary to the Constitution, and the constitutionality of a law of Congress can not depend on the forms of State laws. The fact that the second section of the apportionment act so alters the regulations of some of the States that what remains can not *proprio vigore* be executed does not affect its constitutionality. If a similar provision had been passed by the legislature of one of the States, it would have amounted to an alteration of the election laws, even though, by disagreement of the two branches of the legislature, the further legislation necessary to carry it into execution had failed of passage; and no valid election could have been held in that State until the necessary

regulations in conformity with this provision of the law had been adopted and followed. When the alteration was made by a law of Congress the case was exactly similar, and no valid election could be held contrary to its provisions. If the State legislatures were under the duty of enacting regulations which would make the laws, as thus altered, capable of being executed, it was not because this law of Congress acted as a mandamus on the legislatures. The Constitution itself, from which the legislatures derive their authority, commands them to enact regulations; and if Congress so exercises its authority to alter State regulations as to render further legislation necessary before the laws as altered can form a complete and practicable system, the command for the enactment of such legislation comes not from Congress, but from the Constitution. The law, then, not being contrary to the Constitution, is valid and binding in all the States, unless it can be held invalid under the principle that a law which expresses no meaning, or whose meaning is altogether doubtful, is of no effect. A law requiring elections to be held at a uniform time, without designating the time, would, under this principle, be invalid, because no State, looking to the law alone, could know what day was intended. But such is not the case with the provision requiring elections to be held by districts, no district to elect more than one representative. If this were a provision of the Constitution no one would be doubtful of its meaning or of the duty of the legislatures to follow it. Similarly if it were an enactment of the legislatures themselves. A provision which would have meaning in these situations can not be held to be meaningless simply because it is a law of Congress, which the Constitution says shall be the supreme law of the land.

The undersigned think that the following propositions are clearly made out: That this law is not unconstitutional, because there is nothing in it in opposition to the Constitution; that it is not void in consequence of not being a full execution of the power of Congress, because the Constitution permits Congress to exercise so much of this power at all times as it may think proper; that it is not a nullity, because it is a clear, intelligible, and substantive alteration of the State laws, which Congress had the right to make, and it plainly and distinctly, by its provisions, informs the State legislatures what they are to do to give it practical effect; that the State legislatures are commanded by the Constitution and bound by their oath to support it, to divide their States respectively into districts, and to prescribe any other needful regulations to give this law its effect; and that the general ticket regulation of New Hampshire, Georgia, Mississippi, and Missouri and the election of their representatives, being in opposition to this law of Congress, which is a part of the supreme law of the land, are void and of no effect.

The debate on this subject occupied a large part of the session. The report of the committee was not formally agreed to, but it was voted by a decided majority that each member elected by general ticket was entitled to his seat. The entire debate may be found in the Congressional Globe, volume 13, parts 1 and 2. A full index of the debate is given on page 16 of part 1 and page 3 of part 2.

[1 Bart., 47-69.]

(2) GOGGIN *vs.* GILMER.

Adjournment of poll; election officers not sworn. Majority report for sitting member; minority report to declare seat vacant. No action by the House.

Majority report by Mr. Elmer; minority report by Mr. Schenck.

At the close of the first day's voting Mr. Goggin had a majority of the votes; but the superintendents of election at polls in two counties continued the election for three days on account of rain, under the

Virginia law, and including the votes given at these polls on the second and third days Mr. Gilmer had a majority of 24 votes. He contested the election on the ground that the occasion of adjournment required by the law did not exist; that under the law the officers had no authority to adjourn the poll without a request from one of the candidates, which request was not made; and also that the officers of election at these polls were not sworn. The law under which the officers claimed to act was: "If, by rain or rise of water courses, many of the electors may have been hindered from attending," the election officers "may, and shall, by the request of any one or more of the candidates, or their agents, adjourn the proceedings" for three days.

On the first day of the election, in the counties in question, rain had fallen, many voters had remained away from the polls, and some of them had been kept away by the rain. The committee were of the opinion that the officers of election, from the very nature of the case, must be the judges whether the rain was sufficient to have hindered, and had hindered, many voters from coming to the polls.

Had it now clearly appeared that they were mistaken in this judgment, the committee do not think that their proceedings should be declared illegal and void, in the absence of all proof and of all complaint that they acted fraudulently.

But the evidence was far from showing that they had acted injudiciously.

The committee were also of the opinion that it was a mistaken interpretation of the law above quoted to assume that the election officers could only adjourn the poll on the request of a candidate or his agent. But, conceding the interpretation contended for, the burden was certainly on contestant to show conclusively that no such request had been made. Neither of the candidates for Congress had made the request, but there was nothing to show that it might not have been made by a candidate for the State legislature or by some voluntary agent of one of the candidates for Congress.

The evidence by which it was sought to show that the officers of election were not sworn was unsatisfactory. Except as to one poll, it appeared by other evidence that they were sworn, and the evidence as to that poll consisted of two conflicting certificates of the county clerk; the first clearly attempting to show by certificate facts only capable of being shown by testimony, and the second perhaps open to the same objection, and, if not, at least discredited by its conflict with the first.

The minority report (not given in 1 Bart.) favored setting the election aside. The plain construction of the law was that the election officers, if a certain contingency occurred and if requested by one of the candidates, were authorized and required to adjourn the poll. Except as to one precinct, it was clear that no such contingency existed, and the evidence in regard to that one precinct was of a suspicious character. It was clear also that neither of the candidates had requested the adjournment. The first certificate of the clerk of Amherst County was based on a partial examination of the records and was also clearly incompetent, but the second certificate was competent and showed that the election officers at one poll were not sworn. The requirement of an oath was mandatory, and the poll should be thrown out under the precedents. The minority favored a new election.

Before the case was reached in the House Mr. Gilmer, having been appointed to a Federal office, resigned, and, a new election being thus

obtained, the case was not pressed in the House, and leave was asked to withdraw the papers of contest.

[1 Bart., 70-73; also Report No. 76, part 2, first session Twenty-eighth Congress.]

(3) *BOTTS vs. JONES.*

Illegal votes; election officers not sworn; irregularities. Both reports for sitting member. Sitting member retained the seat.

Majority report by Mr. Elmer; minority report by Mr. Newton.

According to the returns Mr. Jones had a majority of 34 votes. Mr. Botts charged that 284 illegal votes were cast for Mr. Jones; Mr. Jones charged that 440 illegal votes were cast for Mr. Botts. The petitioner also attacked two polls for irregularities.

The testimony was all taken under the provisions of the Virginia law for contests in the State legislature. Under the practice of this law each party had the burden of sustaining the legality of votes cast for him and objected to by his opponent, and the parties in this case had proceeded on this basis. The committee considered this a false principle, but inasmuch as the parties in many cases had taken no testimony at all in regard to votes definitely known to be illegal, the committee were forced to proceed on the same assumption as the parties, and take votes as conceded to be illegal where there was no evidence to show them legal.

Upon an examination of all the testimony the committee deducted 117 votes from the sitting member and 238 from the petitioner, leaving a net majority of 155 votes for the sitting member.

One poll was attacked by the petitioner on the ground that only one "writer" had been appointed to take the poll for Congress. The law required the officer conducting the election to "appoint so many writers as he shall think fit," to "deliver a poll book to each writer," etc. The committee held that the discretionary authority given included the right to appoint only one writer. But in this case three writers were appointed, but only one of them took the poll for Congress.

The other poll was objected to on the ground that the sheriff and one of the two superintendents was not sworn. The committee thought this objection ought not to be considered, as notice of it was not given to the sitting member within the time prescribed by the Virginia law. But if it was considered, the failure of the sheriff to take the oath was immaterial. His presence, under the new laws of Virginia, was not necessary, and his duties were not such as to render the taking of an oath imperative. The failure of one of the superintendents to be sworn was undoubtedly irregular and illegal, but the committee were not prepared on this account to set aside a poll against which there were no charges of unfairness and whose illegal votes had already been purged under a rule extremely favorable to the party objecting to them.

The minority held that this objection ought to be considered, as reasonable notice had been given. The failure of two of the three officers to be sworn vitiated the election. The minority also differed in regard to many individual illegal votes, but as they still found a small majority remaining for Mr. Jones they concurred in the result but not in the reasoning of the majority report.

After a brief debate the House confirmed the title of Mr. Jones by a vote of 150 to 0.

[1 Bart., 73-78; see also Report No. 520, first session Twenty-eighth Congress (minority report not given in 1 Bartlett).]

TWENTY-NINTH CONGRESS, 1845-1847.

Committee on Elections.

Mr. HAMLIN, Maine,
A. A. CHAPMAN, Virginia,
HARPER, Ohio,
CHASE, Tennessee,

Mr. ELLSWORTH, New York,
MCGAUGHEY, Indiana,
CULVER, New Jersey,
CHIPMAN, Michigan,

Mr. DOBBIN, North Carolina.

Cases.

- (1) William H. Brockenbrough *vs.* Edward C. Cabell, *Florida*.
- (2) Isaac G. Farlee *vs.* John Runk, *New Jersey*.
- (3) Edward D. Baker, *Illinois*; Thomas W. Newton and Archibald Yell, *Arkansas*.

(1) BROCKENBROUGH *vs.* CABELL.

Returns made after the legal time and by the wrong officers. Majority report for contestant; minority report for sitting member. Contestant seated.

Majority report by Mr. Hamlin; minority report by Mr. Culver.

According to the law of Florida the secretary of state was to tabulate the returns in his office on the thirtieth day after the election, and the certificate of election was to be based on this tabulation. According to all the returns in the office of the secretary of state on the thirtieth day, Mr. Cabell had a majority, and the certificate of election was given to him. A number of returns were received by the secretary of state more than thirty days after the election, and if all of these were counted it would give Mr. Brockenbrough a majority. All the committee were of the opinion that the law prescribing the time for making returns was directory, and that returns should not be thrown out merely because returned too late. But there still remained the question, Which returns were made by the legal officers? There were three classes of returns: Those made by probate judges, by county clerks, and by precinct inspectors. Under the law of Florida Territory the county clerks were to appoint inspectors and transmit returns. Under a recent law of the State the duties of the county clerks in regard to elections were transferred to the probate judges. But as the old organization and duties of officers were to continue until the new were established, the committee were of the opinion that, if these two laws controlled the election, the returns from the county clerks had the same validity as those of the probate judges. An act "to facilitate the organization of Florida" was claimed to have superseded the earlier Territorial law, so that the duties of the county clerks which were transferred to the probate judges were those of this act and not those of the Territorial law. But the committee held that this act did not apply, both because it was a special act for a special purpose and because it contained no provisions for county elections, and the Congressional elections were required to be held in the same manner as county elections.

If the returns originally made to the secretary of state by the probate judges and county clerks and those returned after the thirty days

by the same officers were counted, the contestant would have a majority. The committee were of the opinion that these were the legal returns. But if, in addition, the returns included in the original tabulated statement of the secretary of state, but made to him by precinct inspectors, were counted, the sitting member would still have a majority. On this basis it seems that a majority of the committee originally voted that the contestee was elected, but they afterwards reconsidered their decision on the ground that if returns made by precinct officers within the thirty days, and certified by the secretary of state to the governor, were to be counted, those made by the same class of officers after the thirty days, and certified by the secretary of state, should also be counted. If all the returns were counted, or only the legal returns made by the probate judges and county clerks, the contestant would have a majority, and the committee reported in his favor.

The minority report (not given in 1 Bart.) advocated the retention of the sitting member, and called attention to the fact that the original decision of the committee was in his favor. No members of the committee contended that *both* sorts of returns were legal. If only those made by the precinct inspectors were legal the sitting member would have a majority. But the committee had voted that the returns made by the probate judges and county clerks were the legal returns. If to the returns originally counted were added the returns subsequently made by these officers, the sitting member would have the majority. The committee had voted not to receive the returns of precinct inspectors made after the thirty days, and this vote was decisive of the case in favor of the sitting member. The contestant could not object to the counting of the returns of precinct inspectors included in the original tabulated statement, for he had himself introduced this statement as a whole, and must be bound by the whole of it.

In debate Mr. Hamlin announced that he personally was in favor of counting *all* the returns regardless of the channel through which the returns reached the secretary of state or the House.

The resolutions presented by the majority were adopted by a vote of 100 to 84, and Mr. Brockenbrough was sworn in.

[1 Bart., 79-87, and Report No. 35, first session Twenty-ninth Congress.]

(2) FARLEE vs. RUNK.

Student votes. Majority report for sitting member; minority report for contestant. Sitting member retained the seat.

Majority report by Mr. Dobbin; minority report by Mr. Chase.

The sitting member received a majority of 16 votes. There were 19 votes, and probably a few more, cast by students of Princeton College and Theological Seminary. Contestant claimed that these votes were illegal and were cast for the sitting member.

Under the recently adopted constitution of New Jersey all white male citizens of the United States who had been residents of the State one year and of the county five months, with certain specified exceptions (not including students), were entitled to vote. The committee found that the votes of these students could not be attacked on any ground except that of residence. All of them were men of mature years whose parents were either dead or no longer contributed to their support; all of them had been engaged in labor for themselves since they left the homes of their parents, and had left both the homes of

their parents and their last residences *animo non revertendi*. They considered Princeton their residence, paid taxes there, and had no definite intentions in regard to residence after the completion of their studies. Under these circumstances the committee held that they were residents of Princeton, and legal voters. It was contended that there was a law of New Jersey declaring that students in college could not vote, but this law was passed before the new constitution, and being inconsistent with it was superseded by it. But if it were in force it could not affect the case, for the legislature could not intend that students should be deprived of their votes simply because they were students, whether residents or not, and these students were proved to be residents.

A recent decision of the supreme court of New Jersey bearing indirectly on the question was quoted, and the committee agreed that it was correct and that under it most of the students at Princeton were not legal voters, but the few who voted were exceptions, as shown by the evidence.

The minority (minority report not given in 1 Bart.) held that the votes were illegal and that all but one of them were cast for the sitting member. The law of New Jersey specifying students as among the persons not entitled to vote in the places where they lived at the time of the election was not repealed until after this election. If it was contrary to the new constitution, it was as much contrary to the old; the minority did not believe it to be contrary to either. But if it were not in force the students in question were not entitled to vote on general principles. Some of them had left their former homes *animo non revertendi*, but they had not come to Princeton *animo manendi*, and both were required to constitute a residence.

Four of them testified that they voted for Mr. Runk, one that he voted for Mr. Farlee; the rest refused to disclose how they voted. It was thus necessary to resort to other evidence. A witness, one of the students of the seminary, testified that he had at various times talked with sixteen of them, or heard them talk with others, on political subjects, and from these conversations he believed them to be Whigs. On this testimony the minority deducted their votes from Mr. Runk.

After a very brief debate in the House it was voted by a vote of 119 to 66 that the contestant was not elected. A resolution declaring the sitting member not entitled to his seat was defeated by a vote of 96 to 96, the Speaker then casting his vote in the negative. From this it would seem that many members who were satisfied that the student votes were illegal were not satisfied for whom they were cast.

[1 Bart., 87-92, and Report No. 310, first session Twenty-ninth Congress.]

(3) BAKER, NEWTON, and YELL.

Holding incompatible office. Seats vacant.

Report by Mr. McGaughey.

Messrs. Baker and Yell had accepted commissions as colonels in the volunteer army. Mr. Newton had been elected to the vacancy alleged to have been created by the acceptance of a disqualifying office by Mr. Yell. The committee reported that the offices were clearly incompatible, and that the seats of Messrs. Baker and Yell were vacant, and that Mr. Newton was entitled to his seat. No action was had by the House, as Mr. Baker had resigned, and Mr. Newton had already been admitted.

[1 Bart., 92-97.]

THIRTIETH CONGRESS, 1847-1849.

Committee on Elections.

Mr. R. W. THOMPSON, Indiana,	Mr. JENKINS, New York,
J. MULLIN, New York,	VAN DYKE, New Jersey,
L. B. Chase, Tennessee,	ROMAN, Maryland,
Mr. N. BOYDEN, North Carolina.	

In the second session, Mr. INGE, of Alabama, and Mr. WILLIAMS, of Maine, were added to the above.

Cases.

- (1) James Monroe *vs.* David S. Jackson, *New York.*
- (2) H. H. Sibley, *Wisconsin Territory.*

(1) MONROE *vs.* JACKSON.

Illegal votes. Residence of paupers. Majority report for contestant; minority report for contestee. House vacated the seat.

Majority report by Mr. Thompson; minority report by Mr. Jenkins.

According to the returns the sitting member had a majority of 143 votes. Contestant alleged that 163 votes were cast for contestee in one precinct by paupers in the almshouse, and that a considerable number of votes of the same class, and also of convicts and other disqualified persons, were cast for him in other precincts.

The law of New York provided—

That no person shall be deemed to have lost or acquired a residence by living in any poorhouse, almshouse, hospital, or asylum, in which he shall be maintained at public expense.

All the committee seemed to agree that under this law the legal residence of a pauper was the place from which he came to the poorhouse. The minority raised the question whether some of the paupers who come to the almshouse before the passage of this law had not already acquired a residence there, and some of the minority drew a distinction between actual residence and legal residence (see 1 Bart., 102); but the main question was whether the proof was sufficient to establish the facts alleged. In the precinct where the 163 votes were charged lists were in evidence said to be copies of lists kept by two challengers of the votes challenged by them. They had challenged all these voters on the ground that they came from the almshouse and were consequently nonresidents. The inspectors of election testified that they had considered residence in the almshouse as much legal residence as residence in any other house in the district, and had admitted votes on this principle. The names found on the lists presented were also found on the poll list, and an officer of the almshouse testified that they were found on the books of the almshouse. He thought that some 18 or 20 of them had resided in the precinct before being admitted to the almshouse.

Upon this evidence the committee found that the persons in question were inmates of the almshouse; that they voted, and that not more than 20 of them were legal residents of the precinct. The

evidence that they voted for the sitting member consisted of proof that Democratic tickets were distributed at the almshouse the evening before election; that the officers in control of the almshouse were Democrats; that the conveyances in which the paupers came to the polls were furnished by Democrats, and that the Democratic tickets were on somewhat thicker paper, and that witnesses in watching the paupers vote were of the opinion that the tickets they had were Democratic. There was proof, however, that 5 of them voted the Whig ticket. Deducting these 5 votes and the 20 votes shown to be legal from the 163, and adding 19 illegal votes proved in other precincts, showed a total of 157 illegal votes cast for the sitting member, which being deducted from his vote, the contestant had a majority of 14 votes. The committee accordingly recommended resolutions declaring contestant elected.

The minority (minority report and most of majority report omitted from 1 Bart.) held that the proof was insufficient to show either that the persons voting were inmates of the almshouse, that they had not previously been residents of the precinct or that they voted for the sitting member, and that the burden was on the contestant to show all these facts. Neither the almshouse books, nor any copy of them, was put in evidence, and the official who testified that the names were on the books was a new official, he did not have charge of the books, did not show that he had collated the lists, and did not show that they were on the books at the time of the election; other testimony showed that two or three of them were not. The persons were not identified, even if the proof of the names was taken as sufficient. The witness did not know of more than 18 or 20 inmates who had been residents of the precinct previous to admission to the almshouse, but his acquaintance with the facts was not extended. Many of the inmates of the almshouse did go to other precincts to vote, and there was nothing to prove that those who voted at this precinct were not those who had a right to vote.

The proof that the voters voted for the sitting member was also of a very unsatisfactory character, and even such as it was it did not cover all of them. If the evidence were all taken to show the facts claimed for it, it would not show a majority for the contestant. A correction of the figures of the majority showed a majority of only 9 for the contestant; but this included at least 35 votes to which the alleged proof that they voted for the sitting member did not profess to apply, as well as a number of others where the chain of evidence lacked one or more links.

The House, after some debate, decided to send the case back to the people, and by a vote of 104 to 91 declared the seat vacant.

[1 Bart., 98-102; and Report No. 403, first session Thirtieth Congress.]

(2) SIBLEY.

Right of Territorial Delegate after admission of State. Majority report to admit Delegate; minority report to exclude him. Delegate admitted.

Majority report by Mr. Thompson; minority report by Mr. Boyden.

The State of Wisconsin had been admitted under an act making its boundaries somewhat different from those of the Territory of Wisconsin, and excluding the territory north and west of the St. Croix River,

containing a population of about 4,000. The governor of Wisconsin Territory having been elected to the United States Senate from the State of Wisconsin, the secretary of the Territory, who, under the Territorial laws, would become acting governor on the resignation of the governor, removed to the territory not included in the new State of Wisconsin, and set up an office as governor of the Territory of Wisconsin. The duly elected Delegate having resigned, the acting governor called a new election, and Mr. Sibley was elected as Delegate from Wisconsin Territory.

The committee found that by the ordinance of 1787, from which all Territorial governments are derived, the people were guaranteed the perpetual enjoyment of certain rights, including the ordinary forms of civil government. Unless the Territorial government still subsisted in that portion of the Territory of Wisconsin not included in the State of Wisconsin, the people of this territory were without laws or government, and reduced to a state of anarchy. These people had formerly enjoyed the right of representation in Congress. This right, and others, could only be taken away from them by the abrogation of the laws under which they enjoyed them and the substitution of other laws. No such enactments could be found, and in consequence the territory in question was still entitled to all the rights of the Territory of Wisconsin. Such was the construction of the laws made by the executive department, and demanded by important considerations of public policy.

The minority (minority report not given in 1 Bart.) held that the act empowering the corporation known as the Territory of Wisconsin to change itself into the State of Wisconsin, and the execution of that act, whereby the Territory became the State, worked an entire passing out of existence of the Territory of Wisconsin, so that no such corporation now existed. The territory sought to be represented by Mr. Sibley was too small to be equitably entitled to a Territorial legislature or a Delegate in Congress, and if it were true that the extinction of the Territory of Wisconsin left these people without any government or laws it would merely be a good reason for immediate action by Congress to supply such government.

The Delegate was admitted by a vote of 124 to 62.

[1 Bart., 102-107; and Report No. 10, second session Thirtieth Congress.]

THIRTY-FIRST CONGRESS, 1849-1851.

Committee on Elections.

Mr. STRONG, Pennsylvania,	Mr. HARRIS, Tennessee,
HARRIS, Alabama,	McGAUGHEY, Indiana,
VAN DYKE, New Jersey,	ASH, North Carolina,
DISNEY, Ohio,	ANDREWS, New York,
Mr. THOMPSON, Kentucky.	

Cases.

- (1) Hugh N. Smith, *New Mexico*.
- (2) A. W. Babbitt, *Deseret*.
- (3) Daniel F. Miller *vs.* William Thompson, *Iowa*.
- (4) John S. Littell *vs.* John Robbins, jr., *Pennsylvania*.
- (5) Jared Perkins *vs.* George W. Morrison, *New Hampshire*.
- (6) W. S. Messervy, *New Mexico*.

(1) SMITH.

Admission of Delegate before organization of Territorial government. Majority report against admission; minority report for admission. Delegate refused admission.

Majority report by Mr. Strong; minority report by Mr. Van Dyke. Under the Mexican Government New Mexico had been a State or department, with recognized boundaries, the right of representation, and local self-government. Upon the cession of the territory in which New Mexico was included to the United States, her former government ceased to exist, and a provisional military government was established by the military authorities. A convention was held at Santa Fe, which memorialized Congress for the establishment of some sort of permanent government and elected Mr. Smith as Delegate to Congress. The committee reported that no Delegate had ever been admitted from territory not yet organized under the laws of the United States, and that to admit such a Delegate would establish a dangerous precedent. The admission of Mr. Smith would be a *quasi* recognition of New Mexico as an existing government—a recognition which it was not in the power of the House alone to give. Moreover, two-thirds of the territory and population of New Mexico were east of the Rio Grande, and all this territory was claimed by Texas. Mr. Smith himself was a resident of this portion of the Territory. If the claim of Texas was well founded these people were already represented; and whether it was or not, the House ought not to take any action inferentially denying its validity.

The minority held that the question of the admission of a Delegate was not a question of law or precedent, but purely of the judgment of the House upon the particular facts of an individual case. The settled character of New Mexico, its former status in the Mexican Republic, its large population, and the importance of its interests under the control of Congress furnished strong reasons why the discretion of the House should be exercised in its favor. The claim of

Texas to a portion of New Mexico had never been established; it had always been resisted by Mexico and the people of New Mexico, and by the executive department of our own Government. The House ought not to take any action which would amount to a substantial recognition of that claim.

The case was debated at considerable length in the House, and the subject was finally disposed of by laying it on the table, by a vote of 103 to 93.

[1 Bart., 107-115.]

(2) BABBITT.

Admission of delegate from the alleged "State of Deseret." Committee reported against admission. Delegate refused admission.

Report by Mr. Strong.

A convention of inhabitants of the Great Salt Lake region had met and adopted measures for the establishment of a "State of Deseret." They drew up a memorial to Congress and elected Mr. Babbitt a delegate to present this memorial, and on the adoption of any form of government to represent the State of Deseret in Congress. The committee reported that Delegates had uniformly been admitted only from Territories organized under the Constitution and laws of the United States; that the admission of Mr. Babbitt would operate as a *quasi* recognition of the legal existence of the "State of Deseret"—a recognition not competent to be given by the House alone; and also that the credentials of Mr. Babbitt only showed that he had been selected to represent his constituency upon the adoption of some form of government, and hence it was evidently not contemplated that he should be admitted previous to the adoption of any form of government.

The debate was chiefly upon the question of the expediency of admitting the delegate. The whole subject was laid on the table, by a vote of 104 to 78.

[1 Bart., 116-118.]

(3) MILLER vs. THOMPSON.

Rejected returns. Votes cast in wrong counties. Majority report for sitting member; minority report for contestant. House vacated the seat.

Majority report by Mr. Strong; minority report by Mr. Van Dyke.

According to the official canvass the sitting member had a majority of 386 votes, but this official canvass did not include the votes cast in several precincts. If all the votes cast in the district were counted, contestant would have a majority of 59 votes. Upon most of the questions raised the committee agreed, and counted all the votes and precincts rejected for informality. The issues on which the case turned, and which were chiefly discussed in the reports, were three—(1) the vote of Kanessville, rejected by the commissioners of Monroe County; (2) the vote of Boone Township, Polk County; and (3) alleged illegal votes in Boone Township, Dallas County.

In Kanessville the vote was: Miller, 493; Thompson, 30. This vote had been duly returned to the clerk of Monroe County, but he refused to receive it, and the county commissioners did not count the vote of this township. The action of the clerk was condemned by the committee, but the majority found that upon the evidence the vote of this

THIRTY-FIRST CONGRESS.

township could not be counted, first, because the commissioners of Monroe County had no right to appoint judges of election and provide for an election, as was done in this case; and, second, because Kanesville was not as a matter of fact within the territory attached to Monroe County and under its jurisdiction.

At this time most of the western half of the State of Iowa was unorganized and sparsely settled. To each of the frontier counties was attached, for election and other purposes, that portion of the unorganized country lying west of it. Among the various provisions for the government of this territory were found two; one giving the county commissioners of the counties to which it was attached the power to establish townships in it, and to appoint the place where the electors should meet for the first township election; and another giving them the power, if it was not divided into townships, to establish voting precincts and appoint judges. Where townships were established, the power to appoint judges seems to have resided in the people at the first election; at subsequent elections the township trustees were to act as judges. The commissioners of Monroe County had established the township of Kanesville and appointed judges, who held an election and duly returned the votes. The committee held that the power of the commissioners to appoint judges was confined to *precincts* where no townships were organized, and that the appointment of judges in a township was in excess of their powers. They could only appoint a place for the first township election, and no other election could be held until after this township election, the time for which was later than the Congressional election in question.

But the main objection to the votes of Kanesville was the fact that it was not as a matter of fact within the territory attached to Monroe County. Recent surveys showed that the voting place was 6 miles north of a line drawn due west from the northern limit of Monroe County, and most of the voters lived still farther north. They were consequently attached to Mahaska County, the next county north, and had a right to vote only in that county or in precincts established under its authority. The fact that the voters *believed* at the time that they were due west of Monroe County (the place was 125 miles to the west, and there had been no surveys at the time of the election) was immaterial, as under the laws of Iowa the right to vote was restricted to the county in which the voter actually resided, and not to that in which he believed himself to reside.

Contestant claimed that the vote of Boone Township, Polk County, should be rejected, on the ground that Boone Township was in the Second and not in the First Congressional district. The First Congressional district included the counties in the southern half of the State, and all the unorganized territory south of a line running due west from the northwest corner of Polk County. The Second district included the northern counties and the unorganized territory north of the above line. Polk County was in the First district; Boone Township (afterwards Boone County) was in the unorganized territory north of the dividing line, but it was attached to Polk County for election purposes. The constitution of Iowa provided that territory so attached to a county should be considered as forming a *part* of it for election purposes. The districting act provided that no county should be divided in forming the districts. It was claimed that the provision of the districting act drawing the line between Polk County

and Boone Township or County was a virtual repeal of the former act attaching them. But the committee held that if the districting act did separate the two counties it rather rendered the act void. But the purpose of the act was evidently that the whole vote of a county should be canvassed together and form a part of the vote of one district. Boone Township was attached to Polk County for election purposes; its inhabitants could vote in no other county, and they must therefore be considered as belonging to the same district as Polk County.

The only other question was that of the legality of a number of votes cast in Boone Township, Dallas County. These voters came from the extreme western part of the State, and traveled sixteen days' journey to get to the voting place. They had a right to vote in whatever county they resided due west of. There was testimony in regard to the places of residence of 42 of them, which the majority of the committee found sufficient to show that the northernmost of them resided south of a line drawn due west from the southern border of Dallas County. They had therefore a right to vote in Mahaska, but not in Dallas County. Contestant conceded that 38 of them voted for him, and they were accordingly deducted from his vote.

According to these findings the majority of the sitting member was increased to 478; or, if the vote of Kaneshville was counted, he would still have a majority of 15 votes. The committee accordingly recommended a resolution declaring him elected.

The minority differed upon all three of these issues. The voters who voted at Kaneshville had an unquestioned right to vote in the First Congressional district, and they should not be deprived of their votes on technical grounds, unless those grounds were exceedingly strong. The county commissioners had always exercised the right of appointing election judges in the unorganized territory, and the judges so appointed in this case had conducted the election fairly and in strict compliance with the law. A line run since the election showed that Kaneshville was north of the northern line of Monroe County, but at the time of the election there had been no surveys. There was at the time of the election an admitted line which ran north of Kaneshville, and upon the basis of this line the county of Monroe had exercised jurisdiction, and the people had based their actions upon the assumption that they were within the jurisdiction of Monroe County. While the facts as now established might prevent any future jurisdiction by Monroe County, they could not invalidate the acts done under a past recognized jurisdiction.

Under the act for districting the State, Boone Township, Boone County, was in the Second Congressional district, and its inhabitants had no right to vote in the First district, in spite of the fact that by an earlier law Boone County, of which Boone Township was a part, had been attached to Polk county for election purposes, and that Polk County was in the First district. Under the law of the United States no district could elect more than one representative, and it followed that the inhabitants of one district could not vote for the representative of another district. Moreover, under the same law which attached Boone County to Polk County more than half the territory of the Second district was attached to Polk County, and it certainly could not have been the intention of the legislature to have the First district include the larger portion of the territory assigned to the Second.

The votes cast in Boone Township, therefore, ought not to be counted in the First district.

The votes alleged to have been illegally cast in Boone Township, Dallas County, were, with possibly 10 exceptions, not shown to be illegal. The evidence did not show, conclusively, that their residences were not due west of Dallas County. If these 10 were deducted, and the vote of Boone Township, Polk County, counted, the contestant would still have a majority, and he was consequently, in any view of the case, entitled to the seat.

The case was debated at considerable length, and the resolution presented by the majority was rejected by a vote of 102 to 94. The resolution declaring the contestant elected was then defeated by the casting vote of the Speaker, and the governor of Iowa was notified that a vacancy existed.

[1 Bart., 118-137.]

(4) LITTEL *vs.* ROBBINS.

Fraud; false counting; ballot-box stuffing. Majority report for sitting member; minority report to declare seat vacant. Sitting member retained the seat.

Majority report by Mr. Strong; minority report by Mr. Van Dyke.

According to the returns the sitting member received a majority of 410 votes. The district was all within the county of Philadelphia, and no charges were made against the election except in Penn district, a suburb of Philadelphia. In the two precincts of this district a majority of 755 votes was returned for the sitting member. The contestant alleged that in these two precincts 385 votes were returned which were not cast, and that 94 votes which were cast for him were not counted. The committee called attention to the fact that it was necessary to establish both of these charges in order to overcome the majority of the sitting member, and that no attempt had been made to establish the latter charge.

All the testimony in regard to the first charge was taken by the contestant, the sitting member having taken no testimony at all. The chief evidence that more votes were returned than cast was a list kept in each precinct by outside parties, stationed at the voting window. The official poll lists in the two precincts contained 385 names not found on these "window lists." The question at issue was whether these lists had been kept with sufficient accuracy to overthrow the *prima facie* correctness of the returns. The majority found that they had not been so kept. In the first precinct the list was kept by five different persons, each serving during a portion of the day. It was largely kept by placing a pencil dot before the names of the voters on the assessor's list as they voted. It was a crowded city district, and there was often such a press at the polls that it was impossible for the list keepers to see all the votes. The assessor's list they had was not strictly alphabetical, and they would probably not always find the name of one voter before the next one voted. The "window list" only included the votes cast from outside the window, but some votes were certainly cast from inside, and it was customary in Pennsylvania to allow the aged and infirm to vote from inside the room. Several persons were shown to have voted who were not on the list, and a list kept by one of the inspectors inside, while confessedly incomplete, and

containing many less names than were returned by the board, contained 111 more than were on the "window list."

The list at the second precinct was kept by two persons, who had no motive in keeping it accurately except curiosity. It was kept by writing down the names of voters as they voted during part of the day on small slips of paper, which were afterwards fastened together in book form. There was such a press around the polls that they were repeatedly pushed away from the window, and persons might thus have voted without their knowledge.

Under the Pennsylvania law very careful provision was made to insure a fair election. There was very little possibility of mistake, and no chance for fraud except by the collusion of five election officers, each of whom was sworn to perform his duty and liable to heavy penalties for failure to do so. No one portion of these "window lists" had more than one witness behind it, and against that witness was the official oaths of five election officers. This fact and the circumstances already mentioned as showing the probability of inaccuracy in the lists left it impossible to say that there was a preponderance of evidence that the returns were fraudulent.

There was no evidence to sustain the charge that the official list contained names of nonresidents, and nothing except what might be inferred from the evidence already mentioned to sustain the charge of ballot box stuffing, and the committee accordingly recommended a resolution declaring the sitting member entitled to his seat.

The minority (minority report and most of majority report omitted from 1 Bart.) held that the charges of contestant were substantially proved. The "window lists" may not have been entirely accurate, but they were substantially so, and they certainly could not have omitted over a third of the votes cast, as they did if the poll lists were correct. The election officers were all of contestee's party, and if they had chosen to commit fraud they had abundant opportunity to do so. The evidence presented was certainly more than sufficient to overcome the *prima facie* of the returns, and to render it incumbent on the sitting member to call the election officers or produce some evidence to sustain their correctness. There were other circumstances going to show the probability that more votes were counted than cast. The most suspicious circumstance, however, was that contestant had issued subpoenas for all of the voters whose names were on the official list but not on the "window list," and that not one of them could be found. This would show, what the other testimony already indicated, that they were purely imaginary persons.

It would be entirely competent for the House to throw out the entire election at these two fraudulent precincts, which would give the seat to the contestant; but the minority recommended, as probably the fairest course, that the election be declared void.

After a brief debate the House adopted the resolution presented by the majority, without division, and the sitting member retained the seat.

[1 Bart., 138-141, and Report No. 488, first session Thirty-first Congress.]

(5) PERKINS *vs.* MORRISON.

Whether election to fill vacancy to be held in old district or new. Majority report for sitting member; minority report for contestant. Sitting member retained the seat.

Majority report by Mr. Strong; minority report by Mr. McGaughey.

At the time of the election of members to the Thirty-first Congress the Third district of New Hampshire was composed of two counties. A redistricting act was subsequently passed, to take effect upon its passage, in which the Third district was composed of the same two counties and four additional towns. Mr. Wilson, the Representative for the Third district, resigned, and the governor issued his precept for an election to fill the vacancy, addressed to the Third district as newly constituted. The election was held, and in the whole district the sitting member received a majority, but in the two counties constituting the original district the contestant received the majority. The committee reported that the only district having legal existence at the time the election was held was the district as constituted by the new law. That law was valid unless it was in conflict with the Constitution or some law of the United States, which was not claimed. Representatives are the representatives of all the people of their States, and so the argument from double representation did not apply. The question of the policy or justice of the law was not for the House to consider. The fact that the State might have been so redistricted that it would be impossible to determine from which district the election should be filled did not affect the question, as the possibility that a right may be abused does not destroy the right.

The minority held that it was plain that the redistricting act was only intended to apply to future Congresses. A vacancy "is the occurrence of an event by which a portion of the people are left unrepresented," and it ought to be filled by the people thus left without representation. The people of the four towns whose votes decided the result of this election in favor of the sitting member were already represented by another Representative. If the people in whose representation the vacancy occurred did not have the right to fill it, it was impossible to say to whom that right belonged, as the numbering of the districts was immaterial, and the territory or population of the old district might be equally divided between two new districts, neither of which would have the old number.

After considerable debate the House confirmed the right of the sitting member to his seat by a vote of 98 to 90.

[1 Bart., 142-147.]

(6) MESSERVEY.

Right of Delegate from New Mexico to admission. Committee reported against admission. No action by the House.

Report by Mr. Strong.

As already noticed in the case of Hugh N. Smith, a convention of the people of New Mexico had met at Santa Fe and drawn up a plan for a Territorial government and selected Mr. Smith as Delegate. Before any decision had been made by the House in this case another con-

vention met in Santa Fe and adopted measures for a *State* government. Under the regulations adopted by this convention Mr. Messervey was elected as a Representative in Congress. He presented his credentials as such, but only asked to be admitted as a Territorial Delegate. The committee reported that he could certainly not be admitted as a Delegate from the Territory of New Mexico upon an election and credentials purporting to constitute him a Representative of the State of New Mexico. The same reasons were given against his admission as were given in the previous cases of Smith and Babbitt, with the additional one that as a form of Territorial government had now been adopted for New Mexico no consideration of expediency could be urged in favor of seating the claimant.

The case was not acted upon in the House.

[1 Bart., 148-152.]

THIRTY-SECOND CONGRESS, 1851-1853.

Committee on Elections.

Mr. DISNEY, Ohio,	Mr. CASKIE, Virginia,
ASHE, North Carolina,	EWING, Kentucky,
WILLIAMS, Tennessee,	DAVIS, Massachusetts,
HAMILTON, Maryland,	GAMBLE, Pennsylvania,
Mr. SCHERMERHORN, New York.	

Case.

Hendrick B. Wright *vs.* Henry M. Fuller, *Pennsylvania.*

WRIGHT *vs.* FULLER.

Irregularities; illegal votes. Majority report to declare seat vacant; minority report for contestee. Contestee retained the seat.

Majority report by Mr. Ashe; minority report by Mr. Davis.

According to the returns the sitting member had a majority of 59 votes. The contest was confined to Danville precinct, Montour County, where the vote was 32 for contestant and 659 for contestee. The contestant attacked this precinct on the ground of irregularities in the organization and conduct of the election board, and also charged that illegal votes sufficient in number to change the result were cast in this precinct for the contestee.

The contestee objected to the sufficiency of the notice of contest, on the ground that it should have included the names of the voters alleged to have voted illegally, and that it should have alleged more particularly by whom and in what manner the irregularities complained of were committed. As this was the first case under the law of 1851 for taking testimony, both the majority and the minority discussed to some length the question of the sufficiency of the notice. The majority held that the notice was sufficient, in that it alleged illegal votes cast at a particular poll sufficient in number to change the result of the election, and specific irregularities committed at the same poll. If the law had intended that the names of the illegal voters should be included, it would have explicitly required it, as in another section it did explicitly require that the names of the witnesses should be given in the notices to take testimony. In many cases, of which this was one, it would be practically impossible to give in advance the names of all illegal voters, and any such rigid requirement would defeat the end of the law.

The intention of the law requiring this notice to be given was to prevent any surprise being practiced, to put the sitting member upon a proper defense.

The notice of contest in this case was sufficient for this purpose.

The irregularities complained of were that the various officers of election usurped each other's functions; that unsworn outsiders assisted in the election, and that these irregularities had for their purpose and result the reception of a large number of illegal votes. Under the laws of Pennsylvania the election board consisted of a judge,

two inspectors, and two clerks. The duties of these officers were different, and the oath taken by each only bound him to perform the duties of his own office; so that, the committee held, any one of them performing the duties of another was *pro hac vice* unsworn. It appeared that during part of the day the judge performed the duties of an inspector, an inspector performed the duties of a clerk, a clerk performed the duties of an inspector, an unsworn outsider performed the duties of a clerk, and the assessor, who was required to be in attendance with his assessment lists, devoted himself to distributing tickets.

On ordinary occasions, where there were no charges of fraud or misconduct, such irregularities might be overlooked, but in this case such charges were made and fully sustained; and under such circumstances to overlook the irregularities would be to open wide the door to fraud. If this were a case arising under the laws of a State, the proper remedy might be to punish the officers for misconduct, but as the House had no power to punish State officers the only remedy was to declare the election void.

With such irregularities it was not surprising to find 1 vote in 5 illegal. The vote cast was very much larger than had ever been cast in the precinct before, and naturally aroused suspicion. It was shown that 41 foreigners voted who had been naturalized since the election, and hence could not have been qualified voters at that time. Ninety-four persons voted whose names were not on the assessor's list, and against whose names the words "tax," "age," etc., had not been written, as required by law, to show that they had made proof of qualification. Thirty-nine persons appeared to have voted under the provision for persons between the ages of 21 and 22, a most extraordinary proportion. There were also 9 votes of nonresidents. The efforts of contestant to show all the illegal votes, and to show how they were cast, were in a measure frustrated by the refusal of witnesses to obey the subpoenas of the commissioner. As on this account he had not been able to show enough illegal votes cast for contestee to overcome the returned majority, the committee could not recommend seating the contestant, but recommended that the seat be declared vacant.

The minority (only part of minority report given in 1 Bart.) held that, there being no charges of fraud, the contestant having admittedly failed to show enough illegal votes cast for contestee to overcome the majority, and the irregularities being such as the courts of Pennsylvania had decided to be immaterial, the case of contestant was not made out and there was no ground for setting aside the election.

The notice of contest ought to have been held insufficient, because neither the names nor the number of illegal voters were given. The words "specify particularly" in the law clearly required this degree of particularity, and it had always been required by the House even in the absence of law.

If the 41 unnaturalized votes and the 3 nonresidents were taken as proved, it would not affect the result, especially in view of the 13 illegal votes proved and conceded to have been cast for contestant at other polls. The evidence in regard to the alien votes was unsatisfactory, in that it did not establish the identity of the voters, and there was proof in a considerable number of cases showing several persons of the same name. There was, moreover, no pretense of proof how these voters voted. The votes attacked because the election officers had

failed to write the reasons for their reception after the names on the poll book were not shown to be illegal, as such omission was common, and occurred on many of the poll books before the committee. It was not a fatal irregularity. The complaint of contestant that witnesses had refused to obey the subpoenas of the commissioner was not justified. The subpoenas were issued in the name of the Commonwealth of Pennsylvania, instead of the United States, and were otherwise illegal and nonenforceable. The commissioner himself showed the most flagrant partisanship in favor of contestant, and witnesses were not much to be blamed for not caring to appear before such a commissioner.

The irregularities complained of did not affect the substance of the election, and could easily be explained by the ordinary circumstances of an election. The courts in Pennsylvania, as everywhere, had always held that such irregularities, in the absence of fraud, did not vitiate an election; and there was no allegation of fraud in this case.

After considerable debate the House laid the whole subject on the table by a vote of 87 to 74, which was substantially a decision in favor of contestee and the recommendations of the minority, as it left Mr. Fuller in his seat.

[1 Bart., 152-164, and Report No. 136, first session Thirty-second Congress.]

THIRTY-THIRD CONGRESS, 1853-1855.

Committee on Elections.

Mr. STANTON, Kentucky,	Mr. STRATTON, New Jersey,
GAMBLE, Pennsylvania,	DICKINSON, Massachusetts,
EWING, Kentucky,	BLISS, Ohio,
SEWARD, Georgia,	CLARK, Michigan,
Mr. MADISON, New York.	

Case.

William Carr Lane *vs.* José Manuel Gallegos, *New Mexico.*

LANE *vs.* GALLEGOS.

Irregularities; Indian votes. Report for contestee. Contestee retained the seat.

Report by Mr. Stanton.

The contestant claimed that many polls where majorities were cast for contestee ought to have been rejected and that other polls were wrongly rejected, to the prejudice of contestant. The committee found that, as might have been expected in a Territory newly admitted, whose people did not understand the forms of our laws, there were many irregularities in the election and returns; but as these irregularities did not affect the substance of the election and there was no proof of fraud they were disregarded. The main irregularity consisted in returning the poll books separately from the abstract of votes, and a few days later. A number of Indians offered to vote, but their votes were refused, as the committee held, properly. They sustained tribal relations and were like other savage tribes. The only return rejected by the committee was that of a precinct where all the votes were cast by Indians and the election was organized by the Indians and held by their chiefs without authority of law.

The resolution presented by the committee sustaining the right of contestee to his seat was adopted without debate or division.

[1 Bart., 164-166.]

THIRTY-FOURTH CONGRESS, 1855-1857.

Committee on Elections.

Mr. ISRAEL WASHBURN, Jr., Maine,	Mr. HICKMAN, Pennsylvania,
STEPHENS, Georgia,	COLFAX, Indiana,
WATSON, Ohio,	SMITH, Alabama,
SPINNER, New York,	BINGHAM, Ohio,
Mr. OLIVER, Missouri.	

In the second session Mr. SAVAGE, of Tennessee took the place of Mr. OLIVER. In the third session Mr. OLIVER again took the place of Mr. SAVAGE.

Cases.

- (1) J. S. Turney *vs.* Samuel S. Marshall, and P. B. Fouke *vs.* Lyman Trumbull, *Illinois*.
- (2) William B. Archer *vs.* James C. Allen, *Illinois*.
- (3) James A. Milliken *vs.* Thomas J. D. Fuller, *Maine*.
- (4) Miguel A. Otero *vs.* José M. Gallegos, *New Mexico*.
- (5) A. H. Reeder *vs.* J. W. Whitfield, *Kansas*.
- (6) Hiram P. Bennet *vs.* Bird B. Chapman, *Nebraska*.
- (7) S. B. Clark *vs.* Augustus Hall, *Iowa*.
- (8) A. H. Reeder *vs.* J. W. Whitfield (second case), *Kansas*.

(1) TURNNEY *vs.* MARSHALL, and FOUKE *vs.* TRUMBULL.

Power of States to superadd qualifications. Report for sitting members. Sitting members retained seats.

Report by Mr. Bingham.

Messrs. Marshall and Trumbull had each received a large majority of the votes cast in their respective districts. Their elections were contested on the ground that all the votes cast for them were nullities, under the following provision of the constitution of Illinois:

The judges of the supreme and circuit courts shall not be eligible to any other office of public trust or profit in this State, or the United States, during the term for which they are elected, nor for one year thereafter. All votes for either of them for any elective office (except that of judge of the supreme or circuit court) given by the general assembly or the people shall be void.

Mr. Marshall had been elected to the circuit and Mr. Trumbull to the supreme court of Illinois, each for terms which (with the additional year of disqualification) would have extended beyond the time at which they were elected to Congress. The committee, quoting the well-known opinions of Story and Kent, held that the States had no power to superadd qualifications for Representative in Congress to those prescribed in the Constitution. Messrs. Marshall and Trumbull were possessed of all the constitutional qualifications, and the people had a right, guaranteed by the Constitution, to elect them to Congress, and they could not be deprived of this right by any State law or constitution. It was contended that the question was not one of qualification, but of election under the laws of Illinois, but the committee held that

inasmuch as the votes were conceded to be the votes of qualified electors, cast at the place and time and in the manner prescribed by law, there could be no question in regard to the election except that of the qualification of the returned members.

After a short debate the House sustained the conclusion of the committee by a vote of 125 to 5.

[1 Bart., 167-169.]

(2) ARCHER *vs.* ALLEN.

Recount; illegal votes. Majority report for contestant; minority report for contestee. House vacated the seat.

Majority report by Mr. Washburn; minority report by Mr. Stephens.

According to the returns the sitting member had a majority of 1 vote. The contestant served a notice of contest, containing the following specification:

That the returns made by the returning officers, as officially announced, are incorrect, and that the poll books of the several counties in this district show that I received a majority of the legal votes polled in the said district for the said office, and am entitled to the certificate of election therefrom.

This notice was seasonably sent to Washington, but through inadvertence the notice to take testimony was not served until nine days before the time the testimony was to be taken (the law requiring ten days). The sitting member objected to the testimony taken, on the ground of insufficient notice. The committee, with the assent of both parties, passed a resolution giving the parties forty days additional in which to take testimony. Before this time had expired the House passed a resolution calling on the committee to report what action they had had in the case. The committee reported these facts, with a statement that their action was in accordance with many precedents, and in the interest of fairness.

The additional testimony having been taken, the committee on the whole case reported in favor of the contestant; the minority reported for contestee. The contestee objected to the notice of contest (whose only specification upon which evidence was taken is quoted above) on the ground that it did not "specify particularly" the grounds upon which contestant relied. The committee held that the notice was sufficient "to authorize an investigation of the correctness of the returns made by the returning officers of any precinct in the district. The notice embraced all the precincts in general terms, and was as good a compliance with the law of 1851, and as serviceable to the sitting member as if every precinct in the district had been specifically named."

The grounds of contest, as developed by the evidence, were two: A recount of ballots in one precinct made while the testimony was being taken, and 3 illegal votes. The recount showed 1 less vote for the contestee and 3 more for the contestant than were shown by the original count. The 3 additional votes for the contestant were ballots which were not counted for either candidate at the first count, on the ground that both names were attempted to be erased. A third count, made a year later, while the additional evidence was being taken, confirmed the recount. The ballot box had been securely locked and kept by one of the judges, another judge taking the key. The key was lost, but the judge who had the box had another key of his own which would fit the lock. This judge was a political partisan of con-

testee, and would not have been likely to tamper with the box in the interest of contestant. He testified that it had not been tampered with at all. The committee had no doubt that the ballots recounted were the same as those first recounted, and in the same condition, and accepted the result of the recount. The original ballots not counted at the first count were in evidence, and the committee were of the opinion that at least one of them, and probably two, ought to be counted, as was done on the recount. If either of them was counted it would elect the contestant.

Of the 3 illegal votes charged, 2 were perhaps illegal; but there was no competent evidence how they were cast. The other was not proved to be illegal.

The minority held that the notice of contest was insufficient, in that there were no particular specifications of the grounds relied on.

It was almost as vague and indefinite as if it had simply notified the sitting member that the contestant intended to claim the seat upon the grounds that he was duly elected and that the sitting member was not.

The law of Congress we do not regard as merely directory or cumulative, but as peremptory and binding in its import and intention as any other law regulating any other judicial proceeding. The House, in judging of the election returns of its members, sits as a court; their proceedings are judicial in their character, and why it is not as competent for Congress by law to regulate the proceeding in this court as in any other?

But if the testimony were admitted it was not sufficient. The recount took place six months after the election, and during all that time the box and a key had been in the possession of one man. The other key was lost, and might have been found and used by some unknown person. So long as there was a possibility that the ballots might have been tampered with, it would be a dangerous precedent to allow a recount. But if it were allowed, it would not change the result. The 3 ballots for contestant not counted on the first count ought not to be counted, as it was the evident intention of the voter to erase the names. If the alleged mistake of 1 in favor of contestee were allowed, it would only make the election a tie. But of the 3 illegal votes charged the only one in regard to whom the proof was sufficient was shown to have voted for contestant instead of contestee, and this would still elect contestee by a majority of 1.

After some debate, the resolution declaring the contestee not elected was passed by a vote of 94 to 90. The resolution declaring the contestant elected was then lost by a vote of 89 to 91, and the Speaker was directed to inform the governor of Illinois of the vacancy.

[1 Bart., 169-176, and Reports Nos. 8 and 167, first session Thirty-fourth Congress (parts of all three reports omitted in 1 Bartlett).]

(3) MILLIKEN *vs.* FULLER.

Irregularities. Report for contestee. Contestee retained the seat.

Report by Mr. Spinner.

The result of the election would not be changed unless the votes of plantations were thrown out because no lists of voters were returned to the secretary of state, or because the election officers were elected at the meeting in April instead of the meeting in March, and the committee considered only these questions. As to the last point, the committee were unanimous in the opinion that as no fraud was alleged,

and the persons officiating were officers *de facto*, the votes were rightfully counted. As to the other point, the committee were divided as to what their opinion would have been if it were an original question; but as the contemporaneous decision of the State canvassers had recognized the returns as valid, they did not feel authorized to exclude the votes.

The House passed the resolution declaring the sitting member elected without debate or division.

[1 Bart., 176, 177.]

(4) OTERO *vs.* GALLEGOS.

Illegal votes; irregularities; fraud. Report for contestant. Contestant seated.

Report by Mr. Smith.

The contestant alleged that in certain specified precincts the votes of Mexican citizens were illegally cast for contestee. He specified the precincts and the number of votes attacked in each. The contestee objected that the notice was insufficient and that he should have been given a list of the names of the voters attacked. The committee held "that the notice was quite sufficient to authorize the taking of the testimony."

Under the treaty by which New Mexico was ceded to the United States, it was provided that all the inhabitants who might choose to retain their Mexican citizenship might do so, but that all who did not declare their intention to retain their Mexican citizenship within one year from the date of the treaty should be held to have elected to become citizens of the United States. The contestee objected to the authority of the tribunal before whom the voters in question were alleged to have declared their intention. Congress had provided no tribunal, but the committee held that this failure of Congress could not be so construed as to prevent the carrying out of the treaty stipulation. The military governor of the Territory had, within the year, issued a proclamation directing that there should be opened in the prefectures of the several counties registers of enrollment of those who should elect to retain the character of Mexican citizens. This proclamation was carried out, and large numbers of persons were enrolled. The committee held that in the absence of any Congressional enactment, the governor was the proper person to designate the tribunal and prescribe the mode of making the declaration; and that any declaration made in good faith, under the above proclamation, was legally valid.

There was evidence to show that 143 persons voted for the sitting member whose names were the same as names found on these enrollments. This the committee held to be *prima facie* evidence that the persons who voted were not American citizens, and to shift the burden of proof to the opposite party. There was some evidence tending to show that 12 of the voters might not be the same as those on the enrollment, or might have been improperly placed thereon; and while this evidence was unsatisfactory, the committee allowed these votes to stand. The remainder were illegal, and were more than sufficient to overturn the returned majority of the sitting member.

One precinct had been thrown out by the probate judge for fraud and irregularities, and contestee asked that it be counted. But it appeared that the election was practically *viva voce*, the judge crying

each vote as it was cast, in violation of the law; that the election officers were not sworn; that the ballots, which were required to be delivered by the voters in person, were handled and written upon by an unsworn outsider; that the legal poll books were not used, but loose sheets of paper, and that there were 192 ballots in the box not numbered, and in excess of the names on the poll book. Upon these facts, and the judicial determination of the probate judge, the committee held that the return was properly rejected.

The sitting member asked to have one return thrown out where he was returned as receiving only 18 votes, on the ground that 124 persons testified that they voted for him. But the testimony was not taken before the officer named in the notice, and the testimony of the voters did not show whether or not they could read, or otherwise knew for whom they voted. It was merely a list of names, with a certificate of the judge that each of the persons named made oath that he was a resident of the precinct in question and voted for contestee. To admit this sort of testimony to overthrow the acts of the officers of election would establish a dangerous precedent. This testimony could not be true unless fraud was committed, with the connivance of all the election officers. Testimony should first have been introduced to show this fraud.

The committee recommended resolutions declaring contestant elected, and after arguments by contestant and contestee, the House passed the resolutions without division.

[1 Bartlett, 177-185, and Report No. 90, first session Thirty-fourth Congress (part of report not given in 1 Bartlett).]

(5) REEDER vs. WHITFIELD.

Law under which election held invalid on account of violence and intimidation. On preliminary question the majority reported in favor of sending for persons and papers and bringing them to Washington; the minority reported that no investigation was demanded. The House sent a special committee to Kansas to take testimony. On the final case the majority reported for the contestant; the minority for the contestee. The House vacated the seat.

Majority report on preliminary question by Mr. Hickman; minority report by Mr. Stephens.

Majority report on final case by Mr. Washburn; minority report by Mr. Stephens.

This case involves the disturbances in Kansas following the Kansas-Nebraska act. It is not necessary to enter fully into the historical questions involved. The contestant claimed that the law under which the election was held was invalid, because the Territorial legislature by which it was passed was not elected by the people of Kansas, but was imposed upon them by an armed invading force. The contestant did not claim his election under this law, or any other, but by virtue of an election held by the people independently of the law. He alleged that at the election at which contestee claimed to have been elected large numbers of illegal votes were cast by the persons who had invaded the Territory from Missouri.

The committee called attention to the public importance of the questions involved, and quoted in detail the startling statements of

facts which the contestant offered to prove. If these facts could be proved it was of the highest importance to the House and the country that a full investigation should be had. The state of affairs in Kansas was alleged to be such that it would be impracticable to take the testimony in any other way than by sending for persons and papers, and bringing them to Washington, and the committee accordingly recommended a resolution empowering the committee to send for persons and papers. It was objected that the contestant could not be heard to object to the validity of the Kansas legislature, inasmuch as he had himself, as governor of Kansas, issued certificates of election to its members, and held official communication with it as a legislative body. But the committee held that the principle of estoppel ought not to be applied by the House to a case so plainly calling for the most searching investigation, and also that in any case this principle could not be applied to the rights of the people of Kansas, whom contestant professed to represent.

The minority held that the contestant, upon his own showing, could establish no valid claim to the seat held by contestee, and hence had no standing as a contestant under the law. The investigation asked for was really not an investigation into the election of the sitting member, but into the election of the members of the Territorial legislature of Kansas. This was a jurisdiction which the House had never before claimed, and which the minority did not believe it possessed. If, however, the investigation was to be made it might better be done by sending a commission to Kansas.

The House at first adopted the resolution presented by the committee, but reconsidered the vote, and sent it back to the committee. The resolution finally adopted by the House provided for the appointment of a committee of three members to proceed to Kansas and take evidence in regard to all the troubles in Kansas. Messrs. Sherman, Howard, and Oliver were appointed, and conducted the investigation. They reported a large amount of evidence, from which they drew the conclusions that each election held in the Territory had been carried by organized invasion from the State of Missouri; that the alleged Territorial legislature was an illegally constituted body, with no power to pass valid laws; that the election under which the sitting member held his seat was not held under any valid law, and could only be regarded as an expression of the choice of those resident citizens who voted for him; that the election under which contestant claimed the seat was not held under any law, and could similarly only be regarded as an expression of the choice of those resident citizens who voted for him; that more resident citizens voted for the contestant than for the sitting member; and that in the present condition of the Territory a fair election could not be held.

The committee reported that these conclusions were fully sustained by the evidence. Neither of the claimants was elected under any valid law. But the committee could not under the circumstances recommend that the seat be declared vacant. The office of Delegate is not created by the Constitution, but Delegates are received as a matter of favor. The House might admit private persons to appear before it as counsel, and it might admit any persons it chose to represent the people of a Territory. This was a most extraordinary case, and under all its peculiar circumstances the committee were of the opinion that the

contestant, having received an expression of their choice from the largest number of legal voters, ought to be admitted.

The minority (minority report not given in 1 Bart.) held that the House had no power to inquire into the validity of the election and organization of the legislature of Kansas. The laws passed by that legislature must be held to be valid unless they were in conflict with the organic law of the Territory or the Constitution of the United States. The contestee having received an undisputed majority of the votes cast at the election held under the law, even after the elimination of all illegal votes, he was entitled to retain the seat. The only evidence elicited by the investigating committee throwing any light on the question of the validity of the legislature was a private admission of contestant that it was legally organized. The testimony did not show the condition of violence and intimidation claimed. Every citizen of Kansas was free to vote as he pleased, and if it was true that many nonresident votes were cast, their number was not sufficient to affect the result of the election.

As to the proposition of the committee to unseat the contestee because he was not elected under a valid law, and then seat the contestant, who did not claim to have been elected under any law, the minority said that they could look upon it "as nothing short of an open outrage upon both law and right, and if it be sanctioned by the House, an act without a parallel in the annals of parliamentary history."

The resolution declaring that contestee was not elected was agreed to after a prolonged debate by a vote of 110 to 92. The resolution giving the seat to the contestant was rejected by a vote of 88 to 113. The seat thus being vacated, a new election was held, which gave rise to a second contest (see page 149).

[1 Bart., 185-204, and Report No. 275, first session Thirty-fourth Congress (part 2, minority report, not given in 1 Bartlett).]

(6) BENNET *vs.* CHAPMAN.

Irregularities. Majority report for contestant; minority report for contestee. Contestee retained the seat.

Majority report by Mr. Watson; minority report by Mr. Stephens.

Counting all the votes cast in the Territory, contestant had a majority of 13 votes. But the governor and Territorial canvassers had rejected the returns of about half the counties in the Territory for various irregularities, and contestee claimed that these returns, or enough of them to give him the majority, were properly rejected.

Some of the returns were rejected on the ground that the poll books containing the precinct returns were forwarded by the county register to the office of the secretary of the Territory. The law required them to be kept in the office of the county register, there to be canvassed by the probate judge and three householders, and the canvass to be forwarded to the secretary of the Territory. But the committee held that the law was merely directory, and that the irregularity was not such as to justify the rejection of the votes. The probate judge and three householders had no power in their canvass except to count the votes returned to them. The original precinct returns were better evidence of the vote than any canvass of them could be, and the only

irregularity was that the Territorial canvassers had better evidence before them than the law required them to have.

In one county the clerk certified a county abstract in due form, and also certified abstracts of the precinct votes. On these latter abstracts he certified that no poll books had been returned to him from certain of the precincts. The committee held that if this was a fact, the clerk's certificate was not evidence of it. In one of the precincts there was affirmative proof that a poll book was kept, and even if it were admitted that it was not transmitted to the county clerk with the abstract of votes, this ought not to invalidate the return.

Two counties had been rejected because of illegal votes and because the county canvassers had refused to certify to the election of a county officer voted for at the same election. It was claimed that if this rejection was not sustained, at least those votes cast on the "half-breed tract" should be rejected. But the committee found no evidence that they had ever been counted. The certificates on the returns indicated that they had not been counted, and while these certificates might not be evidence of the fact, they were certainly not evidence to the contrary. Even if they were counted, the committee were of the opinion that the voters had a right to vote. They were citizens of the United States, the territory on which they lived was different from ordinary Indian reservations, and even if they were trespassers on it, the trespass should not disfranchise them. The other objections to their votes were not sustained by evidence.

The contestant having received a majority of all the votes, the committee reported resolutions declaring him elected.

Mr. Stephens presented a minority report, holding that contestee was legally elected. The omission of the county canvass of votes he held to be a fatal irregularity. The election officers were appointed by the probate judge, and unless their returns were canvassed by him there was no evidence that the persons making returns were the election officers. The poll books, or lists of voters, were the only means of detecting illegal votes, and the returns not accompanied by them were properly rejected. But if all these votes, and all votes except those cast on the "half-breed land" were counted, contestee would still have a majority. The officers who held the election in the "half-breed land" acted without legal appointment and were not sworn. The persons on this land were outside of the civil jurisdiction of the Territory, refused to pay taxes or perform the duties of citizens, and were clearly not entitled to vote.

After a brief debate the House confirmed the right of the sitting member to his seat by a vote of 69 to 63.

[1 Bart., 204-214.]

(7) CLARK *vs.* HALL.

Irregularities. Report for contestee. Contestee retained the seat.

Report by Mr. Bingham.

The committee reported that some of the county abstracts were informal, but in accordance with their decision in the previous case (Bennet *vs.* Chapman) they did not reject them. It also appeared that some of the abstracts did not contain all the votes cast, but as the changes required by the evidence would not overcome the returned

majority of the contestee they reported a resolution declaring him elected. The House agreed to the resolution without debate or division.

[1 Bart., 215.]

(8) REEDER *vs.* WHITFIELD (second case).

Same issues as first case; and also right of governor of Kansas to order special election. Majority report to declare seat vacant; minority report for sitting Delegate. Resolution laid on the table, leaving contestee in his seat.

Majority report by Mr. Washburn; minority report by Mr. Oliver.

The House having declared the seat of the Delegate from Kansas vacant, the governor issued a proclamation fixing a time for a new election. At this election Mr. Whitfield received all the votes cast. He was admitted to the House pending the contest, after a long debate.

The committee found that the election was held by officers and according to laws deriving their authority from the legislature of Kansas, which had already been decided by the House to be an illegal body and incapable of passing valid laws. But if its legality were conceded, there was no law under which this special election could have been held. The organic law of the Territory empowered the governor to fix the time for holding the first election, but subsequent elections were to be held at times fixed by the legislature. Among the provisions of the laws passed by the legislature was no provision for a special election like this. If, however, it had appeared that the sitting member was the choice of a majority of the citizens of Kansas, the committee would be inclined to waive these considerations and recommend that the House exercise its discretionary power to admit him. But this did not appear, and the contrary seemed probable. The election was held under a law passed by, and by officers indirectly appointed by, the usurping legislature. These officers might be trusted to carry out the law according to the evident intent of the legislature. The law was an extraordinary one. It prescribed no period of residence as a qualification for voting, but only actual inhabitancy in the Territory at the moment of voting. The election officers might at their discretion receive evidence concerning the qualification of voters, or examine the voters themselves; in the latter case no other evidence was to be received to contradict the voter's oath. All the voters were required to take a test oath to support the fugitive-slave law and the Kansas-Nebraska act. The laws thus permitted any citizen of Missouri to vote who would swear that he was at the time of the election an inhabitant of Kansas, while disfranchising all of the citizens of Kansas who could not subscribe to a test oath committing themselves to the principles of the party in power. A large proportion of the citizens of Kansas did not vote at the election, both because they were disfranchised by the test oath and because they believed the election to be held without authority of law.

The committee recommended that the seat be declared vacant.

The minority held that the charges that the legislature of Kansas was elected by fraud and usurpation were unfounded. While there might have been individual instances of violence, the majority of the legislature were elected by a majority of the *bona fide* citizens of Kansas.

The spirit of the organic act of the Territory justified the governor in fixing the date for the special election, and it was still more clearly made his duty by the spirit of the act of 1817. The objection to the election on this score was technical, and not of the sort that ought to be addressed to a tribunal like the House of Representatives.

The House, by a vote of 96 to 85, tabled the resolution reported by the committee, which left Mr. Whitfield in his seat. The only debate on this case was upon the swearing in of the Delegate when he first appeared.

[1 Bart., 215-222.]

THIRTY-FIFTH CONGRESS, 1857-1859.

Committee on Elections.

Mr. HARRIS, Illinois,	Mr. PHILLIPS, Pennsylvania,
BOYCE, South Carolina,	GILMER, North Carolina,
WASHBURN, Maine,	LAMAR, Mississippi,
STEVENSON, Kentucky,	WILSON, Indiana,
Mr. CLARK, Connecticut.	

In the second session, Messrs. WRIGHT, of Tennessee, and CAVANAUGH, of Minnesota, in place of Messrs. PHILLIPS and HARRIS.

Cases.

- (1) Clement L. Vallandigham *vs.* Lewis D. Campbell, *Ohio*.
- (2) Henry P. Brooks *vs.* Henry Winter Davis, *Maryland*.
- (3) W. W. Phelps and James M. Cavanaugh, *Minnesota*.
- (4) Alpheus G. Fuller *vs.* W. W. Kingsbury, *Minnesota Territory*.
- (5) Wm. Pinkney Whyte *vs.* J. Morrison Harris, *Maryland*.
- (6) Bird B. Chapman *vs.* Fenner Ferguson, *Nebraska*.

(1) VALLANDIGHAM *vs.* CAMPBELL.

Application for further time to take testimony refused. Illegal votes. No majority report. First minority report for contestant; second minority report for contestee; third minority report to vacate seat. Contestant seated.

Majority report on preliminary question by Mr. Harris; minority report by Mr. Wilson.

First report on main case by Mr. Lamar; second report by Mr. Gilmer; third report by Mr. Harris.

Contestee applied to the committee to recommend that time be given to take further testimony. The committee reported that the main grounds on which the application was based seemed to be that contestee, having been a member of the previous House, had been unable to attend at the taking of testimony, and that contestant had occupied the whole of the sixty days, leaving no time for contestee. The committee found that the first ground furnished no valid excuse, as the law plainly contemplated that the parties might be represented by agents. The second ground was also insufficient, for, while the law prevented either party from taking testimony in two places at once, it did not prevent both parties from taking testimony at the same time.

The minority recommended that the extension be granted. The contestant had occupied the whole time, in some cases taking testimony in two places at once, so that he had utilized seventy-five days within the sixty days, while contestee had only been able to use ten days. At the close of the sixty days contestee had proposed that both parties continue to take testimony, waiving the objections of time, but contestant had refused, and no course was left to contestee but to make application to the House when in session.

The House, by a vote of 114 to 101, refused to extend the time.

On the main case the committee were unable to agree. Four members agreed to the report of Mr. Lamar for contestant, four to the report of Mr. Gilmer for contestee, and Mr. Harris, the chairman, recommended that the seat be declared vacant. The House adopted the conclusions of Mr. Lamar's report.

There were a number of technical questions raised in regard to the evidence of contestant. It was objected that the notice was insufficient, in not giving the names of the voters objected to, but the first minority held that it was sufficient to designate them by the class to which they belonged. The only evidence of the whole vote as returned was an abstract of votes from the secretary of state's office, which was procured after the expiration of the sixty days. But it was held that such documentary evidence as proved itself might be presented at any time. The fact that the voters objected to voted was proved by oral testimony, and it was objected that the poll books should have been put in evidence. But the poll books in Ohio were not records, and there was no provision for obtaining copies of them. In any case they would be only a part of the evidence necessary to establish the fact of voting, as there must be other evidence of identity. In accordance with the decision in the New Jersey case, parol evidence alone might be received in the absence of the poll books. The first minority also held that the declarations of voters as to their qualifications and how they voted might be admitted. This was the settled rule in England, and had nearly always been followed by Congress. It was not so much an exception to the general rule in regard to hearsay testimony, as it was based on the fact that the voter whose vote was objected to was himself a party to the proceedings.

According to the returns the sitting member had a majority of 19 votes. Three or four ballots were counted for both sides which had been rejected for various reasons by the officers of election. A number of votes were also deducted from each side as having been cast by minors, persons of unsound mind, aliens, and nonresidents of the ward, township, county, or State; but the main contention was in regard to 16 votes alleged to have been cast for the contestee by persons of color. The first minority found that these persons were disqualified under the constitution of Ohio, and that the proof was conclusive that 15 of them voted for the sitting member. They claimed to be more than half white, and hence to be "white" within the meaning of the Constitution; but it was held that persons having a visible admixture of African blood were not white, and that they also came within the scope of the Dred Scott decision declaring them not to be citizens of the United States. There was direct testimony that part of them voted for the sitting member, and the fact that the right of all of them to vote was sustained by the friends of sitting member at the polls and strongly opposed by those of contestant was circumstantial evidence such as had always been received to show how a vote was cast. Deducting the votes according to the findings of the first minority would give contestant a majority of 23 votes, or if those votes in regard to which the only evidence was the declarations of the voters were not included his majority would be 14. This minority therefore recommended resolutions declaring contestant elected.

The second minority held that no case was made out for the contestant, either on the pleadings or the evidence. The notice of contest was insufficient in that it alleged no facts which, if proved, would

justify giving the seat to the contestant. The only ground relied on seemed to be the admission or exclusion of voters, and the only way in which such a ground could be particularly specified was by naming the voters and the legal objection to their admission, which was not done. There was, further, no allegation that any particular number of votes was returned for either party or that contestee received on the returns any particular majority, and hence there was no way of knowing, without going beyond the facts alleged in the pleadings, whether the illegal voters were sufficient to overcome the returned majority.

Similarly, there was no way from the evidence of knowing how many votes were cast for either party or what majority the contestee received. The only attempt at proof was the abstract of votes, which was introduced long after the legal time and after the House had refused to receive any additional testimony. The law of 1851 contained provisions in regard to documentary as well as oral testimony, and hence its limiting provisions applied to both; and this statement, even if put in in time, would not be evidence of the votes cast. The original evidence of the casting of the votes was the poll books, which were not introduced. This abstract was merely an abstract of the contents of other abstracts purporting to be based on the poll books. The poll books were a record, and their contents could only be proved by copies.

These poll books were the written official evidence of the fact of the casting of the votes, and until they were introduced or their destruction proved no secondary evidence of the fact could be received.

But waiving all these points, a detailed examination of the individual votes attacked would show a majority for the sitting member of at least 16 votes. The second minority therefore recommended resolutions declaring contestee elected.

The chairman of the committee, Mr. Harris (this report is not given in 1 Bart.), was unable to reach a decision between the parties, and favored sending the case back to the people for a new election. Deducting only such votes as there was clear and convincing proof against, the majority of the sitting member would be 22 votes. There were 73 other votes which the contestant claimed were sufficiently proved, but the proof seemed to be conclusive as to only 8 of them. Six others were attacked by proof strongly tending to show them illegal, but not conclusive. The proof in regard to the remainder was insufficient. Contestant had thus not conclusively established his right to the seat, but the evidence produced almost a conviction that he was elected. In deciding between the two claimants the House would be almost as likely to decide wrong as right, to whichever claimant it assigned the seat. It seemed to be more just in a case like this to regard the parties as on an equal footing rather than to hold the presumptions strongly in favor of the returned member, and when the House could not feel certain which one was elected the fairest course would be to remit the election to the people for a new trial.

The House after a long debate seated the contestant by a vote of 107 to 100.

[1 Bart., 223-244, and Report No. 380, first session Thirty-fifth Congress, pp. 22-31.]

(2) BROOKS *vs.* DAVIS.

Application for special investigation by the House refused.

Majority report by Mr. Boyce; minority report by Mr. Phillips.

The contestant served a notice of contest on the returned member, under the law of 1851, but no testimony was taken. The contestant presented a memorial alleging that the seat of Mr. Brooks ought to be vacated on account of the violence and intimidation prevailing in the city of Baltimore at the time of the election, but that on account of the implication of the city authorities in this disorder, and their consequent unwillingness to protect witnesses or prevent further intimidation, it would be impossible to take the testimony under the law of 1851. He petitioned the House for an investigation either by the House or a committee.

The committee recommended that the petition be not granted. There was no evidence presented to show that the evidence might not be taken regularly, and the fact that in another case, in the same city and involving the same issues, testimony was now being quietly taken tended to the contrary conclusion.

The minority (minority report not given in 1 Bart.) held that this was not an ordinary case coming under the law, inasmuch as contestant did not claim the seat, and was not, strictly speaking, a contestant. The allegations were so serious as to demand investigation, especially as the governor of the State, in his message, had publicly declared that there had been no free expression of the will of the people in Baltimore.

After a brief debate, by a vote of 115 to 89, the House refused to grant the request.

[1 Bart., 245-248, and Report No. 105, first session Thirty-fifth Congress, pp. 5-7.]

(3) PHELPS and CAVANAUGH.

Election of Representatives before the admission of the State. Claimants admitted.

Majority report by Mr. Harris; minority report by Mr. Gilmer.

The Minnesota enabling act provided that the State should be entitled to one Representative and as many more as the census should show it entitled to. The constitution formed under the enabling act provided for the election of three Representatives from the State at large, and the schedule provided for their election at the same time that the constitution was submitted to the people for ratification. The election was held, and Messrs. Phelps, Cavanaugh, and one other person were elected. When the constitution was submitted to Congress for ratification it was changed so as to provide for only two Representatives, and the State was then admitted. Messrs. Phelps and Cavanaugh, two of the persons elected when the constitution was adopted, presented their certificates.

The committee held that the fact that the election was held before the admission of the State did not invalidate it.

The act of admission into the Union, upon being consummated, relates back to and legalizes every act of the Territorial authorities exercised in pursuance of the original authority conferred.

The fact that the election was by general ticket did not invalidate it, as the second section of the apportionment act of 1842 only applied to that apportionment, and even where it applied the House had refused to recognize or enforce it. The fact that the law under which the claimants were elected provided for the election of three Representatives did not render it void, and the committee would not consider the question whether it rendered it voidable until it was raised by some citizen of the State of Minnesota. Only two certificates were presented, and the House had no knowledge that more than two persons were elected. The question was simply whether these two claimants had a *prima facie* right to be sworn in. As there were no other claimants, and no question was raised against their election, provided any one was elected, the committee recommended that they be sworn in, without prejudice to the right of any person to contest their seats.

The minority (minority report not given in 1 Bart.) held that Representatives could not be elected by a State not yet in existence, "to represent her nonentity," and even if they could the law under which this election was held was void. If there were any precedents for the admission of Delegates elected before the admission of the States, they were the results of party necessity, and deserved only to be expunged from the journals. But even conceding this, it was impossible to hold the law in question valid. If the election of the claimants was held under any law, it was under a law providing for the election of three Representatives, and an election of only two Representatives would be contrary to that law, and void. But an election of three Representatives was contrary to the organic law, as ratified by Congress, and was void. It was a notorious fact that three persons were voted for and certified as elected, though only two certificates were presented. The person having the third from the highest number of votes was as much elected as the first two, and the House had no more authority to select two out of the three than it would have to select between two persons having an equal number of votes.

After a very brief debate, the resolutions presented by the committee were passed, by a vote of 135 to 63, and the claimants were admitted.

[1 Bart., 248-251, and Report No. 408, first session Thirty-fifth Congress, pp. 5-11.]

(4) FULLER vs. KINGSBURY.

Right of delegate from Minnesota Territory to sit after the admission of the State into the Union as a representative of the portion of the Territory not included within the limits of the State. Majority report for sitting member; minority report for contestant. House vacated the seat.

Majority report by Mr. Harris; minority report by Mr. Gilmer.

The Territory of Minnesota had included a large amount of territory west of the limits assigned to the State of Minnesota. At the same time that the election was held for members of the Thirty-fifth Congress, in anticipation of the admission of the State into the Union, Mr. Kingsbury was elected as Delegate from the Territory of Minnesota and took his seat at the beginning of the Congress. After the admission of the State, Mr. Fuller presented a certificate from certain county officers, sealed with a seal purporting to be the seal of the

"Territory of Dakota" (no such Territory had yet been organized by Congress), certifying that he had been elected as a Delegate from the said Territory. It was conceded that the so-called "Territory of Dakota" was the same geographical area as that portion of the Territory of Minnesota not included within the limits of the State of Minnesota. Mr. Kingsbury claimed the right to retain his seat to represent this portion of the Territory, and the committee held that he possessed that right. The law admitting the State of Minnesota did not repeal the law organizing the Territory and deprive that portion of the Territory not included within the limits of the State of all government. The cases of Paul Fearing, from the Northwest Territory, and of H. H. Sibley, from Wisconsin Territory, had settled the principle that the erection of part of a Territory into a State did not vacate the seat of the delegate. Mr. Kingsbury being entitled to the seat, of course Mr. Fuller was not, and the committee reported resolutions sustaining the right of the sitting Delegate.

The minority found that the election for Delegate had been an entirely separate one within and without the limits of the new State, and that Mr. Fuller had received the majority of the votes cast outside the State. Moreover, Mr. Kingsbury was not a resident of the portion of the Territory he sought to represent. The minority recommended seating the contestant.

The debate in the House turned on the question whether the Territory of Minnesota still existed after the admission of the State; it being apparently conceded that if any such Territory existed, Mr. Kingsbury had the right to represent it. The House finally passed the following resolution, by a vote of 102 to 80:

Resolved, That the admission of the State of Minnesota into the Union with the boundaries prescribed in the act of admission operates as a dissolution of the territorial organization of Minnesota; so that so much of the late Territory of Minnesota as lies without the limits of the present State of Minnesota is without any distinct, legally organized government, and the people thereof are not entitled to a Delegate in Congress until that right is conferred upon them by statute.

[1 Bart., 251-257.]

(5) *WHYTE* vs. *HARRIS*.

Violence and intimidation; illegal votes. Majority report to vacate seat; minority report for contestee. The House laid the whole subject on the table.

Majority report by Mr. Harris; minority report by Mr. Wilson.

This case arose out of the disturbances in Baltimore attendant upon the "American party" agitation. There had been disturbances at two or three previous local and State elections, which had excited great attention, and on account of which the governor of the State had called out the military force to aid in preserving the peace at this election. It was alleged, however, that in spite of these extraordinary precautions, the whole election was attended by riots and violence, and that there was no such thing as a free expression of the will of the people. The contestant served a notice of contest, in which he alleged acts of violence and intimidation at each of the precincts of the district; and also, in some of the precincts, the reception of large numbers of illegal votes and various acts of fraud.

The committee called attention to the unprecedented character of

the case, saying that it was not an ordinary question as to which of two candidates was legally elected, but "the question involved is, Shall elections of members to the House of Representatives of the United States be free, fair, and open to the whole body of legal electors?" The committee quoted from the governor's message on the subject, the proclamation of the mayor, and the accounts given in non-partisan newspapers to show that it was a generally conceded fact that the election in question was marked by riots and violence. It was claimed by some that the disturbances were the result of attacks by members of the American party upon naturalized citizens, and by others that the foreign-born citizens were the aggressors; but in either case the effect upon the validity of the election would be the same. The fatal results of the riots at previous elections had left the city in a state of alarm, and the rioters at this election took advantage of this feeling and were largely able to exercise the same intimidation as at previous elections without the necessity of resorting to the same degree of violence. An abstract of all the testimony was given, showing at each precinct the presence of large bodies of excited men, who prevented the Democratic challengers from acting and intimidated Democratic voters, especially those of foreign birth, from approaching the polls. Individual cases of assault were shown at most of the polls. The witnesses for the sitting member, on the other hand, testified that the election was much quieter than usual and that the pushing and shouting around the polls was not such as to prevent anyone from voting who desired to do so.

The tickets used by the American Party were distinguished by having red stripes on the backs, so that it could easily be known for whom a voter voted. The committee were of the opinion that the requirements of the laws of Maryland that the election should be "by ballot" implied a secret ballot, and that such marks as these practically rendered the election a *viva voce* one, and were in violation of the law. These tickets greatly aided the intimidation, by enabling the rioters to know whom to intimidate.

The contestant claimed to have shown a very large number of illegal votes and to have established his right to the seat, but his testimony was inconclusive, and the committee did not give it much discussion. They held, however, that the whole election should be held void for rioting and intimidation. A large number of English cases was cited where the election had been avoided for riot, even where the returning officer had been able to finish the poll and comply with the provisions of the writ. There had fortunately been but two cases in the House of Representatives (*Trigg vs. Preston*, and *Biddle and Richard vs. Wing, C. & H.*, 78, 504) in which such a charge had ever been made, and as the charge had not been established in either of these cases, there were no precedents as to the effect of such a charge if established. But the committee held that there could be no such thing as an *election* unless all the voters were free to vote.

An election is the free choice, by those who have the right to make it, and who desire and seek to make it, uncompelled, unawed, and unintimidated.

There had been no such election in this case, and the committee therefore reported a resolution declaring the election void and the seat vacant.

The minority held that the contestant had failed either to make out his own case or to destroy the validity of the election. The notice of

contest was plainly insufficient; it did not even indicate the class of votes objected to as illegal, and most of its specifications were extremely vague and general. The allegation of "intimidation of voters," even if proved, would furnish no ground for vacating the election. The true rule was that laid down in the case of *Biddle and Richard vs. Wing* (C. & H., 507), where it was held that the House would not inquire into the reasons why any voter or class of voters did not vote. The allegations in regard to the stripes on the backs of the ballots were immaterial, as there was nothing in the laws of Maryland preventing such marks, and the practice seemed to have originated with contestant's party. The complaint that the judges of election received "hundreds of ballots" which they did not deposit in the boxes was not borne out by the testimony. In one precinct there were 11 intoxicated men who were not entitled to vote; but they were raising a disturbance, and the judges of election, to avoid trouble, pretended to receive their ballots, but did not deposit them in the boxes. The presence of a cannon at one of the polls was not significant, as it had been at the same place for years, and was used for Fourth of July celebrations. It was only fired twice on the day of election, and then without ball, and at a time when no voters were approaching the polls.

The evidence by which contestant attempted to establish his own right to the seat, and the names and number of the alleged illegal or intimidated voters, was wholly hearsay, and hence inadmissible. Illegal voting was sought to be shown by comparing the number of votes returned with the number of votes cast at former elections, or the estimates of witnesses as to the number of legal voters resident in the precincts, but the evidence was fully contradicted. Lists of names found on the poll books of this election, and not on those of previous elections, were shown to persons who testified that they did not know the voters, but the testimony was of a very unsatisfactory sort, and the increase in the vote was accounted for by other witnesses. Large lists of names were put in evidence, purporting to be lists of persons who were intimidated from voting, but the best-proved of them only showed that the witness had been told of the alleged fact by the voters or their friends, and most of the lists did not even have this proof. They were gathered by a large number of persons, and then put in evidence by the person who consolidated the lists, few or none of the original makers of the lists being called.

In regard to the alleged violence at the polls, the minority could find no case in which an election had been declared void for this reason, unless the violence was such as to interfere with the election and prevent the ascertainment of the result. The testimony of the contestant in this case was very loose and general, and when examined in connection with the contradicting testimony it failed to show any such condition of extreme violence as claimed in the majority report. There was no pretense that the officers of election were not able to canvass the vote peaceably and correctly. The specific instances of assault shown in the testimony were very few. In this whole election there was no person killed, shot, or seriously injured; two persons were stuck with a darning needle, two had teeth knocked out, one was thrown over the crowd by the heels, and eight were struck. The testimony attempting to show more numerous cases of assault broke down upon cross-examination.

It was an unfortunate fact that there were often disturbances at the

polls in city elections, and if the partisan accounts of occurrences at many other elections were to be taken, doubtless as good ground for vacating them could be shown as in this case.

Let us once establish the precedent that Representatives are to be unseated and the will of the people, especially when expressed by large majorities, overruled because of violence at the polls, and, while it will put all our city elections in the power of the riotous and rowdy, it will inaugurate a new rule as to future cases as unsound in principle as it will be bitter in its fruits.

The House, by a vote of 106 to 97, laid the whole subject on the table. There was no debate on the merits of the question.

[1 Bart., 257-267, and Report No. 538, first session Thirty-fifth Congress, pp. 1-57 (large parts of both reports omitted in 1 Bartlett).]

(6) CHAPMAN *vs.* FERGUSON.

Application for time to take further testimony granted. Irregularities; frauds. Majority report for contestant; minority report for contestee. House laid the whole subject on the table.

Preliminary report by Mr. Harris; majority report by Mr. Wilson; minority report by Mr. Boyce.

Notice of contest and answer were served, but the contestant did not give notices of intention to take any testimony until more than half the legal time had expired and until the contestee had gone to Washington. Notices were then left at the contestee's usual place of abode, and testimony was taken by contestant. The contestee made affidavit that he knew nothing of the testimony until he saw it printed. The committee were of the opinion that the contestee erred in not having an attorney to represent him in the Territory, and if the interests of the contestant and contestee were alone concerned they might not have reached the conclusion they did; but, as the question to be determined was the choice of the people, they recommended an extension of sixty days in which to take testimony. The House agreed to the resolution recommended.

After the testimony had been taken the committee reported that the contestee's majority on the face of the returns was 57, but after counting for both parties certain precincts and votes rejected for irregularities his majority would be 51. This majority was overcome and a majority shown for contestant by rejecting illegal votes cast at two precincts and throwing out a third. At the first two precincts the evidence showed that the number of votes cast was very much in excess of the number of residents. In one of the precincts the judges were not sworn, and in the other the names "Oliver Twist" and "Samuel Weller" appeared on the poll book; and there was other evidence of fraud which the committee thought would justify throwing out the precincts, but they chose only to reject the illegal votes. At the third precinct there were returned 401 votes, all but 4 for the contestee. The poll was kept open long after the legal hour. Shortly before the legal hour for closing one of the judges announced that only 271 votes were then polled, and between 8 and 9 o'clock in the evening he announced that only 373 votes were then polled. A witness testified to having seen one person vote four or five times. An old resident was unfamiliar with most of the names on the poll list. At the next election only one-third as many votes were cast. The judges of election were sworn by a notary public, who, in Nebraska, was not author-

ized to administer oaths in such cases. The committee rejected the whole poll, but held that if this should not be done the fraudulent votes and those cast after the legal hour were sufficient in number to give contestant the seat.

The minority rested their case on this precinct, as, unless it was rejected, the contestee's majority could not be overcome. There were only 15 votes received after 6 o'clock. The voters were legal voters; but the minority deducted their votes, as also the votes of "Oliver Twist" and "Samuel Weller" in another precinct.

In the debate the point was strongly pressed that the evidence relied on by contestant was that taken during the first sixty days, and was hence *ex parte*; most of it was also hearsay. The rebutting evidence of contestee was regularly taken and cross-examined and entitled to much more credit.

The House, after a short debate, laid the whole question on the table by a vote of 99 to 93.

[1 Bart., 267-275.]

THIRTY-SIXTH CONGRESS, 1859-1861.

Committee on Elections.

Mr. GILMER, North Carolina,	Mr. STEVENSON, Kentucky,
DAWES, Massachusetts,	GARTRELL, Georgia,
CAMPBELL, Pennsylvania,	STRATTON, New Jersey,
BOYCE, South Carolina,	McKNIGHT, Pennsylvania,
Mr. MARSTON, New Hampshire.	

Cases.

- (1) William A. Howard *vs.* George B. Cooper, *Michigan*.
- (2) A. J. Williamson *vs.* D. E. Sickles, *New York*.
- (3) Samuel G. Daily *vs.* Experience Estabrook, *Nebraska Territory*.
- (4) Francis P. Blair, jr., *vs.* J. Richard Barrett, *Missouri*.
- (5) James S. Chrisman *vs.* William C. Anderson, *Kentucky*.
- (6) William G. Harrison *vs.* Henry Winter Davis, *Maryland*.
- (7) William P. Preston *vs.* J. Morrison Harris, *Maryland*.

(1) HOWARD *vs.* COOPER.

Application for further time to take testimony refused. Irregularities; violence and intimidation; illegal and fraudulent votes. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report on preliminary question by Mr. Campbell; minority report by Mr. Stevenson.

Majority report on main case by Mr. Gilmer; minority report by Mr. Gartrell.

Notice of contest and answer were duly served, but contestant did not take his testimony until the last few days of the sixty days, and took his most important testimony on the last day. The contestee took no testimony, but on the meeting of Congress presented *ex parte* affidavits impeaching the character of one of contestant's witnesses and contradicting the testimony of others, and asked that these affidavits be received as evidence or that he be given time to take the testimony of the affiants. The committee recommended that the application be not granted. Contestee had opportunity to take testimony during the whole sixty days, and as he had ten days' notice of the names of witnesses to be examined, he was free to procure testimony to impeach them. To allow an extension simply because contestant had taken testimony during the latter part of his time, and where the failure of contestee to take testimony was due to his own laches, would be virtually to repeal the law, and the committee could not recommend it.

The minority (minority report not given in 1 Bart.) recommended that the extension be granted. The case should not be decided on the testimony of witnesses who could be impeached, and whose testimony was taken on the last day of the sixty days, when contestee had no opportunity to impeach or rebut it. Contestee could not have presumed that witnesses would swear falsely, and it would not have

been proper for him to have introduced impeaching testimony until after the witnesses had testified.

The House, by a vote of 89 to 79, refused to grant the extension asked for.

On the main contest the committee reported in favor of seating the contestant. The returned majority of the contestee was overcome by throwing out certain precincts for irregularities and a number of fraudulent and illegal votes. There were disturbances at the polls in one precinct, but the committee were doubtful as to the propriety of throwing out the poll on this account, and allowed it to stand.

The Fourth Ward of the city of Detroit was thrown out for irregularities. The alderman of the ward was *ex officio* an inspector, but he did not act during the day, and another inspector was chosen by the voters. In the evening the alderman officiated at the counting of the vote. He was not sworn. It seems, also (the irregularities are not clearly stated either in the reports or debates), that the tickets for the city election and for the Congressional election were deposited in the same box; being folded when deposited it would have been easy for the voter to have cast two ballots of the same sort.

The minority quoted testimony in regard to this ward, and held that the irregularities were not such as to justify its rejection.

The election at Grosse Point was held at the house of one Wilson, according to the official notice. The contestant claimed that under the law it should have been held at the house of one Kline, 2 miles distant. Both parties, and the majority and minority of the committee, seem to have assumed that if the election was held in the wrong place it was void. The law was somewhat obscure, but the majority held that the election should have been held at Kline's house, and was consequently void. The minority held that it was properly held at Wilson's house.

The vote of the township of Van Buren was thrown out by the committee on the ground that only two inspectors officiated, while the law required three: There is no mention of this irregularity in the minority report.

The committee also deducted 106 illegal and fraudulent votes. Fifty-eight of these were of voters who were taken into a ward ten days before the election under an agreement to furnish them board and drinks if they would vote the Democratic ticket. The committee held that ten days' presence in a ward under such circumstances did not constitute the residence required by law. Some of these men had been in jail in Canada during part of the ten days, and so did not have the required length of residence even of this sort.

The minority sustained the legality of most of these votes, and disagreed with the conclusions of the majority in regard to other individual votes.

Neither minority report is given in 1 Bartlett.

The House, by votes of 97 to 77 and 92 to 71, passed the resolutions declaring contestee not elected and contestant elected.

[1 Bart., 275-288, and Report No. 87, pp. 31-37, and No. 445, pp. 7-15, first session Thirty-sixth Congress.]

(2) WILLIAMSON *vs.* SICKLES.

Application for additional time to take testimony granted. Case not made out.

Majority report by Mr. Dawes; minority report by Mr. Gilmer.

The board of canvassers of the county of New York certified the votes cast at the Congressional election as having been cast for "Member of Congress" instead of "Representative in Congress," and for this reason the State canvassers refused to issue certificates of election or determine the result, but announced the votes returned for each candidate. The persons having received the highest number of votes procured certified copies of this announcement or statement, and upon the organization of the House were sworn in on these credentials. The contestant in this case presented a petition reciting that he had employed counsel and partly prepared a notice of contest, but that as he had been advised by counsel that he could not proceed under the law of 1851 until there had been some official determination of the result, he had not served notice or taken any testimony.

The committee reported that the law of 1851 was not absolutely binding on the House, but was a wholesome rule not to be departed from without cause. Cases, however, might arise which did not come within this law, and in such cases the parties must apply to the House itself for authority to take any other than voluntary testimony. Contestant had acted in a *bona fide* belief that this was such a case, and whether it was or not, the House might exercise the discretion given in the law and allow supplementary evidence to be taken. The disadvantages arising from the delay were all with the contestant and not with the sitting member.

The minority held that the contestant should have proceeded under the law, which was "obligatory alike upon the House, the committee, and the contestant," and should be followed in all cases to which it applied. The announcement of the vote by the State canvassers was a determination of the result under which the contestant might have proceeded. If it was not such a determination, then the contestee had no *prima facie* right to the seat; but this question had already been settled by the action of the House in admitting contestee and his colleagues. But if this case were conceded not to come under the law of 1851, the contestant had no better claim, for in all the cases decided before 1851 it had been held that the returned member was entitled to a reasonable notice, and no such notice or any notice had been given in this case.

The House, by a vote of 80 to 64, passed the resolution extending the time. At the next session, the testimony having been taken, the committee briefly reported that contestant had failed to make out his case.

[1 Bart., 288-298.]

(3) DAILY *vs.* ESTABROOK.

Irregularities; illegal voting. Report for contestant. Contestant seated.

Report by Mr. Campbell:

According to the returns contestee had a majority of 300 votes, but the committee found that the vote of three counties, part of the vote

of another, and one precinct in another should be thrown out. This would give the majority to the contestant. The three counties thrown out were unorganized counties. Under the laws of the Territory unorganized counties were attached for election purposes to the counties lying next east of them, and there were provisions whereby they could organize, by a regular election of county officers, under the direction of the county authorities of the county to which they had been attached. The law establishing one of the counties in issue used the word "organized," and it was claimed that this fact made it an organized county; but the committee held that it could not be organized until a regular election of county officers had been held under the law. No such election had been held, but in a convention or mass meeting certain persons had been nominated whom the governor afterwards commissioned or appointed. This was not a legal organization, and the county not being organized votes returned from it directly to the governor instead of to the clerk of the next county east must be rejected. It was evident also that the votes returned from this county were fraudulent. Nearly all of the 292 votes returned from it professed to have been cast in a settlement on the south side of the Platte River, and hence outside the limits of the county. This settlement contained too few inhabitants to have cast so many votes, and there were scarcely any settlements or inhabitants in the county itself.

The votes of two other counties were also rejected as unorganized, but there was also evidence in each of these cases that the votes were fraudulent. One of the counties was shown to have no inhabitants at all. The return of the other was opened by the governor's private secretary, and by him returned to the clerk of the organized county to which this county was attached, with instructions to return it to the governor with the returns of that county. This return was afterwards stolen, and there were reasons for believing it to have been a forgery.

From another county 128 votes were returned. It was in proof that there could not be over 60 voters in the county. A copy of the poll book was forcibly taken from witnesses by a mob whose avowed object was to prevent the exposure of fraud. The original poll book was also stolen. Witnesses who had seen it testified that it was signed by persons never heard of in the county, and contained the names of persons not known. The committee counted 60 votes as the largest number that could have been legally cast.

One precinct was also rejected because it was on the Pawnee Indian Reservation, which, by the act of Congress organizing the Territory, was not a part of Nebraska Territory.

The contestee objected to the service of more than one notice of contest, but the committee held that any number of notices might be served, if they were all within the time prescribed by law. The contestee also objected that there was no competent proof of the result of the election. The evidence of the result was an abstract of votes, certified from the office of the secretary of the Territory. It was obtained without notice, and after the contestant's attorney had given notice that he would "examine no more witnesses." The committee held that the abstract was competent evidence and that, as it was not the testimony of a witness and could not be cross-examined, notice was not necessary. The contestee objected that this mode of procedure

would deprive him of opportunity of proving the abstract to be false, but the committee held that as he did not allege that it was false the objection was immaterial.

The committee were unanimous in recommending the seating of contestant, and the House, after a brief debate, adopted the resolutions recommended without division.

[1 Bart., 299-308.]

(4) BLAIR *vs.* BARRETT.

Irregularities; frauds; illegal votes. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Dawes; minority report by Mr. Gilmer.

On the face of the returns (after correcting a clerical error in one precinct return) the contestee had a plurality of 607 votes. The contestant claimed that this plurality was due to fraud, violence, and bribery, and to the reception of a very large number of illegal votes.

There was an increase of some 6,000 votes in the total number of votes cast in this district over the number cast at the next previous election, and nearly all this increase was in the vote of the sitting member, and was confined to seven or eight precincts. Such an increase, unexplained, was a very suspicious circumstance. Any cause which could legitimately account for so large an increase would be something well known and easily proved, and the fact that no attempt was made to do so implied that it could not be done. The conclusion was strengthened by the fact that at the polls where the increase occurred there were very great irregularities. In a number of precincts it did not appear that the judges were sworn; one judge could not write, and another was deaf. There were scenes of violence at the polls, in which some of the judges took part. Proclamations of \$1.25 for a vote were made in the crowds. Men were employed on the roads a few days before the election who had never been seen before, and who disappeared the day after election. These men and others were permitted to vote without any regard to the precautions required by the law to prevent illegal voting.

The committee rejected the votes of three of these precincts, where there was no proof that the officers were sworn. The contestant had charged in his notice of contest that the officers were not sworn, and the committee held that the burden was on the contestee to prove either that they were sworn or that the votes as returned were actually cast by legal voters. According to the precedents of Congress the failure of the officers to be sworn required the rejection of the poll; but if in this case the whole election had been fair and regular, and it had appeared that the returns represented the actual choice of the legal voters, freely expressed, the committee would have been inclined to allow the returns to stand on "the principle that the acts of officers *de facto* are valid as regards the public and third persons who have an interest in their acts." But the contestee having shown neither the qualification of the officers nor the fairness of the vote, but the contrary appearing, the votes of these three precincts were rejected.

There was a very large amount of testimony in regard to individual illegal votes. Some of these were nonresidents, who had never been heard of in the precincts before or since the election. For this class of voters the evidence was necessarily the negative testimony of old resi-

dents of the precincts, corroborated by the poll books of former elections, etc. The disqualification of other voters was shown by their own testimony or that of their friends, or by their own admissions. The way in which each voter voted could be easily ascertained, as the ballots were numbered.

A large part of the evidence on which votes were rejected as illegal consisted of comparisons of the poll lists with a city census taken soon after the election. The city census takers were instructed to obtain information as to birth, naturalization, length of residence, etc., and when a person appeared on the poll books as voting, but the facts stated in the census returns showed him not to be a qualified voter, his vote was rejected. The committee held that this census was *prima facie* evidence of the facts contained in it, and that it was properly put in evidence. Part of it was sworn to by the census takers themselves and the rest by persons who testified that it was an exact copy of the census returns. In the first case, it was the ordinary case of witnesses refreshing their memory by written memoranda; in the second case, the copies were examined copies and admissible under the usual rules of evidence. These census returns were corroborated by oral testimony, and also by lists made out by old residents of the precincts from their own knowledge.

Upon the evidence the committee deducted 663 votes from contestee and 55 from contestant. This would make a majority of 13 votes for contestant if no precincts were rejected. If the three precincts where the judges were not shown to have been sworn were rejected the majority would be 168. If an *ex parte* affidavit, presented forty days after the hearing before the committee, was taken as evidence that the judges at one of these precincts were sworn, the majority would be 134. In any case the contestant had a majority of the legal votes, and the committee recommended resolutions declaring him elected.

The minority presented a very elaborate report (not given in 1 Bartlett), holding that none of the charges, except as to a few illegal votes, were made out, and that contestee would have a majority of 610 votes after the deduction of illegal votes from both parties. The charge of bribery entirely failed of proof (this seems to have been conceded by the majority also), and the charges of violence rested upon insignificant occurrences, magnified by the imaginations of witnesses, who broke down when cross-examined as to the exact facts. The charges of fraud and unfairness against the judges rested upon the testimony of impeached witnesses, who were fully contradicted. The increase in the vote over the previous election was accounted for by the interest in the election of a judge and local officers, and by the recent naturalization of many foreigners. The census, so much relied on by contestant, showed nearly 8,000 legal voters who did not vote.

The only other issues were the illegal votes and the alleged failure of the officers of election to be sworn. The evidence in regard to illegal votes was largely hearsay, often several degrees removed. The minority admitted only such hearsay testimony as rested on the declarations or admissions of the voters themselves, and then only "whenver they constituted a part of the act of voting or were offered in corroboration of declarations made in reference thereto." The census returns they considered as entirely insufficient. The ordinance for taking the census did not provide for gathering information in regard

to the qualifications of voters, and information so gathered did not have whatever official character the census might have as to the facts legally covered by it. The census takers got their information often from members of the voter's family or his neighbors or wherever they could. They had no such opportunity of judging of a voter's qualifications as the election officers had, and no authority to do so. Unless the census was taken on the day of election it could not be evidence of the person residing in a precinct, especially in a city, where removals were frequent. And even taking the census as absolutely correct, there was no evidence at all of the identity of the persons named in it with the persons of the same name who voted and were recorded on the poll list.

There was no proof that any of the judges were not sworn, and the contrary strongly appeared. Upon the poll books of the three precincts in question appeared oaths, which were, perhaps, irregular. In one case the names of all three judges were named in the body of the oath, but only two were signed; in another none were signed; in another the certificate of the judge administering the oaths was under the oath of the clerks, but it was evidently intended to apply to both. But as the law of Missouri only required the judges to *take* the oath, and did not require them to subscribe it, these omissions were immaterial. And even if the judges had not been sworn, they were officers *de facto*, and in recent decisions in New York and Pennsylvania the principle that the acts of such officers, affecting third parties and the public, were valid, had been applied to unsworn election officers. The precedents of Congress were said to be the other way, but the minority, in an elaborate review of all the cases, showed that affirmative proof of the neglect or refusal of the officers to take the oath had always been required, and that in most cases there had been other circumstances tending to vitiate the election.

After an extended debate, the House adopted the resolutions recommended by the majority by votes of 94 to 92, and 93 to 91, and contestant was sworn in.

[1 Bart., 308-328, and Report No. 563, first session Thirty-sixth Congress, pp. 37-88.]

(5) CHRISMAN *vs.* ANDERSON.

Mistakes in returns; unsigned returns; illegal votes; majority report for contestee; minority report for contestant. Contestee retained the seat.

Majority report by Mr. Stratton; minority report by Mr. Gartrell.

On the face of the returns, as first made out by the county canvassers and returned to the State canvassers, contestee had a majority of 3 votes. Subsequent to the making out of the first returns, but before the meeting of the State canvassers, mistakes were found, which, if corrected, would make a majority of 6 votes for contestant. The State canvassers refused to count amended returns, including these corrections, on the ground that as the poll books (the election was *viva voce*) were required to be sent to the county canvassers sealed, and to be canvassed immediately, if corrections were to be allowed to be made after the poll books had been opened and for some time accessible to many persons, the provision for sealing would be nugatory. If the State canvassers could receive corrections at all

they must receive corrections made at any time and under any circumstances, without any means of knowing or authority to judge of these circumstances. The committee were of the opinion that the decision of the State canvassers was correct, both on the ground stated and on the ground that the county canvassing boards, having once completed their returns, were *functus officio* and had no authority to reconvene and revise their work. But the committee were under no such limitations as the State canvassers, and would go behind all returns. If the mistakes included in the supplemental returns were the only ones made contestant would have a majority on the face of the returns. But going through the poll books of the whole district, and correcting all mistakes, contestee had a majority of 7 votes.

There was one poll book not certified by any officer of election. Deducting all the votes found on it, contestee had a majority of 53 votes. Contestant charged 113 illegal votes, and contestee 211. The committee found 25 illegal votes cast for contestee and 81 for contestant. Deducting these votes, contestee had a majority of 109. If all the charges of illegal votes made by contestant were sustained contestee would still have a majority. The committee therefore reported resolutions declaring contestee elected.

The minority strongly condemned the action of the State canvassers, and held that contestant ought to have been given the certificate of election. The contestee was estopped from objecting to the reception of amended returns, for the reason that he himself had procured the first one to be sent in, and the State canvassers were estopped by their own decision in a former case.¹ And their ruling in this case was clearly against the true construction of the law.

The law requiring the poll books to be certified over the signatures of the election officers was directory merely, and voters ought not to be disfranchised by the neglect of the election officers to comply with this provision of the law.

Correcting all clerical errors in the returns, the minority found that contestant had a majority of 8 votes. They were convinced that a consideration of the evidence in regard to illegal votes would increase this majority, and they therefore reported resolutions declaring contestant elected.

The House, after some debate, adopted the resolutions presented by the majority by a vote of 112 to 61.

[1 Bart., 328-341.]

(6) HARRISON vs. DAVIS.

Illegal votes, fraud, violence, and intimidation. Report for contestee. No action by the House.

Report by Mr. Gilmer.

The contestant asked to have the election declared void on account of illegal votes, fraud, and violence. He did not claim that enough illegal votes were proved to change the result (contestee received about three-fourths of the votes cast), and the committee found that the proof did not show more than 75 at the most. The proof of fraud or the deliberate reception of illegal votes entirely failed. Some of the

¹ It was denied by the canvassers and the majority of the committee that this former case was the same sort of a case as the present one.

judges of election, friends of the contestant, apparently by preconcert, withdrew from the polls at an early hour, but no excuse for their action was shown. The law permitted the other judge to go on and hold the election, and the result was certainly not affected.

It was charged, however, that nearly all the polls were in the possession of bands of armed rioters, and that on account of the violence at the polls "thousands of voters" were intimidated from voting. But by a comparison of the vote of this election with that of previous elections it appeared that the vote was within 2,000 of the highest number ever cast. If all these 2,000 voters had voted for contestant, it would not affect the result. It was necessary for the contestant to prove either that the number of voters intimidated was sufficient to affect the result, if they had voted, or that the violence was such as actually to arrest the election; but not more than 2,000 persons could have been excluded, and the proof only showed 34. The violence was not sufficient to arrest the election, except at one poll, for a few minutes, and there were only 57 actual cases of assault and battery shown. If the whole city of Baltimore had been, as was claimed, in a state of anarchy, it would have been possible to prove it by much better evidence than this. Such a state of affairs, if it existed, could have been proved by the specific testimony of thousands of witnesses, instead of by the vague opinions of a few partisans, who broke down entirely when cross-examined as to the specific facts. The election was not as quiet and orderly as could have been desired, by any means, but this was largely due to the conduct of contestant's partisans in going to the polls in armed and organized bands.

A collision and bloodshed are the natural result of adverse parties meeting, armed, at the polls. The reformers having armed for the polls, it was natural that their opponents should meet them in like manner. While no one can be surprised at the result, the illegality and rashness of men combining to go armed to the polls can not be too severely condemned; but it scarcely lies in the mouth of a party which has organized an armed band to take charge of the police of the polls to complain that others were there armed also; nor of those who drew first a weapon to complain that others followed their example.

The animus of the whole case met with the strong disapproval of the committee, as is shown in many places in the report. The conclusion of the report is:

Such a case, supported by such testimony, discredited by such circumstances, and failing in every material allegation, conducted by a political association in the name of the contestant, and inspired in great measure by personal malice against the sitting member, manifested by the libelous allegations of the petition, disproved by the testimony taken to support them, ought to be treated as a vexatious prosecution and rebuked by the judgment of the House.

The committee reported a resolution declaring the sitting member entitled to his seat. There was no action by the House.

[1 Bart., 341-346, and Report No. 60, second session Thirty-sixth Congress, pp. 1-55 (large portions of the report omitted in 1 Bartlett.)]

(7) PRESTON *vs.* HARRIS.

Illegal votes, violence, and intimidation. Report for contestee. No action by the House.

Report by Mr. McKnight.

The contestant alleged in his notice of contest various illegalities, of which he offered no proof. The evidence taken was of much the same

character as that in the preceding case, but there was less of it. Not over a dozen illegal votes were shown, and not more than 20 persons were prevented from voting by violence and intimidation. While there were individual cases of assault, there was no such condition of affairs as to justify the rejection of any of the city polls, where the sitting member received large majorities. There was an entire failure to prove the essential point—that enough voters had been excluded to affect the result. The committee quoted the law and precedents as stated in the other cases from the city of Baltimore in this and the preceding Congress, and came to the conclusion that there was no reason shown for vacating the seat. There was no action by the House.

[1 Bart., 346-348.]

THIRTY-SEVENTH CONGRESS, 1861-1863.

Committee on Elections.

Mr. DAWES, Massachusetts,	Mr. WORCESTER, Ohio,
VOORHEES, Indiana,	BROWN, Rhode Island,
McKEAN, New York,	MENZIES, Kentucky,
LOOMIS, Connecticut,	PATTON, Pennsylvania,
Mr. BAXTER, Vermont.	

Cases.

- (1) George K. Shiel *vs.* A. J. Thayer, *Oregon*.
- (2) John M. Butler *vs.* William E. Lehman, *Pennsylvania*.
- (3) Andrew J. Clements, *Tennessee*.
- (4) Charles H. Upton, *Virginia*.
- (5) John Kline *vs.* John P. Verree, *Pennsylvania*.
- (6) S. Ferguson Beach, *Virginia*.
- (7) Le Grand Byington *vs.* William Vandever, *Iowa*.
- (8) J. Sterling Morton *vs.* Samuel G. Daily, *Nebraska*.
- (9) Joseph Segar (first case), *Virginia*.
- (10) F. F. Lowe, *California*.
- (11) Charles Henry Foster, *North Carolina*.
- (12) Joseph Segar (second case), *Virginia*.
- (13) Benjamin F. Flanders and Michael Hahn, *Louisiana*.
- (14) John B. McCloud and W. W. Wing, *Virginia*.
- (15) Lewis McKenzie, *Virginia*.
- (16) John B. Rodgers, *Tennessee*.
- (17) Jennings Pigott, *North Carolina*.
- (18) Christopher L. Grafflin, *Virginia*.
- (19) Alvin Hawkins, *Tennessee*.

(1) SHIEL *vs.* THAYER.

Right of constitutional convention to fix time of election. Report for contestant. Contestant seated.

Report by Mr. Dawes.

The contestant received the majority of votes cast at an election held on the first Monday in June, 1860; the contestee the majority cast at an election held November 6, 1860. The constitution of Oregon provided that the first election for Representative in Congress should be held in June, and also that the "general election" should be held in June once in two years. The committee found that among the officers to be elected at the general election was the Representative in Congress. The contestant was thus elected at the time prescribed by the constitution of the State.

The legislature of Oregon had assumed that it had power to fix the time of the election, and had attempted to do so, but owing to a disagreement between the houses no law had been passed. It was conceded that there was no legal authority for the election held in November, at which contestee was elected, but he claimed that the people had a constitutional right to representation and could not be

deprived of it by the failure of the legislature to pass laws fixing the time for the election.

The committee had no doubt that the constitution of the State had fixed the time of holding the election beyond the control of the legislature, and the contestant having been elected at the time fixed by the constitution they recommended that he be seated.

In the House it was claimed that under the Constitution of the United States the time for an election (at least after the first election) can only be fixed by the legislature or by Congress. No time having been fixed by either no valid election could be held. A resolution based on this principle was defeated by a vote of 37 to 77. Mr. Dawes argued that the words of the Constitution, "by the legislature thereof," meant by the people, through any constituted authority. The resolutions offered by the committee were adopted without division.

[1 Bart., 349-352.]

(2) BUTLER *vs.* LEHMAN.

Forgery; recount of ballots. Majority report for contestant; minority report for contestee. Contestee retained the seat.

Majority report by Mr. Loomis; minority report by Mr. Worcester.

According to the returns before the district board of canvassers (the "return judges") contestant had a majority of the votes and he was declared elected by that board. Subsequently it was discovered that the return from one of the counties was a forgery and the return judge was convicted and imprisoned for the forgery. If the vote of this county had been correctly returned contestee would have had a majority, and the governor took notice of this fact and issued the certificate to him. As the *prima facie* case had already been settled by the admission of contestee to his seat the committee did not consider it necessary to decide whether the action of the governor was proper or not. (Mr. Dawes in debate expressed his individual opinion that it was proper.)

On the face of the original returns contestee had a majority of 132 votes. Contestant charged that the judges in 11 precincts had made false returns of the votes, and claimed to have sustained these charges by a recount of the ballots. The recount was made by the magistrates taking the testimony in the presence of both parties and there was no question as to its correctness. But it was alleged that the ballot boxes were not sufficiently identified and that there had been opportunity to tamper with their contents. Nearly all the changes were found in three of the boxes and the contention was chiefly in regard to them. The boxes were all alike and there was considerable difficulty in identifying them until they were opened, but after they were opened the committee held that there could be no doubt of their identity. Each box containing ballots was accompanied by another box containing election papers, which themselves contained the means of their own identification. The ballots in the accompanying box must have belonged to the same precinct and their substantial correspondence with the number of names on the poll lists completed the identification.

The boxes were produced by the official custodians, sealed, and in the same apparent condition as when deposited with them. Under these circumstances the burden of proving that they had been tampered

with was properly on the contestee, and this burden could not be sustained merely by showing that they had been left in a situation where it was *possible* for some unauthorized person to have tampered with them. There was no proof in this case to render it *probable*. The contestee called the election officers to swear that their returns were correct, "but in the opinion of the committee this testimony neither impairs the case of the contestant nor strengthens that of the respondent. Officers who had declared upon their official oaths that the returns made by them were true, would not be likely to come into court afterwards and swear that they were false." It was not necessary to determine whether the incorrectness of the returns was due to fraud or to mistake, but the committee were convinced that the recounts represented the true state of the vote, and recommended the seating of the contestant.

The minority found that neither the identity of the boxes nor the integrity of their contents was satisfactorily established. It is always necessary for the party claiming under a recount to rebut a reasonable presumption that the ballots have been tampered with. And in this case, where a direct charge of crime was made against the election officers, the truth of this charge was collaterally involved in the contentions of contestant, and it was hence necessary for him to sustain those contentions by the same degree of proof as would be required in a criminal trial. But the minority held that it had not been sustained even by a preponderance of the testimony. The boxes were kept by the custodians, who were magistrates or aldermen, in their public offices or private houses, where they could easily have been tampered with by anyone. They were sealed mostly by having melted wax poured on the knots of the tape, without any impression. Such a seal might easily be imitated. It was very difficult to identify them before they were opened, and after they were opened the fact that the ballots in them corresponded somewhat nearly to the returns of the precincts they were supposed to belong to did not show their identity, especially in the three cases where the variations were considerable. In most of the district contestant ran behind his party, but in these three precincts, even on the face of the returns, he was ahead of his party, and the acceptance of the recount would make the disparity still more striking.

Under the law of Pennsylvania the ballot boxes could only be reopened upon a sworn statement of what they were expected to show, and before a "tribunal authorized to try the merits of the case." The commissioners taking testimony were no such tribunal. And the courts of Pennsylvania were always very reluctant to authorize the opening of the boxes. If the precedent was established that any defeated candidate could have a retrial of the election by a recount before the officers authorized to take testimony under the act of 1851 there would be no end of contests, and no one would be safe in his seat.

The minority thought that the testimony of the election officers could not be discredited merely by *charging* them with a crime. They not only testified to the correctness of their returns, but to all the circumstances of the count, showing that there was little possibility of mistake.

After considerable debate, the resolutions presented by the *minority* were adopted by a vote of 77 to 67, and the sitting member retained his seat.

[1 Bart., 353-366.]

(3) CLEMENTS.

State in rebellion. No certificate from the governor or returns from most of the sheriffs, but vote otherwise proved. Report for claimant. Claimant admitted.

Report by Mr. Dawes.

The State of Tennessee had passed an ordinance of secession, and an election was held for members of the Confederate congress on the day and in the manner provided by law for the election of Representatives in Congress. The loyal voters in part of the State cast their votes for Representatives in Congress, and claimant received all such votes cast in his district. The governor refused to grant a certificate of election, and the sheriffs of all the counties but one, being themselves rebels, refused to return the votes cast, but the claimant had the certificate of the sheriff of one county, and had shown by outside proof that he had received votes, amounting in all to about 2,000, in all the counties of the district but one. On the day of the election there was not yet such an armed force in possession of the district as to prevent loyal voters from casting their votes. The committee recommended that the claimant be admitted, and the House agreed to the resolution without debate or division.

[1 Bart., 367, 368.]

(4) UPTON.

State in rebellion. Only 10 votes cast, and they not in form of law. Claimant not admitted.

Report by Mr. Worcester.

The first question in this case was as to the eligibility of the claimant. He had been for many years a resident of Fairfax County, Va., but a few years before the election had moved to Ohio, and voted there on one or two occasions. But a few months before the date at which he claimed to have been elected to Congress he had returned with his family to his residence in Virginia and remained. The committee held him to be an inhabitant of Virginia, and eligible.

The convention of Virginia which passed the ordinance of secession had passed an ordinance suspending and prohibiting the election for Representatives in Congress, and the *de facto* governments, State and local, and the vast majority of the people of this part of the State, so far as appeared, acquiesced in the acts of this convention. Claimant announced himself as a candidate for Congress, but could find no newspaper in the district which would print his announcement, and was obliged to issue circulars. He claimed that 95 persons had voted for him at "side polls," but 85 of these were shown merely by the signatures of the voters to unauthenticated papers, and he did not base his claims on them. But the poll book of one precinct (the election was *viva voce*) showed, of 51 votes cast, 10 which were cast for claimant as Representative. But the election officers whose oaths were appended to it were only sworn to conduct the election for State officers. The testimony showed that the taking of the votes for Representative in Congress was merely the individual act of some of the officers. There was some evidence tending to show that more votes were cast for State officers than were shown on the copy of their poll book in

evidence, indicating that the copy was incorrect or incomplete. The poll book presented was not signed or certified by any of the officers of election, and did not purport to come from any of the officers in whose custody it should have been. The case was not analogous to that of Clements, because in that case some 2,000 votes were legally cast, and several hundred of them were legally returned and canvassed. In this case there was no proof that these 10 votes had been legally cast, and they were not returned or canvassed at all.

The committee expressed no opinion as to the general propriety of allowing an election to stand on only 10 votes, and when most of the voters of the district had no notice that an election would be held, and believed that it could not be legally held.

The case was considerably debated in the House. An amendment admitting claimant was rejected by a vote of 50 to 73. The resolution of the committee against his admission was then passed without division.

[1 Bart., 368-380.]

(5) KLINE *vs.* VERREE.

Recount of ballots. Report for contestee. Contestee retained the seat.

Report by Mr. Dawes.

Contestant served a notice of contest containing 11 specifications, to all of which contestee objected as vague and indefinite. When the case came before the committee, contestee filed a motion to dismiss the case. Contestant stated that he rested his case on the last clause of the tenth specification. The specification was—

10. The examination of the tally papers relating to said Congressional election, and deposited in the office of the prothonotary of the court of common pleas, and deposited in the several ballot boxes in said Congressional district, together with a recount of all the ballot boxes in said district, at said election will show that you were not elected and that I was elected.

Waiving the question whether the clauses of this specification could be separated, the committee held that the clause relied on amounted to no more than an allegation that the contestant was elected and the contestee was not. The objection to the sufficiency of the notice had not been waived, as in some previous cases, but had been made in time for the notice to be amended, and was expressly insisted upon.

The question was thereupon presented to the committee: Shall parties contesting seats in the House of Representatives be held to conduct that contest according to the requirements of the statutes of the United States, or be permitted, without expense, to depart from and disregard the plainest provisions of those statutes in this regard, founded in the plainest principles of justice and fair dealing? * * * The committee, after a careful consideration of this question, have come unanimously to the conclusion that this notice is in no just sense a conformity with the requirements of the statute, or the well-settled rules which should govern in all contests of this kind. The committee have not felt at liberty to pass over this entire disregard of well-settled rules and statute enactments without notice, lest proceedings like these should grow into precedents, and parties to contests should hereafter meet committees, not for the purpose of trying prepared and defined issues, but for the purpose of making vague and uncertain complaints and indulging in endless and unsatisfactory discussions.

The committee were, however, induced, from a desire that no injustice might by any possibility be done the contestant, to permit him to orally "specify" and "particularize" the grounds upon which, under the last clause of the tenth specification, this contest is based.

These grounds were allegations of mistakes made in the count of a number of precincts. There were twelve of these precincts, and if the

results of the recounts of all twelve were accepted, contestant would be elected by a majority of 8 votes. Nearly all the changes were in three precincts, the changes in the three amounting to 54 votes, and the discussion was chiefly in regard to these three precincts.

The committee held that before the recounts could be considered there were two questions to be answered:

Were the ballot boxes produced the ones actually used at these precincts at the election contested? And did they contain, untouched, the ballots so cast?

On the question of identity there was no dispute, as the boxes were properly labeled and identified by the custodians. But the integrity of the ballots was not shown, and the contrary was indicated. The boxes were left in exposed places in public offices. One of the boxes was in charge of a man whose character was impeached. He testified that it had been taken from the office by a stranger and kept for some time. The other box had been left where it could have been tampered with. One of the aldermen believed from its appearance that it had. The conduct of another alderman was suspicious. Most of the bundles of ten and of "scratched tickets" corresponded exactly to the tally sheet, but there were certain bundles of ten which had been counted as straight tickets, but which had "pasters" containing contestant's name on some of them. It was alleged that the judges had overlooked these pasters. But the pasters were of yellow paper, on white ballots, and could not have been overlooked. Some of them were pasted across folds in the ballots, without any corresponding folds in the paster. The third box appeared on its face to have been tampered with. There were loose ballots on top, and the box was not so sealed as to prevent loose ballots from being abstracted and inserted.

The committee were unanimous in the conclusion that no confidence could be placed in the recount of these three boxes, and recommended resolutions declaring contestee elected. The resolutions were passed by the House, after a short debate, by a vote of 105 to 13.

[1 Bart., 381-391.]

(6) BEACH.

State in rebellion. Whole district, except one precinct, in armed occupation of rebels, and election in that precinct not held in pursuance of any valid law. Claimant not admitted.

Report by Mr. Dawes.

A constitutional convention, composed of delegates from the western portion of the State of Virginia, had assembled at Wheeling, and organized a government for the entire State. State officers and a legislature had been elected, and the legislature had met and passed laws for the State. The constitutional convention, however, continued in session, and also passed laws. Among these laws was a law fixing the time for holding elections for Congress. The governor issued a proclamation to the people, calling on them to vote on the day thus fixed. On that day a poll was opened in the city of Alexandria, and claimant received 138 votes. He contended that the fact that only a few votes were cast—if they were legal votes and cast according to law—did not affect the validity of the election. The committee applied this rule to the election in question, and found that it would not stand the test. The fixing of the time of the election was a legislative function, and could not be exercised by the constitutional convention in the presence of

the legislature. Further, the election was not held in conformity with the code of Virginia. The code prescribed that special elections should be called in pursuance to writs addressed to the sheriffs, who were to make proclamation. In this case there were no writs and no proclamations, and the votes were not canvassed according to law. The election was hence not held in accordance with law. But the committee would not have held it void on this account if the legal voters of the district, as a whole, had had an opportunity to vote. But the whole district, except the city of Alexandria, was in the armed occupation of the rebels, and that city was occupied by the troops of the United States, and was practically under martial law. No notice could be given to the people of the rest of the district, and they could not have held elections. They could not be held to have acquiesced in the result of the election, for "acquiescence presumes liberty to protest. In this instance that liberty did not exist." The committee recommended that the claimant be not admitted, and the House agreed to the resolution recommended, without debate or division.

[1 Bart., 391-395.]

(7) BYINGTON *vs.* VANDEVER.

Legal time of election. Vacation of seat by acceptance of military office. Committee reported seat vacant. House concurred.

Report by Mr. Dawes.

Mr. Vandever was elected on the day of the Presidential election in 1860, and it was contended that this was not the proper day, but the committee found that under the laws of Iowa Representatives in Congress were to be elected at a "general election," and that in the Presidential years the general election was required to be held on the same day as the Presidential election. Mr. Vandever's election was therefore legal. But he had since the election raised a regiment which had been mustered into the volunteer service of the United States and had been appointed colonel of that regiment. His commission from the governor of Iowa read "Colonel of the Ninth Regiment of the Militia of Iowa," but the committee found that the regiment in fact was the Ninth Regiment of Iowa Volunteer Infantry. Whether the office was one in the Volunteer Army of the United States or in the militia of Iowa made little difference, as in either case it was incompatible. It was a physical impossibility to perform the duties of the office and also those of Representative, and the conflict of authority involved in the two offices was irreconcilable. And the committee were of the opinion that in spite of the words of his commission Colonel Vandever was really an officer in the Army of the United States. The acceptance of an incompatible office, in law, vacated the first office, and the committee therefore reported that the seat had been vacated. After a short debate the resolution was adopted without division. Some time later the contestant was heard upon the question of his own right to the seat (this question was not included in the committee report, though it had been decided in the committee against contestant), and a resolution to admit him to the seat was defeated by a vote of 28 to 84.

[1 Bart., 395-402.]

(8) MORTON *vs.* DAILY.

Fraud; illegal votes; irregularities. Majority report for contestee; minority report for contestant. Contestee retained the seat.

Majority report by Mr. Dawes; minority report by Mr. Voorhees.

On the face of the returns contestant was elected, and the certificate of election was given him by the governor. Subsequently the governor gave another certificate to contestee, and at the beginning of the session the House, after some debate, admitted the contestee to the seat. The testimony having been taken by the contestee as contestant and the contestant as contestee, the House passed a resolution referring the papers to the committee without regard to this irregularity.

The contestee asked that votes from four counties or parts of counties be rejected, and the committee held that they should be rejected. One of these was the northern precinct of L'eau qui Court County. The evidence showed that the election was held at a house 90 miles from the county seat and close to the Dakota border. There were only 5 residents at or near the place of election, and nearly all the votes cast were by nonresidents. Most of them came from Dakota; some were Indians, and some of the voters voted several times. The United States census was completed only a few days after this election. Counting the votes returned from the other precincts in this county, there would be a fair proportion of votes to population, considering that it was a frontier country, but if the votes of this precinct were counted there would be more voters than the census showed the entire population of the county to be.

The contestant attempted to overthrow this testimony by impeaching the witnesses, but the committee held that he had not been successful, and rejected all the votes returned from this precinct.

The committee also rejected 81 votes cast by residents on the Pawnee Indian Reservation. This reservation was not a part of the Territory of Nebraska nor under its jurisdiction.

The committee also rejected the votes of Buffalo County on the ground that it was not legally organized. The organization of this county had been declared to be illegal by the House in the former case of *Daily v. Estabrook*, and the committee quoted from the report in that case.

The committee also rejected the votes of nonresidents cast at some other precincts, but refused to reject votes cast on the "half-breed land," which was not exactly an Indian reservation, and the votes of two counties in regard to which there was inconclusive evidence of lack of legal notice.

The contestant asked to have the vote of the Falls City precinct rejected on account of fraud, but the only witness testifying to the fraud was impeached. He asked to have the vote of Pawnee County rejected as unorganized, but the committee found that he had not presented proper evidence of the insufficiency of the original organization, and that it appeared on the other hand that the county had been recognized by the legislature as organized and created into a legislative district.

The main contention of contestant was that the votes of nine counties should be rejected because an "abstract" of the votes was not returned to the Territorial canvassers, but only a statement of the aggregate

votes. Assuming that this statement of aggregates was not the abstract required by law, the committee did not think that this irregularity would justify the rejection of the votes of the counties, especially as it was not denied that these aggregate returns stated the actual aggregate of the votes cast.

Under the rulings of the committee, contestee had a majority of 150 votes, and the committee recommended that he retain the seat.

The minority presented a long report (not given in 1 Bartlett), differing from the committee on most points. They held that there was as good ground for rejecting the vote of the Falls City precinct as L'eau qui Court precinct, and they would about balance each other. However irregular the original organization of Buffalo County may have been, the present officers were certainly elected legally, and the original irregularity could not forever prevent the county from being organized. The return of the aggregate votes, instead of the abstract required by law, had the effect of rendering the detection of fraud difficult or impossible, and should not be permitted. Contestant had been refused permission to take certain additional testimony desired, but the minority printed an *ex parte* affidavit tending to show that the certificate of election by which contestee held the seat was a forgery.

After some debate, the House laid the whole subject on the table, by a vote of 69 to 48, thus leaving the sitting member in his seat.

[1 Bart., 402-414, and Report No. 69, second session Thirty-seventh Congress, part 2, and on preliminary question Report No. 4, first session Thirty-seventh Congress.]

(9) SEGAR.

State in rebellion. Whole district except one precinct in armed occupation of rebels, and election in that precinct not held in pursuance of any valid law. Claimant not admitted.

Report by Mr. Dawes.

The facts in this case are the same as those in the case of Beach, already outlined (page 176), and the report is in nearly the same words. The election was held in only one precinct, and only 25 votes were cast. The committee reported against the claimant, and after a long debate the House adopted the resolutions recommended without division. This case is earlier than the one of Beach, and the decision of that case was based on the decision of this, but they have been given here in the order of 1 Bartlett in order to avoid confusion.¹

[1 Bart., 426-437.]

(10) LOWE.

Claim of additional representative under new apportionment. Claimant not admitted.

Report by Mr. Dawes.

The seventh census, in 1850, was taken under a law which provided a method by which, unless a subsequent law should be passed, the eighth and all subsequent censuses should be taken. The law also provided for a method of apportionment by the Secretary of the Interior, on the basis of 233 representatives, to take effect on March

¹ Except that in 1 Bartlett the two cases of Segar are accidentally transposed. This is the first case.

3, 1853. Under this act California was entitled to but one representative, but in consideration of the incompleteness of the census of that State, Congress passed a special act giving her two representatives. Under the eighth census California would, under the apportionment law, be entitled to three representatives, and believing that the new apportionment went into effect immediately, the authorities of California issued proclamations for the election of three members from the State at large, and three members were so elected, claimant being the third.

The claimant contended that as there was no express provision that the new apportionment should go into effect on March 3, 1863, and as all the preparatory proceedings were required to be finished "as soon as practicable," and the census was required to be completed by the 1st of November, that the apportionment must go into effect by March 3, 1861. But the committee held that the whole purpose of the law was to have the Eighth Census and apportionment proceed, *mutatis mutandis*, precisely as the Seventh had done. There was no express provision that the Eighth Census should be completed by November 1, 1861, except the provision that the Seventh should be completed by November 1, 1851, and the same mode of construction would require that the provision that the apportionment under the Seventh Census should go into effect on March 3, 1853, should be held to require that the apportionment under the Eighth Census should go into effect on March 3, 1863. Such was the plain intent of the law, and such had been the construction put upon it by Congress in the special act providing for additional representation under the eighth apportionment. The construction contended for would substantially require a dissolution and reorganization of the House, as in the case of States whose representation would be reduced under the new apportionment there would be no way of determining which members should retire, and all the seats would have to be vacated and a new election had. The committee reported a resolution declaring the claimant not elected, and the House agreed to the resolution, after a short debate, and without division. An amendment admitting claimant was rejected by a vote of 49 to 69.

[1 Bart., 418-424.]

(11) FOSTER.

State in rebellion. Election not in conformity to law, and few votes cast. Claimant not admitted.

Report by Mr. Dawes:

The State of South Carolina was almost entirely occupied by rebel troops, and there was no government of any sort except the rebel government. There was no regular election held anywhere, but claimant asked to be seated on certain papers purporting to be signed by a few citizens expressing their choice of him for Congress. The committee could see nothing on which the right of the claimant could be properly based, and reported a resolution declaring him not entitled to the seat. The House adopted the resolution without debate or division.

[1 Bart., 424-426.]

(12) SEGAR (second case).

Election held in only part of the district, but under the forms of law. Committee made no recommendation. House admitted claimant.

Report by Mr. Dawes:

After the report of the committee and action of the House on the prior case of Segar, another election was held, in which the objections stated in the committee report were sought to be avoided. Writs of election were issued by the governor and carried to the sheriffs of three counties, and elections were held in form of law in two of these counties, and one precinct of the third. About 1,000 votes were cast, and these were returned and canvassed in form of law. The governor issued a certificate of election, but this was not until after the case had been referred to the committee. There were 17 counties in the district, and the usual vote was about 8,000. The three counties where the elections were held contained a little over one-fourth the population of the district.

The committee reported the facts, but could agree on no conclusion. The House, after some debate, by a vote of 71 to 47, admitted the claimant.

[1 Bart., 414-418.]

(13) FLANDERS and HAIN.

Time of election fixed by military governor. Registration law partly disregarded. Committee report for claimants. Claimants admitted.

Reported by Mr. Dawes.

The First and Second districts of Louisiana, from which these claimants claimed to have been elected, were each composed of portions of the city of New Orleans and some country parishes. The city of New Orleans and most of the country included in these districts were in the complete control of the United States army, under General Butler, and the conditions were such that elections could be held in nearly all the district without fear of rebel interference. General Shepley had been appointed military governor of Louisiana, and a very large portion of the population in the reclaimed territory had taken the oath of allegiance and acquiesced in the authority of General Shepley.

No Congressional election had been held in the State in 1861, and there were, consequently, vacancies in the representations of all the districts. Under the constitution of the State the governor had authority to fix the time of elections to fill vacancies, and the military governor, in the exercise of his civil powers, fixed the time for this election and issued writs. The election was held under all the forms of law, except in respect to the registration of Orleans Parish. No registration was required by the laws of the State except in this parish, and here the registration was a permanent one. The seceding legislature had abolished and destroyed the former registration, and required a new registration conditioned on the taking of the oath of allegiance to the Confederacy. This enactment was, of course, void, but the destruction of the former and still valid registration rendered it impossible to proceed under that. A new registration was ordered and

partly completed, but it was ordered that all persons who failed to be registered might be permitted to vote on satisfying the judges of their qualification. This was generally done by proof of former registration. The committee held that the registration law was directory, and that its partial disregard did not vitiate the election, but if it were held otherwise the election could still stand on the result outside of Orleans Parish, where no registration was required. The election was participated in by a very large majority of the legal voters present in the parishes, and appeared to have been a very free and peaceable election. The only possible objection to the validity of the election was a possible objection to the authority of the military governor to order the election.

The exact powers of a military governor can not be easily defined. They have their origin in, and are probably limited by, necessity. They are to some extent civil as well as military, and the authority for his civil functions is no less clear than for his military.

Both had been recognized by the Supreme Court, and also by Congress, on former occasions, as in the admission of California. The Constitution required the United States to guarantee to each State a republican form of government. Representation was one of the essentials of such a government, and the right of the people to representation ought not to be dependent on the willingness of the rebel governor of Louisiana to order an election. Some one must assume the power to order the election. General Shepley assumed to act as governor of Louisiana, and his actions were acquiesced in by the people. The House ought at least to recognize him as *de facto* governor until his authority was contested by some one.

The committee recommended resolutions admitting claimants. There was no minority report, but in the extended debate in the House strong objections were raised to their admission, based on the fact that the military governor was not elected by the people, but appointed by the President. The claimants came not so much as the representatives of the people as the creatures of Executive power, and to admit them would be to augment the already dangerous increase in that power.

After an extended debate, the House adopted the resolution admitting the claimants by a vote of 92 to 44.

[1 Bart., 438-455.]

(14) McCloud and Wing.

State in rebellion. Election not in form of law, and held in only small part of the district. Report against claimants. Claimants not admitted.

Report by Mr. Dawes.

At the election under which these claimants applied for seats, Mr. McCloud received a majority of the votes, but if a precinct where the election was by ballot, the law of Virginia requiring it to be *viva voce*, were thrown out Mr. Wing would have a majority. The committee did not decide between the claimants, as in their opinion the whole election was illegal.

The election was called by a proclamation of Major-General Dix, commanding the Department of Virginia, who issued a proclamation fixing the time of the election and the qualifications of voters, and requiring all qualified voters to vote, under pain of being considered disloyal. The election officers were appointed by General Viele,

"military governor of Norfolk," and returns were made to him. Governor Pierpoint issued writs of election to the sheriffs of the four counties where the election could be held, but the date mentioned in these writs was afterwards changed by some one, so that the election was held the day after the reception of the writs, though the law required ten days' notice.

The committee found that the election was entirely in disregard of law. General Dix was not in any sense a military governor, and pretended to no civil functions. The jurisdiction of the "military governor of Norfolk" was uncertain, but it did not seem to cover the whole district in which the election was held. The election officers were under the law required to be elected by the people, and not to be appointed by any officer. The requisite notice of the election was not given, and the returns were not made to the proper officers. The qualifications of voters as fixed in the proclamation of General Dix were not those prescribed by the constitution and laws of Virginia. Writs of election were issued to only four of the eleven counties of the district. This was, in this case, the result of necessity, as the remaining counties were in the possession of the rebels, but it would be dangerous to recognize any such power of selecting certain counties in a district under any circumstances.

The election could not be considered as a fair expression of the choice of the people, as it was only held in four of the eleven counties of the district and but a small fraction of the total vote was cast. The rest of the district was in the armed occupation of rebels, and no election could have been held in it. The committee therefore recommended resolutions against the admission of claimants, and the House passed the resolutions without debate or division.

[1 Bart., 455-459.]

(15) McKENZIE.

State in rebellion. Election not in form of law, and held in only small part of the district. Report against claimant. Claimant not admitted.

Report by Mr. Dawes.

The facts in this case were much the same as in the other Virginia cases. Only two of the nine counties in the district had been reclaimed so that elections could be held in them. Governor Pierpoint issued writs of election, but authorized the persons to whom they were addressed to change the date of the election if necessary, and the date was changed from December 31 to January 15. The committee were of the opinion that this power to fix the dates of the election could not be delegated.

The legislature of Virginia had subsequently passed an act which, it was contended, legalized this election, but the committee found that the act was only intended to permit the making of returns within less than the formerly legal time. If the act had had the intention claimed, it would have been beyond the power of the legislature to legalize an election not legal at the time it was held.

Only two of the nine counties were able to participate in the election, and the committee, on the principles heretofore followed, recommended that the claimants be not admitted. The House passed the resolutions without debate or division.

[1 Bart., 460-462.]

(16) RODGERS.

State redistricted by seceding legislature. Claimant not admitted.

Report by Mr. Dawes.

The State of Tennessee had been redistricted by the rebel legislature for the Confederate congress. On the day of the election for members of the Confederate congress claimant claimed to have been elected to the House of Representatives from a district composed of parts of two districts already represented by two members of the House. The committee recommended that he be not admitted, and the House concurred without debate or division.

[1 Bart., 462, 463.]

(17) PIGOTT.

State in rebellion. Election held in only small part of district. Claimant not an inhabitant. Not admitted.

Report by Mr. Dawes.

The election was held in only three of the eleven counties of the district, and only in portions of them. Under the principles heretofore followed, the committee held that this was not an election.

Claimant had formerly lived in North Carolina, but had been a resident of Washington for years. He had gone to North Carolina a few months before the election as private secretary to the military governor. The committee held that this did not constitute him an inhabitant.

The House passed the resolution refusing to admit the claimant without debate or division.

[1 Bart., 463, 464.]

(18) GRAFFLIN.

State in rebellion. Election not in form of law, and held in only a small part of the district. Claimant not admitted.

Report by Mr. Dawes.

The facts in the case were the same as those in the case of McKenzie, and the committee came to the same conclusions. The governor had delegated the power of fixing the time of the election to the person who carried the writs, which the committee held he had no power to do. The election was held in only a small part of the district, and could not express the choice of the voters. The House agreed to the resolution refusing admission to claimant without debate or division.

[1 Bart., 464, 465.]

(19) HAWKINS.

State in rebellion, and most of the district in armed occupation. Claimant not admitted.

Report by Mr. Dawes.

A convention of the people of the district had been held, and a date fixed for an election, unless some other date should be fixed by the governor. The district was then free from troops. Just before the day fixed, writs from the military governor arrived fixing a later day.

The rebels heard of these writs, and made an incursion into the district. Battles were fought, and by the day of election the whole district was occupied by the contending armies. The general in command of the Federal troops issued orders postponing the election; but in a few places, where the orders did not reach, polls were opened. Perhaps 1,900 votes were cast, but the only proof of the votes possible was unsworn letters and statements from private citizens. The committee thought it would be a dangerous precedent to accept these as proof. The House refused to admit claimant, without debate or division.

[1 Bart., 466-468.]

THIRTY-EIGHTH CONGRESS, 1863-1865.*Committee on Elections.*

Mr. DAWES, Massachusetts,	Mr. SCOTFIELD, Pennsylvania,
VOORHEES, Indiana,	SMITHERS, Delaware,
BAXTER, Vermont,	UPSON, Michigan,
SMITH, Kentucky,	BROWN, Wisconsin,
Mr. GANSON, New York.	

Cases.

- (1) Lewis McKenzie *vs.* B. M. Kitchen, *Virginia*.
- (2) John S. Sleeper *vs.* Alexander H. Rice, *Massachusetts*.
- (3) José M. Gallegos *vs.* Francisco Perea, *New Mexico*.
- (4) John P. Bruce *vs.* Benjamin F. Loan, *Missouri*.
- (5) Birch *vs.* King and Price *vs.* McClurg, *Missouri*.
- (6) Lucius H. Chandler, *Virginia*.
- (7) Samuel Knox *vs.* Francis P. Blair, *Missouri*.
- (8) Robert C. Schenck and Francis P. Blair.
- (9) John H. McHenry, jr., *vs.* George H. Yeaman, *Kentucky*.
- (10) J. B. S. Todd *vs.* William Jayne, *Dakota Territory*.
- (11) James Lindsay *vs.* John G. Scott, *Missouri*.
- (12) John Kline *vs.* Leonard Myers, *Pennsylvania*.
- (13) Charles W. Carrigan *vs.* M. Russell Thayer, *Pennsylvania*.
- (14) Joseph Segar, *Virginia*.
- (15) A. P. Field, *Louisiana*.
- (16) M. F. Bonanzo, A. P. Field, and W. D. Mann, *Louisiana*.
- (17) T. M. Jacks and J. M. Johnson, *Arkansas*.

(1) MCKENZIE *vs.* KITCHEN.

Election held in less than half the district. Claim that one county was a part of West Virginia. Majority report against both claimants; minority report for contestee. Neither claimant admitted.

Majority report by Mr. Dawes; minority report by Mr. Smith.

Of the votes cast at this election contestee received a majority, but if the vote of Berkeley County were excluded contestant would have a majority. He claimed that Berkeley County was a part of West Virginia, and had no right to vote for a Representative from Virginia. But the committee found that Berkeley County was not to be admitted to West Virginia until the voters of the county and the legislature of West Virginia had both given their assent. The assent of the voters was given on the same day that votes were cast for Representative in Congress, and that of the legislature was not given until some time afterwards. Berkeley County was not mentioned in the act of Congress admitting West Virginia, and hence the assent of Congress had not yet been given, and the county was still a part of Virginia.

This disposed of the claim of contestant. The case of contestee was more difficult. The part of the district still under the control of the rebels contained a very little more than half the territory and popula-

tion of the district. The counties in which elections were held contained nearly half the population, but elections were not held in the whole of all the counties, and parts of the counties were still disputed territory and only partly under the control and protection of the United States Army. All the district was under the control of martial law and military discipline, "certainly, at best, poor instrumentalities for ascertaining the choice of freemen." The committee came to the conclusion that this case was within the application of the precedents already established, and recommended that the claimant be not admitted.

Mr. Smith favored seating the contestee on the ground that substantially half the district participated in the election (this report is not given in 1 Bartlett), but the House, after a short debate, adopted the resolutions presented by the committee without division.

[1 Bart., 468-472, and Report No. 14, first session Thirty-eighth Congress, pp. 10, 11.]

(2) SLEEPER *vs.* RICE.

Mistake in first count. Recount and amended return. Report for contestee. Contestee retained the seat.

Report by Mr. Dawes.

According to the precinct returns as first made contestant had a majority of 32 votes, but seven days after the election an amended return was made from Ward 12, Boston, which was counted by the board of aldermen and included in the total return. Counting this amended return, contestee had a majority of 28 votes. Contestant claimed that this amended return was without authority in law and untrue in fact. But the committee found that under the statutes the ward officers had authority to make amended returns, within nine days after the election, to correspond with the truth, and that these returns were to be counted by the board of aldermen whether made in obedience to a notice from said board or not. As all returns were to be counted, regardless of informalities, the reason for amended returns contemplated must have been that the first returns were not true. As no specific method of ascertaining whether they were true or not was provided, no method could be held to be prohibited which attained that object. The amended return, based on a recount of votes by the election officers, was hence legal.

An examination of all the circumstances convinced the committee that it also represented the truth. The votes were counted in packages from time to time during the day, a tally sheet kept of this count, and the result announced on a blackboard. The ballots were divided into packages, and the official returns were based on a count of these packages, made in the evening. According to the first, or "rough count," there were 60 votes less cast for Representative in Congress than for other offices. An examination of the original tally sheet showed that a mistake of 60 had been made by reading the figures 578 as 518. There was also a deficiency of about 30 in the votes for Representative in Congress, according to the first official count. If this should be corrected by adding the 60 votes found by correcting the first "rough count," there would be an excess of about 30 votes. The number of votes shown by the "rough count," as corrected, corresponded substantially to the number cast for other offices.

The ballots had been kept in a trunk in the attic of the house of the clerk of the ward. Believing that a mistake had been made, he privately recounted them, from the appearance of the bundles, without untying the package. He then called a meeting of the ward officers, who carefully recounted all the ballots, comparing the account with the tally sheet of the original count. It was found that one package of 28 votes had been overlooked in the original count. Counting this package, the result corresponded substantially to that shown by the corrected "rough count," and the number of votes cast for Congress was substantially the same as for other offices.

The clerk swore that the ballots had not been tampered with, and the committee found that the remarkable coincidences shown, and the probability of the result of the recount and the improbability of the original count, and the full explanation of how the mistake must have occurred, left no room for doubt that the ballots were not tampered with.

The resolutions sustaining the right of contestee to his seat were adopted without debate or division.

[1 Bart., 472-481.]

(3) GALLEGOS vs. PEREA.

Application for further time to take testimony refused.

Report by Mr. Smithers.

Notice of contest and answer were duly served. Contestee took some testimony. Contestant served notice to take testimony either before the chief justice of the Territory or a probate judge. He took no testimony, but applied to the House for further time, alleging that there were but two judges of the district court in New Mexico; that one of them resided in an inaccessible part of the Territory and the other was a violent political opponent. No reason was given for not taking testimony before the probate judge named in the notice. The committee recommended that the extension be not granted, and the House agreed without debate or division.

[1 Bart., 481, 482.]

(4) BRUCE vs. LOAN.

Violence and intimidation; military interference. Majority report to declare seat vacant; minority report for contestee. Contestee retained the seat.

Majority report by Mr. Ganson; minority report by Mr. Upson.

Contestant asked that the election be declared void on account of violence and intimidation and illegal interference by the armed militia of the State. There were fifteen counties in the district, and the contestant charged that the election was interfered with in seven of them, but he took testimony in only five, alleging that it would have been dangerous to attempt it in the other two. It was conceded that the election in eight counties was fair.

The convention of the State had passed a law requiring all persons to take a prescribed oath of loyalty in order to qualify them to vote. All the loyal citizens of the State had been organized into militia. Shortly before the election, orders had been issued to the militia cautioning them against interfering with the freedom of anyone to vote

at the election. The committee found, however, that these orders had been disregarded in the five counties named. Testimony was quoted in all of them to show that there were scenes of violence at the polls, and that persons were prevented from voting for contestant. Contestee had been a brigadier-general of the militia, and many of the candidates on the same ticket with him were officers in the militia. None of the candidates on the ticket with contestant belonged to the militia.

After quoting and commenting on the testimony in regard to the various polls, the committee called attention to the condition of Missouri, and the fact that it had been entirely reclaimed from the rebels, and that there was no occasion for military interference at the polls, nor any reason why a free and quiet election could not have been held. If the militia had obeyed the orders given them, this would have been the case.

But the evidence discloses ample proof that a portion of the militia in certain localities disregarded entirely the injunctions given them in the orders before mentioned, and in many instances, in violation of their duty as good citizens, and of the commands promulgated prior to the election by those orders to them as soldiers, assumed to determine who should and who should not vote, and for whom votes should be cast, and by threats, violence, and by various modes of intimidation so far interfered with the election as, in the opinion of the committee, to render the election a nullity.

The minds of the people of Missouri had not yet become quiet, and threats and instances of violence were likely to spread a condition of alarm, and have more effect than they would have in a community accustomed to the conditions of peace. Considering the evidence in the light of these considerations, the committee concluded that the election was void, and recommended resolutions vacating the seat.

The minority held that no such condition of affairs existed as to invalidate the election. There were 15 counties in the district, and evidence was brought against only 5 of them, and against only 8 precincts in these 5 counties. There were probably 150 precincts in the district, and the election was not attacked in 142 of them. A detailed examination of the testimony in regard to these 8 precincts showed that a large part of it was hearsay, or consisted of vague and general statements or rumors, not confirmed by the specific facts shown. There was excitement and some violence, but this was to be expected under the circumstances, and it did not appear that it interfered with a fair election. The fact that fewer votes were cast at this election than at former elections, taken by the majority as indicating the result of intimidation, could be better accounted for in other ways. If all the votes claimed to have been intimidated at the only poll where there was serious violence were deducted, and all the votes at the other polls that could be claimed upon any reasonable estimate, contestee would still have a majority. The minority therefore recommended resolutions declaring contestee elected.

After a long debate the House passed the resolutions presented by the *minority*, by a vote of 71 to 59, and contestee retained his seat.
[1 Bart., 482-520.]

(5) *BIRCH vs. KING* and *PRICE vs. McCLURG*.

These cases were similar to the case of *Bruce vs. Loan*. After the House had refused to agree to the report of the committee in that

case, the papers in the above-named cases were reported back to the House and laid upon the table. There were no written reports, nor was there a contest in the House.

[1 Bart., 520.]

(6) CHANDLER.

State in rebellion; election in only small part of district. Claimant not admitted.

Report by Mr. Dawes.

This was a case like a number of others in Virginia. Only a small part of the district had been reclaimed, and no election could be held in most of the district. The committee reported against the claimant, referring to the reports in similar cases for the principles and reasoning involved in the decision.

[1 Bart., 520, 521.]

(7) KNOX *vs.* BLAIR.

Fraud; illegal voting; irregularities. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Dawes; minority report by Mr. Ganson.

This district consisted of a portion of the city of St. Louis and three outside townships. The returned majority of the sitting member was 153 votes. A large number of charges were made by both sides, but the ones relied on by the contestant were those against the Abbey precinct, and charges of illegal votes cast by members of various military companies. The contestee relied on charges of illegal votes cast by members of the various companies of "Osterhaus's brigade" and on the illegal rejection of various returns for informality. The committee called attention to the fact that the pleadings on both sides were very vague and indefinite.

For vagueness, uncertainty, and generality they are, in the opinion of the committee, without example, and seem to have been drawn in studious disregard both of the act of Congress and of all precedent. But as neither contestant nor sitting member was in a situation to take exception to the substance or mode of the other's pleading, the committee were not called upon for a decision upon this point, but present the case as they find it upon the record. They do not feel at liberty, however, to permit these pleadings to pass into a precedent without recording the opinion that many of the allegations on both sides are bad both in substance and form.

In the Abbey precinct, where 424 votes were cast, nearly all for contestee, contestant charged 400 illegal votes, giving the names of the voters. The committee found that the whole election was so tainted with fraud as to require the rejection of the entire return. The law permitted residents of the district to vote in any precinct in the district on taking an oath that they had not and would not vote in any other precinct. The evidence showed that the judges in this precinct had permitted 88 illegal voters to vote in a body, and there was no evidence that they had administered the required oath to any of them. One of the judges exchanged places with a violent partisan of the sitting member during part of the day while he himself electioneered for contestee. The polling place was under the practical control of another violent partisan of the sitting member. There were large numbers of paroled prisoners in the barracks near the polling place under the charge of an officer who was an active supporter of the sitting member. Many of

these soldiers were seen in wagons going toward the city and shouting for Blair. At this precinct four times as many votes were cast as had ever been cast in it before or since, and mostly by persons who were entire strangers to old residents of the district.

Indeed, it is difficult to see in the manner in which this election was conducted any limit, beyond an exhaustion of the supply of men, to the number of votes returned from this precinct.

When the result in any precinct has been shown to be "so tainted with fraud that the result can not be deducible therefrom," then it should never be permitted to form a part of the canvass. The precedents, as well as the evident requirements of truth, not only sanction but call for the rejection of the entire poll when stamped with the characteristics here shown.

The evidence in regard to illegal voting by members of military companies consisted largely of sworn copies of muster rolls. Contestee claimed that these were not admissible for any purpose, but asked that if they were admitted for any purpose they be admitted for all purposes. The committee held that the copies of the muster rolls kept with the regiment, as well as those kept in the office of the Adjutant-General at Washington and of the adjutant-general of Missouri, were each original papers, sworn copies of which might be admitted. The committee held also that they were evidence of the ages of the persons whose names were contained in them, and when made about the time of the election of the persons belonging to the regiments, but they were not evidence of the residence of voters, and when made a year or two before the election were not evidence of the persons composing the regiment at the time of the election. Upon this and other evidence the committee rejected a large number of illegal votes cast for the contestee.

The contestee claimed that 302 persons voted as members of the "Osterhaus brigade" who did not belong to it, and that a large number of others were nonresidents of the district, and asked that the vote of the whole brigade be thrown out. The muster rolls were made out nearly two years before the election, and constant recruiting from the city of St. Louis had been going on since, so the committee held that the 302 voters whose names were claimed not to be on the muster rolls were not shown not to be members of the brigade. The fact that large numbers of these names were difficult German names, liable to be misspelled, probably accounted for a large part of the apparent discrepancy. There was, however, specific proof of illegal votes in many of the companies of the brigade, and the committee rejected these votes.

A number of poll books of military companies were rejected by the official canvassers because no "abstract of votes" was returned with them. But the abstract was simply a computation or casting up of the votes, and as the votes themselves were all returned (the election in military companies was *viva voce*), the omission to cast them up was immaterial. Making all the deductions and additions indicated above, Mr. Knox had a plurality of 49 votes, and the committee recommended resolutions declaring him elected.

The minority held that the case of contestant was not made out. Without the rejection of the whole vote of the Abbey precinct a majority could not be shown for him. Contestant did not in his notice of contest ask that this precinct be thrown out, or allege fraud against the judges, and he ought not to be permitted to do so now. His original charge was illegal votes, and he now only claimed to have

proved 88 of these. Accepting the proof according to the claims of contestant, there were in fact only 70 such votes. If the charge of fraud was allowed to be made now, the reception of that number of illegal votes did not prove fraud, and the evidence on which the votes were claimed to be illegal was not conclusive. The other charges alleged to show fraud were not sustained by the evidence and the minority could see no reason for rejecting this poll.

The muster rolls, the minority held, were not trustworthy evidence, but if they were to be admitted they ought to avail both sides, and not be admitted under a partial rule which permitted contestant to prove by them such charges as he had made, while not permitting contestee to prove in the same way the class of charges he had made. And contestant, further, had charged that votes were illegal on certain grounds, and was now permitted to show them illegal on other grounds, which ought not to be done. The specifications relied on by contestee were specific, and the proof came within them, so that the committee's excuse for permitting contestant to go beyond the law because contestee had done so had no basis. Deducting all illegal votes as found by the minority, Mr. Blair had a majority of 469 votes, "or, allowing that identity of name proves identity of person," of 399 votes.

After a brief debate the House adopted the resolutions presented by the majority, giving the seat to contestant, by a vote of 81 to 33.

[1 Bart., 521-550.]

(8) SCHENCK and BLAIR.

Acceptance of military appointment vacates seat unless appointment resigned before the beginning of the session. Mr. Schenck's seat declared not vacant; Mr. Blair's vacant.

Report by Mr. Dawes.

This report is not given or mentioned in 1 Bartlett, probably because it is not strictly the report of a contested election case. Both Mr. Schenck and Mr. Blair had been appointed major-generals in the Army subsequent to their election to Congress. General Schenck had resigned before the beginning of the first session; General Blair not until about a month after the session commenced. Both had resigned under a verbal understanding that they might be restored to their positions if they desired. General Schenck had not made application to be restored, but General Blair had made application for a command.

Upon these facts the committee reported that Mr. Schenck was entitled to his seat, but that General Blair had never had the legal right to qualify.¹ The offices of major-general and member of Congress were clearly incompatible, and under the principles laid down in all the precedents the acceptance of a disqualifying office operated as a resignation of the office already held. But under the precedent of the case of Herrick (Fifteenth Congress) a Representative-elect was not a member until the beginning of the first session of Congress, and the fact of holding an incompatible office subsequent to election, but previous to the beginning of the session, did not prevent the Representative-elect from qualifying as a member, having previously resigned his other office. General Schenck, therefore, was entitled to retain his seat.

The case of General Blair involved a new question. He had resigned

¹General Blair had already been deprived of his seat by the action of the House in the case of *Knox vs. Blair*.

his military office before qualifying as a member of Congress, but not until a month after the day on which he could and should have qualified. The committee held that where a person holding one office is appointed to another and incompatible one, the duties of which are required to commence at a certain time, and he continues to perform the duties of the former office after that time, he must be held to have declined the latter, and can not afterwards, by resigning his former office, be entitled to assume the latter. At the opening of the first session General Blair had to choose between the two offices, and having continued in the military service, he could not afterwards take a seat in Congress.

[Report No. 110, first session Thirty-eighth Congress.]

(9) MCHENRY *vs.* YEAMAN.

Military interference. Majority report for contestee; report by Mr. Voorhees to vacate seat. Contestee retained the seat.

Majority report by Mr. Smithers; minority report by Mr. Voorhees.

The sitting member received a majority of 5,224 votes. Contestant asked that the election be declared void on account of certain military orders, declaring the State under martial law and directing the military to aid the civil authorities in holding a fair and peaceable election, and on the ground that the election was carried by force and fraud, and that test oaths were applied unknown to the laws of Kentucky.

The committee did not inquire into the propriety of the orders complained of. Contestee received a very large vote—a majority of all the voters in the district, as shown by the largest vote ever previously cast. The population of the district had been depleted by the war, and if all the voters left in it who did not vote had voted for contestant contestee would still have been elected. There were occasional irregularities, but contestee was plainly the choice of a majority of the people, and ought to retain his seat.

Mr. Voorhees filed a report (not given in 1 Bartlett) contending that the election was void, because held under martial law, and because the orders and policy of the military authorities were such as to intimidate persons from voting for contestant.

Any election for a civil office held under *martial law*, where the qualifications of voters are prescribed by military officers, is not such an election as the founders of this Government intended should be held under the Constitution which they framed, and should be declared void in all cases by the Congress of the nation. Such an election is the one now in question.

After a brief debate the House passed the resolution declaring the sitting member entitled to his seat by a vote of 96 to 26.

[1 Bart., 550-555, and Report No. 70, first session Thirty-eighth Congress, part 2.]

(10) TODD *vs.* JAYNE.

Prima facie right to the seat. Contestant admitted. Fraud; irregularities; illegal votes. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Dawes; minority report by Mr. Scofield.

At the beginning of the session both contestant and contestee presented themselves and claimed the right to be sworn in. The question

was referred to the Committee on Elections, who reported in favor of Mr. Jayne. Mr. Jayne presented a certificate of election, signed by himself as governor, a certificate of election from the present governor, and the proclamation of the secretary and acting governor, showing that he was elected according to the official canvass. Mr. Todd presented a certificate from the same secretary and acting governor, stating that subsequent to the time fixed by law for the official canvass another return had been received, giving Mr. Todd a larger majority than the majority of Mr. Jayne on the official canvass. The committee found that the secretary had no legal authority to issue this certificate, and it had no more weight than the statement of a private person. But, taking it as true, it showed that the *prima facie* right, under the law and the official canvass, belonged to Mr. Jayne. Whether the votes in question were actually cast and correctly returned was a question to be considered when the case was heard on the merits.

On the merits of the case the committee reported for contestant. On the face of the returns contestee had a majority of 16 votes. This did not include the votes of two counties rejected by the Territorial canvassers and the county whose returns were delayed. Contestant claimed that the votes of two of these three counties should be counted, and that illegal votes cast in various counties should be deducted. Contestee made counter charges of illegal voting, and asked that one of the counties not counted be counted and the others rejected.

Technical objections were raised by both sides. The committee excluded a deposition taken by contestee a month after the expiration of the legal time before a judge in the District of Columbia instead of before an officer resident of the Territory. Contestee objected to the notice of contest, because it was served *before* the result had been proclaimed. The committee were—

of opinion that this was a defect which the sitting Delegate could waive, and that by answering *after* the result had been proclaimed, and within the time when a new notice of contest could have been served, without availing himself of the objection, and proceeding to take the testimony, he had waived the right to object to it at the hearing.

The testimony of contestant was taken before two justices of the peace. The law of 1851 permitted it to be taken before justices of the peace only when no other officer named in the law was a resident of the Territory. Contestant claimed that the only other officers in the Territory included in the law were the chief justice and associate justice of the Territory, and that as their families were domiciled in Iowa, and they only went into the Territory to hold court, they were not residents of the Territory.

The committee were of opinion that the two justices of the peace, residents of the Territory, were competent to take the depositions.

The committee rejected 9 votes cast by a surveying party only temporarily in the Territory. They also deducted the votes of one precinct whose whole vote was evidently tainted with fraud. The poll was opened the night before the election, at a different place from that required by law, and a large number of illegal votes received. The next day, at the legal place, other votes were received and put into the same box unopened. Names were added to the poll list to make up for the extra ballots, and there were other indications of fraud.

Another county was attacked because the votes of many Iowa soldiers and a number of halfbreed Indians were received. From the evidence

it was possible to tell the largest number of votes that could have been cast by these persons, and they were eliminated and the rest counted. Another county was not counted by the official canvassers nor by the committee. A party friend of contestant, who had been appointed judge, but was refused permission to act, requested voters to vote open tickets, and his friends did so, and he took their names. The judges adjourned for dinner, taking the box with them. When the box was opened in the evening there were more ballots than voters had voted, but less for Mr. Todd than had voted open tickets for him. There was a general fracas when this was discovered, and the ballots never were finally canvassed.

The only other disputed point was the vote of Kittson County, which was returned to the secretary of the Territory a few days late. The committee did not think this ought to prevent it being counted, if it was otherwise correct. Contestee claimed that the vote was fraudulent and fictitious, but his only evidence was the deposition taken in Washington, which had been excluded by the committee. It was also objected to on the ground that the precinct was in the Indian country. But the committee held that the only Indian lands excluded from the limits of the Territory by the organic act were such as were held under certain treaties. This was not such land, and the votes not having been proved to be otherwise illegal, should be counted. This would give a majority to contestant, and the committee recommended that he be seated.

Mr. Scofield and Mr. Upson presented a minority report sustaining the right of the sitting member. They rested the case on Kittson County. If evidence not strictly within the law of 1851 was to be excluded, the law should be impartially applied, which would exclude all of contestant's testimony. The chief justice of the Territory was required by law to be a resident of the Territory, and he was actually in the Territory during part of the time that the testimony was being taken, and issued subpoenas for contestant, who acknowledged him in his notices to be a resident of the Territory. So long as he was a resident, testimony could not be taken before justices of the peace under the law. If contestee was to be held to have waived his objection to the notice of contest, contestant must also be held to have waived all objections to the testimony in regard to Kittson County by being present and cross-examining the witness (though under protest), and consenting to an adjournment that the deposition might be completed. If this deposition were admitted it would show that the election in Kittson County was a fraudulent one. Unless this vote was counted, the case of contestant, according to the statements of the majority report, could not be made out. After some debate the House adopted the resolution declaring contestee not elected, by a vote 91 to 1, and that declaring contestant elected by a vote of 64 to 31.

[1 Bart., 555-568, and on *prima facie* case, Report No. 1, first session, Thirty-eighth Congress.]

(11) LINDSAY vs. SCOTT.

Illegal votes; irregularities. Report for contestee. Contestee retained the seat.

Report by Mr. Upson.

According to the returns, contestee had a majority of 489 votes. The election was contested on the ground that many disloyal persons

voted illegally for contestee and that in a number of precincts neither the election officers nor the voters took the oath of loyalty prescribed by the convention of the State. The committee held that the requirement of this oath was in effect the requirement of loyalty as a qualification for voting, and while the election officers might possibly have no discretion to refuse the vote of a person who should take the oath falsely, the vote would be none the less an illegal one.

In a number of precincts it appeared that this oath was taken neither by the election officers nor the voters and the committee rejected the votes of these precincts. The laws of the State required that all ballots should be numbered and that no ballots not numbered should be counted. In three precincts the ballots were not numbered and the committee rejected the votes (but on this point they were not unanimous, as they were on the others). The votes of two military companies were objected to because given *viva voce*, but the committee found on examination that this was permitted. Contestant also charged many individual disloyal votes, but the committee found the evidence in regard to them insufficient. Making all the deductions required contestee still had a majority of 61 votes left, and the committee recommended that he retain his seat. The resolution presented was adopted without debate or division.

[1 Bart., 569-574.]

(12) KLINE vs. MYERS.

Opportunity to recount refused in absence of evidence of probable fraud or error. Contestee retained the seat.

Report by Mr. Scofield.

Contestant conceded that he had not made out his case on the evidence presented, but showed that he had made an unsuccessful effort to procure a recount of the ballots and applied for an order of the House to send for the boxes and recount the votes.

The committee were of opinion that such an application should be founded upon some proof sufficient at least to raise a presumption of mistake, irregularity, or fraud in the original count, and ought not to be granted upon the mere suggestion of possible error. The contestant failed to furnish such proof.

On the contrary, the election appeared to have been fair and the count careful.

To adopt the rule that ballot boxes should be opened upon the mere request of the defeated candidate would occasion more fraud than it could possibly expose.

The committee recommended resolutions declaring contestee elected. Mr. Dawes and Mr. Ganson dissented from the ruling of the committee, but the resolutions were adopted without division.

[1 Bart., 574, 575.]

(13) CARRIGAN vs. THAYER.

Recount refused, in absence of evidence of probable fraud or error, or of legal steps to procure it within the time.

Report by Mr. Dawes.

This was another case from Philadelphia in which a recount by order of the House was asked for. The mayor and recorder of Philadelphia had refused to obey a subpoena *duces tecum*, issued by two

justices of the peace at the instance of contestant. The committee refused to grant the application, on the grounds stated in *Kline vs. Myers*, and also because these two justices of the peace had no jurisdiction to issue subpoenas in the case, and hence no legal steps had been taken to procure the recount within the sixty days. The act of 1851 gave jurisdiction and authority to justices of the peace only in case none of the other officers mentioned in the act were resident in the district. There were at least three such officers resident in this district. The contestant conceded that on the evidence already taken he had not made out his case, and the committee accordingly recommended resolution declaring contestee elected. The resolutions were passed by the House without debate or division.

[1 Bart., 576-577.]

(14) SEGAR.

State in rebellion; election held in only a small part of district. Claimant not admitted.

Report by Mr. Dawes.

At the election in question about 1,667 votes were cast, of which Mr. Segar received about 1,300. He had a certificate of election in due form, and asked to be sworn in and to occupy the seat until some one else should appear showing a better title.

But the committee were of opinion that they should inquire into and report the facts concerning this election and their conclusion thereon.

There were twenty counties in the district, and polls were opened in only four of them, containing about one-fourth of the voting population; the rest of the district being occupied by the rebel armies. Under the principles decided in previous cases, the committee held that this could not be considered an election. In all previous cases—

It was recognized as a rule that when the vote actually polled was such a minority of the whole vote that it could not be determined that the person selected by that minority was the choice of the whole district, and the absent majority were not voluntarily staying away from the polls, but were kept away by force, then no such selection thus made could be treated as an election.

The resolution recommended was adopted, after a brief debate, by a vote of 94 to 23.

[1 Bart., 577-579.]

(15) FIELD.

State not redistricted. Election in nearly all of old district suppressed by military interference. Claimant not admitted.

Report by Mr. Dawes.

Mr. Field claimed to have been elected from the First district of Louisiana, but the State had not been redistricted under the new apportionment law, giving it five Representatives instead of four, and the First district, from which he claimed his seat, was the old First district.

If, therefore, there was no other difficulty in the way of giving effect to this alleged election, it could not be said to have been held in conformity with, but in contravention of, law.

But the main objection to the election was that it was held in a very small part of the district. The district was composed of a part of the

city of New Orleans, and two small outside parishes. In the city of New Orleans, where nineteen-twentieths of the voters resided, the whole election was suppressed by orders of General Shepley, military governor. There was some evidence that 156 votes were cast in one of the outside parishes, and perhaps about as many were cast in the other; but in the city of New Orleans 10,000 voters were kept from the polls by soldiers acting under the orders of General Shepley. The committee could see no reason for this action on the part of the military governor, and strongly condemned it, but it was effectual, and even if the fact that the district had no legal existence, and that the votes were informally returned to an unauthorized private committee, could be overlooked, the fact that the election was thus suppressed in nearly the whole district was fatal to its validity.

After a brief debate, the resolution recommended, refusing admission to the claimant, was passed by a vote of 85 to 48.

[1 Bart., 580-583.]

(16) BONANZO, FIELD, and MANN.

Reorganization of State government initiated and partly directed by military authority. Majority report for, and minority report against, the admission of claimants. No action by the House.

Majority report by Mr. Dawes; minority report by Mr. Smithers.

These cases involved the question of the recognition of the reorganized State government of Louisiana. Full reports were made on the case of Bonanzo, and brief reports in the other two cases, calling attention to the fact that they were based on the same state of facts.

An election had been held in Louisiana under the proclamation of the military governor, and members elected at it had been admitted to the Thirty-seventh Congress. No election had been held at the regular time for the election for the Thirty-eighth Congress, but soon after that time Major-General Banks had issued a proclamation inviting the loyal people of the State to participate in the election of State officers. The State officers were elected, and afterwards, under the proclamation both of the civil and military authorities, delegates were elected to a convention to revise the constitution of the State. This convention divided the State into five Congressional districts, and directed an election to be held for Representatives in Congress. The validity of this election, the committee held, depended "upon the effect which the House is disposed to give to the efforts to reorganize a State government in Louisiana." The objection to these efforts was that they originated in no previous State or Federal law; but this was the result of necessity. "The State was attempting to rise out of the ruin caused by the armed *overthrow* of its laws." There were no State laws providing for such a contingency, and it was not within the power of the United States to pass them. Their enactment was within the power reserved "to the States, respectively, or to the people." If this new government was the work of the people, and was republican in form, it was entitled to recognition. The committee found from the evidence in the case that the elections in question had been participated in by a large majority of the loyal people of the State, and that the loyal people constituted a majority of all the people. They therefore recommended that the claimants be admitted.

The minority were of the opinion that the election in question did not represent the free and voluntary action of the majority of the loyal people of the State. The election was called by the proclamation of a military ruler, and his orders were such as to amount to a practical command to the people to take part. The State was under martial law, a condition inconsistent with the free creation of a civil government. As nearly as could be judged from available data, much less than half of the loyal voters within the Union lines took part in the election, and a large part of the State was without the lines. It was in evidence that a large class of voters voluntarily remained away from the polls. In an ordinary election, held under an existing law, they would have been held to have acquiesced in the result, but an election to organize a new government must be participated in by a majority of the people. The minority thought that the restoration of the unquestioned authority of the United States in Louisiana depended more on the prosecution of the war and the destruction of the seceding government than on the organization of impotent State governments, subservient to military authority, and recommended that the claimants be not admitted.

There was no action by the House.

[1 Bart., 583-597; 2 Bart., 1-16.]

(17) JACKS and JOHNSON.

Election under provisional government of Arkansas. Committee recommended admission of claimants. No action by the House.

Report by Mr. Dawes.

The people of Arkansas had met in convention and amended the constitution of the State, and provided for a provisional government. The amended constitution and other acts of the convention were ratified by a large and substantially unanimous vote. It was apparent that a large portion of the people of the State had always been loyal, and at least 10,000 volunteer soldiers had been furnished for the Union army. At the election for members of Congress a very full vote was cast, and both claimants were elected by very large majorities. Under the principles laid down in the case of Bonanza, the committee thought the claimants ought to be admitted, and recommended resolutions to that effect.

There was no action by the House.

[1 Bart., 597-604; 2 Bart., 17-24.]

THIRTY-NINTH CONGRESS, 1865-1867.*Committee on Elections.*

Mr. DAWES, Massachusetts,
SCOFIELD, Pennsylvania,
BAXTER, Vermont,
UPSON, Michigan,

Mr. PAINE, Wisconsin,
SHELLABARGER, Ohio,
McCLURG, Missouri,
RADFORD, New York,

Mr. MARSHALL, Illinois.

Mr. PAINE resigned his place at the commencement of the second session, and Mr. POLAND, of Vermont, took his place.

Cases.

- (1) Augustus C. Baldwin *vs.* Rowland E. Trowbridge, *Michigan*.
- (2) Henry D. Washburn *vs.* Daniel W. Voorhees, *Indiana*.
- (3) William E. Dodge *vs.* James Brooks, *New York*.
- (4) Charles Follett *vs.* Columbus Delano, *Ohio*.
- (5) S. H. Boyd *vs.* John R. Kelso, *Missouri*.
- (6) Smith Fuller *vs.* John L. Dawson, *Pennsylvania*.
- (7) William H. Koontz *vs.* Alexander H. Coffroth (two cases), *Pennsylvania*.
- (8) Dorsey B. Thomas *vs.* Samuel M. Arnell, *Tennessee*.

(1) BALDWIN *vs.* TROWBRIDGE.

Right of State legislature to fix place of elections in violation of State constitution. Majority report for contestee; minority report for contestant. Contestee retained the seat.

Majority report by Mr. Scofield; minority report by Mr. Marshall. Contestee had a majority of all the votes cast, but contestant had a majority of the votes cast inside the State. The State constitution prohibited the elector from voting outside of the township or ward in which he resided, but the legislature had passed a law permitting soldiers to vote outside of the State, wherever their regiments might be encamped. A large number of such votes were cast, and the majority of Mr. Trowbridge depended on them. The supreme court of Michigan had held that the provision permitting these votes to be cast outside the State was in conflict with the Constitution, and the committee agreed with the court, but held that in case of such conflict the power of the legislature was paramount. The power to fix the times and places of elections was conferred, by the terms of the Constitution, on the legislatures of the States. The fact that each of the colonies, at the time of the adoption of the Constitution, had a legislature similar to the legislatures of the present States, and that throughout the Constitution the word "legislature" was consistently used to designate this assembly, and was carefully distinguished from the word "convention," which was also used with a definite meaning, showed that by the word "legislature" the Constitution meant "the legislature *eo nomine*, as known in the political history of the country." The power to act at all in the premises was derived from the Constitution, and

not from any previously existing power, and if it was conferred upon the legislature by the Constitution, a constitutional convention could not exercise it, or inhibit the legislature from exercising it.

Even if the constitutional convention was to be considered as a constructive legislature, it could only be held to possess this power by virtue of its character as a legislature, and its enactments on the subject could only have the force of legislation, which subsequent legislation could supersede.

The law having been passed by the legislature and not being in conflict with the Constitution or laws of the United States, was valid, and contestee, having been elected by the votes received in accordance with it, was entitled to his seat.

Mr. Marshall in a report signed only by himself dissented from the opinion of the committee. The legislative assembly of limited powers, known as the "general assembly," or by various other names in the different States, did not exhaust the legislative power of the State.

The "legislature" of a State, in its fullest and broadest sense, signifies that body in which all the legislative powers of a State reside, and that body is the people themselves who exercise the elective franchise.

The secondary or subordinate legislature—

is the creature of the organic laws of the State, owes its existence to it, and can rightly do nothing in contravention of its provisions. If, then, this section of the Federal Constitution can be construed to refer to this secondary or subordinate legislative body of a State, it must be held to mean that the time, place, and manner for holding elections for Representatives shall be prescribed in each State by the legislature thereof, such legislature acting in subordination and in conformity to that organic law to which it owes its own existence.

Mr. Marshall held that the cases of *Shiel vs. Thayer* (Thirty-seventh Congress) and *Farlee vs. Runk* (Twenty-ninth Congress) had already decided the question according to his interpretation. But admitting the interpretation of the committee, the law in question was not a law to fix the places of holding elections. If the legislature had passed a law that any citizen of the State might vote at any place where he happened to be on the day of election, it would not be a law fixing the place of elections. This was practically that law as applied to a certain class of citizens; and in any case it was doubtful if the legislature of a State could fix a place for holding elections outside the limits of the State. If the legislature had this power, so had Congress, and it might pass a law requiring all the citizens of Michigan to vote in Chicago.

The resolution presented by the committee declaring contestee elected was passed by a vote of 108 to 30.

[2 Bart., 46-54.]

(2) WASHBURN *vs.* VOORHEES.

Ballot-box stuffing. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Dawes; minority report by Mr. Marshall.

The testimony in this case was all taken before the mayor of Terre Haute; but it was not taken in the city of Terre Haute, but in a number of small towns in the same county. Under the laws of Indiana the mayor was only empowered to administer oaths in the city of which he was mayor, and contestee moved to exclude the testimony in this

case on the ground that it was taken before an unauthorized officer. But the committee held that the right of the mayor to take testimony in this case was not derived from the laws of Indiana, but from the United States statute of 1851. Until 1861 the laws of Indiana had not empowered all mayors to administer oaths, even in their own towns, and yet since 1851 they had been authorized by name in the United States statute to take testimony in contested election cases.

All the testimony in the case was taken by contestant, contestee neither offering any testimony of his own nor attending to cross-examine the witnesses examined by contestant.¹ A large number of charges were made by contestant, but the only ones relied on were fraud and ballot-box stuffing in four precincts. In each of these precincts a number of voters considerably in excess of the number returned as voting for Mr. Washburn were called and testified that they voted for him. The votes of a few voters who could not be found were proved by others, but the number themselves testifying was in each case larger than the returned number. In two of the precincts there was in addition proof of actual fraud. In both these cases all the election officers were partisans of contestee. In one precinct the judges after counting 15 or 20 votes adjourned for supper, putting the 15 or 20 strung ballots on top of the uncounted ballots and locking the box. The box was left in the room where the election had been held, unprotected except by the lock. On the return of the judges the key belonging to the box would not unlock it, but it was unlocked by another key in the possession of one of the judges. The string of counted ballots was not visible, but after some time it was found in the bottom of the box under the uncounted ballots. The judges of election issued a public card the next day acknowledging that fraud was probably perpetrated, but insisting that it was without their knowledge. There were counted for contestant 143 votes, but 170 voters were proved, all but 6 by their own testimony, to have voted for him. The committee held that the return was so tainted with fraud that the truth could not be deduced from it and that it must be rejected. But the rejection of the return did not necessarily leave the votes actually cast uncounted. The 170 votes proved outside the return were counted for Mr. Washburn.

At the other precinct where there was direct proof of fraud 108 persons were shown to have voted for contestant, while only 88 were returned. The election officers all took dinner with the inspector, who put the ballot box into a closed bedroom. After dinner he went into this bedroom and remained for fifteen minutes. The next day the servant girl found that she could not open the door leading from this bedroom to another, and, looking for the cause, found that a tack had been removed from the carpet and a large number of Republican tickets put under it. The committee rejected this return and counted the 108 votes proved outside the return.

The proof of fraud in the other two precincts consisted chiefly of the discrepancy between the vote proved and the vote returned, though there were other suspicious circumstances. In one precinct the returned vote for contestant was 58, the proved vote 91; in the other case the returned vote was 24, the proved vote 36. In these two precincts the committee preferred not to reject the whole return, espe-

¹ What the reason for this was does not appear from either report.

cially as the result would not be affected either way, but counted for contestant the 33 and 12 votes proved in excess of the returns. Making these corrections, contestant would have a majority of 225 votes, and the committee recommended that he be seated.

The minority (Mr. Marshall and Mr. Radford) held that the charges had not been sustained. There was evidence tending to show that more votes were cast for Mr. Washburn than were returned for him, but if all the votes proved by the testimony of others than the voter, or by the testimony of voters who could not read and might have been imposed upon, were disregarded, nearly all the excess would disappear. But even taking the evidence as true, it merely showed that contestant was entitled to 75 additional votes, which could be given to him without affecting the result. The precincts where the additional votes were claimed were always strong Democratic districts, and contestant was returned as receiving about the usual Republican vote in them. No sane man could believe that he actually received a majority of the votes in them, and unless he did he could not have received a majority of the votes in the district. The minority report quoted all the evidence by which fraud was sought to be shown, and held that it was insufficient. All the circumstances stated in the majority report could be explained in a way consistent with the innocence of the election officers. The ballot box where the strung tickets were found under the others might have been shaken by someone without being opened. The inspector who went into the room alone with the ballot box was its lawful custodian and had a right to go there. He might have gone to change his clothes or write a letter. The girl who found the tickets under the carpet signed her testimony with her mark, and did not explain how she knew they were "Republican tickets," or whether they had on them the name of contestant.

The minority sustained the objection to the testimony taken before the mayor, but did not press the point. They concluded by saying that if the report of the majority was sustained the case would "deserve to stand out in history solitary and alone, and occupy a place to itself and above all others on the grand roll of partisan outrage and injustice."

The resolutions recommended by the majority, giving the seat to contestant, were adopted by a vote of 87 to 36.

[2 Bart., 54-78.]

(3) DODGE vs. BROOKS.

Fraud. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Dawes; minority report by Mr. Marshall. According to the returns contestee had a plurality of 148 votes. Many long and somewhat vague charges were made by both parties, but the charges relied on by contestant were charges of irregularities and of fraudulent registration and the reception of fraudulent votes in four precincts. The district was entirely comprised within the city of New York, and the precincts where fraud was charged were precincts bordering on the East River, filled with tenement houses and shanties. Two of the four precincts where fraud was charged were rejected by the committee—the Fifteenth district of the Eighteenth Ward, known as "Mackerelville," a tenement-house district bordering

on the river, and the Seventh district of the Twenty-first Ward, known as "Dutch Hill," a stony elevation covered with temporary shanties, built on ground not owned or rented by the occupants.

Especially in such precincts as these, where the detection of illegal voting would be difficult even when the laws were strictly observed, was it necessary that the rigid registration laws should be fully carried out. But in the first of these districts nearly all the provisions of the law were violated. The district was a new one, divided off from the old Twelfth district since the last election. The place for holding the election was not designated until two days before the election, and the voters, and even the election officers, had difficulty in finding it on the day of election. The registering officers were not residents of the district, as required, and did not hold their meetings during all the legal time, and, of course, not in the legal place, as that had not yet been designated. One of the three registering officers did not attend at all and the other two were not regular in their attendance, leaving most of the registering to be done by an unsworn acting clerk, brother of the regularly appointed clerk. Many names were put down in an old account book by the keeper of the saloon where the registering officers met, and afterwards copied on the registry, partly by himself. No adequate precautions were taken to limit the registration to the legal voters. The result was that at the election this district polled nearly as large a vote as had ever been polled in the whole of the old Twelfth district, from which it was cut off. No new houses had been built, and there was no known increase of population.

The committee were—

of the opinion that there was no registry at this district; that neither of the persons appointed as registers was competent to hold the office; that the man acting as clerk acted without authority; that the mode of making up the registry itself was a fraud upon the registry law and in no manner a compliance with its provisions; that the use of such registry at the polls as a guide to the inspectors of election contributed directly to the polling of fraudulent votes; and that the large and unaccounted-for increase of votes at this poll is directly attributed to these departures from and violations of plain provisions of law, and that to accept the result of such poll so taken and so counted as the true account of legal votes only is to sanction most inexcusable violations of important provisions of law, essential to the purity of the ballot box.

The committee therefore excluded the vote of this poll.

The charges against the other precinct were of much the same character. It was a "shanty" or "squatter" district, and there could have been no increase in its population without an increase in the houses, but there had been a decrease of houses. The vote, however, increased 100 per cent. The houses not being arranged in streets or numbered, it was almost impossible to detect illegal voting, but contestant introduced the testimony of a skilled man who had spent six weeks hunting through the district and was unable to find anyone to correspond to 109 of the names on the poll list. One of the officers of election testified in detail to the methods of fraudulent registration and voting adopted by himself and the other officers. The testimony was corroborated on most material points by two other witnesses, and not denied in the main by another officer of election who testified. From all the testimony it was clear that at least 116 fraudulent votes were cast, but it was impossible to tell for whom more than 30 of them were cast. These were cast for contestee. The rest of the poll must either be retained with these fraudulent votes, one-fourth of the whole number, included in it, or the whole poll must be rejected.

The committee thought the latter course the more just, but if only the 30 votes were rejected the result would be the same.

In the Thirteenth district, Eighteenth Ward, there was testimony to similar frauds; but as about an equal number of witnesses testified to the contrary, the committee did not find the proof sufficient to reject the poll. In the Third district, Twenty-first Ward, there were great irregularities, and contestant claimed to have proved that more votes were cast for him than were returned. But 13 of these votes were only proved by statements made by the voters to witnesses long after the election, and disregarding these only a small excess remained.

The committee recommended the seating of contestant.

The minority held that contestant's case was not sustained by the evidence, and that, on the contrary, if he were the sitting member he would have to be unseated for bribery. The specifications of the notice of contest were very vague and general, and not such as contestee ought to be called upon to meet. The testimony was of an entirely inconclusive sort. The fact of increase in the vote of some of the wards might be contrasted with a still greater increase in the vote of wards giving large majorities for contestant. The minority cited from the evidence very fully to show that it did not sustain the statements and inferences of the majority report.

The contestant was a man of immense wealth, and had himself spent \$6,000 in election expenses, while the contributions of his friends increased the expenditure to \$15,000. The expenditure of such immense sums was a menace to elections, and ought to be rebuked. But if the polls rejected by the majority were to be rejected there was another poll where the election officers left the ballots unprotected for some time when the count was only half completed. There was better reason for rejecting this poll than the others, and if all three were rejected they would about balance each other.

The House passed the resolutions seating contestant by a vote of 70 to 53.

[2 Bart., 78-110].

(4) FOLLETT vs. DELANO.

Service of notice of contest proved by ex parte affidavit. Irregularities in poll books. Report for contestee. Contestee retained the seat.

Report by Mr. Dawes.

Contestee did not reply to the notice of contest, and denied that it had been regularly served. The only proof that it had been served at all was an *ex parte* affidavit appended to it. The committee held that while in ordinary cases the sitting member in his answer admits the service of the notice, yet when he does not answer or admit it the fact of service ought to be proved by deposition and not by affidavit. The affidavit stated that the notice was served by leaving it at the house of contestee, but contestee insisted that under the act of 1851, requiring that contestant should "give notice in writing," he was entitled to personal service, and the committee sustained him in this. Another affidavit stated that contestee was given notice on January 5, but contestee contended that this was too late. The law of Ohio provided that the result must be declared "within ten days after the first day of December," but there was no way provided by statute by which anyone could ascertain on what day within this limit the determination was made.

The committee held that under this law the thirty days within which notice must be served commenced to run on December 10, unless knowledge of a determination on an earlier day was brought home to contestant. Hence if the service on January 5 were properly proved it would be within the time. The contestant claimed that the sitting member, by not answering the notice of contest, must be taken to have confessed the truth of the allegations. But the committee held that however fair this might be, if contestant and contestee were the only parties interested in the case, the right of the majority of the people to representation ought not to be compromised in this way.

The committee are of opinion that the House should require proof that the sitting member has not, and that the contestant has, a majority of the legal votes before unseating the one and admitting the other, however the sitting member may have seen fit to conduct his own case in a contest.

But the committee chose to examine into the merits of the case without relying on these technical points of pleading. The allegations relied on by contestant were that the poll books forming part of the returns of certain "soldier votes" were defective in form and substance. It appeared that some of these poll books were not signed and certified; one of them did not contain the oath, and one of them did not show when or where the election was held. But the committee found that under the law the result was to be declared from the tally sheets and not from the poll books, and that the tally sheets were required to accompany the poll books, and to contain the same signatures and certificates as the poll books should contain. In the absence of proof to the contrary the committee presumed that the tally sheets had been returned correctly and in due form. This presumption was not rebutted by showing irregularities in the poll books, for the law did not require the tally sheets to be corroborated by the poll books; they were of themselves a sufficient basis for the return. There being, then, no evidence overthrowing the *prima facie* correctness of the returns, by which contestee had a majority of 239 votes, the committee recommended that he retain his seat.

The resolution presented by the committee was passed without division.

[2 Bart., 113-121.]

(5) *BOYD vs. KELSO.*

Irregularities. Report for contestee. Contestee retained the seat.

Report by Mr. Upson.

There were two notices of contest. The first was vague and indefinite, but as the contestee had not objected to it in his answer, the committee considered it. The second was not served within the time required by law, and there was no proof except the certificate of a deputy sheriff that it was served at all. The committee did not consider this notice or the testimony offered under it, but said that a casual examination of its contents indicated that it would not affect the result. The contestant introduced abstracts of votes from the various counties of the district, and also an abstract from the secretary of state, giving the votes, except certain returns which had been rejected for informality. One of the county certificates seemed to be made up of votes from two counties, though it was only certified by the clerk of one. It was claimed that this vote ought to be rejected, but it is not clear what the committee did with it. The testimony in

regard to the various irregularities alleged was very unsatisfactory. A few votes were testified to have been cast by soldiers or by non-residents of the precincts, but there was no evidence that the soldiers were not legal voters, and nonresidents of the precinct might vote in Missouri under some circumstances. Some of the poll books appeared like poll books of a *viva voce* election, but from the testimony of other witnesses it would seem that ballots were used. One military poll book was in the form for an election by ballot, but soldiers could vote either *viva voce* or by ballot, so this was immaterial. The evidence presented by contestant did not satisfactorily show what votes were counted for either party on the final canvass, and he had not shown anything to overcome the *prima facie* right of contestee.

The resolution declaring the sitting member entitled to the seat was passed without division.

[2 Bart., 121-126.]

(6) FULLER vs. DAWSON.

Irregularities. Report for contestee. Contestee retained the seat.

Report by Mr. Paine.

According to the returns as canvassed, contestee had a majority of 125 votes. Contestant alleged that various military returns, giving him an aggregate majority of 141 votes, were wrongfully excluded from the canvass, and that certain military returns giving majorities for contestee ought not to have been included in the canvass. Contestee objected that the notice of contest had never been legally served on him, and that it was vague and indefinite, and that much of the testimony introduced did not properly come within the specifications. He also insisted that there was no evidence that the returns alleged to have been wrongly counted for him were really counted at all. The committee examined the evidence without reference to these points, and as the conclusion thus reached was favorable to contestee, it was then not necessary to decide them.

A detailed examination of the evidence in regard to the military returns alleged to have been rejected showed that some of them were properly rejected, and that the vote claimed by contestant must be corrected in other instances, so that the total majority received by him in the precincts that might properly be counted was only 104. This would leave contestee still a majority of 21 votes, which could not be reduced below 16 votes by the construction most favorable to contestant of the evidence against returns giving a majority for contestee. The committee therefore recommended a resolution declaring contestee entitled to his seat, which was passed without division.

[2 Bart., 126-138.]

(7) KOONTZ vs. COFFROTH.

Prima facie case. Conflicting returns; some returns not counted. Seat given to contestee. Case on merits. Irregularities in returns and illegal votes. Contestant seated.

Majority report on *prima facie* case by Mr. Upson; minority report by Mr. Paine.

Report on case on merits by Mr. McClurg.

The governor of Pennsylvania, in his proclamation declaring who were elected to represent the State in Congress, refused to declare

either claimant from this district elected. The House passed a resolution referring the papers to the Committee on Elections, with instructions to report "which of the rival claimants to the vacant seat from that district has the *prima facie* right thereto, reserving to the other party the privilege of contesting the case upon the merits." Acting under this resolution the majority of the committee reported in favor of Mr. Coffroth, and the minority in favor of Mr. Koontz.

Each of the claimants presented what purported to be a certificate of the return judges, showing that he had received a majority of the votes, and declaring him elected. The certificate of Mr. Coffroth was signed by four return judges, representing four of the five counties; that of Mr. Koontz was signed by five persons, representing the five counties, but it was conceded that only two of the persons signing this certificate were regularly appointed return judges, and one of these also signed the certificate of Mr. Coffroth. This condition of affairs came about from the following facts: When the return judges of the different counties assembled to count the votes, the majority of the judges in three of the counties rejected certain military returns as irregular, and made out statements of the votes not including these returns. They appointed return judges to represent the county and take the statement of the votes to the meeting of the district board of return judges, and these return judges, with the return judge from another county, were the ones who met and canvassed the votes and gave the certificate to Mr. Coffroth. The minority of the return judges of these three counties each selected one of their number, and made out statements of the votes as counted by them. These three minority return judges assembled, and were joined by the return judge of Somerset County, who refused to sign the certificate made by the majority return judges. The Fulton County return judge signed both certificates.

It being admitted that the certificate showing the election of Mr. Coffroth was signed by four out of the five return judges duly appointed, while the majority of those signing the other certificate were admitted to be without legal title, the committee found it "difficult to explain why this return, thus made and certified by these return judges, does not show a *prima facie* right in Mr. Coffroth to the seat in question." But it was claimed that this return showed on its face that the vote of Somerset County was not included in it. The committee did not think that the voluntary refusal of the return judge of this county to take part in the official canvass ought to put Mr. Koontz in a better position than he would have held if the judge had done his duty. The vote of Somerset County was undisputed, and if it was added to the votes of the other counties, as certified by the legal return judges, Mr. Coffroth would still have a majority of 93 votes on the official returns of the whole district; or, if the return of the district board of return judges was to be gone behind, the separate county returns might be taken. Those returns made by a minority of the return judges in the counties certainly had no authority in law. Taking the returns made by the majority of the return judges where there was a dispute and the undisputed returns of the other counties, Mr. Coffroth had a majority of 88 votes in the district. It was claimed by Mr. Koontz that all the return judges of a county present at a meeting must sign the return, but the committee agreed with the attorney-general of the State in holding that a majority could act.

The committee did not see how on a *prima facie* case they could go behind the county returns; but if they should go behind these returns they were of the opinion that most of the military returns complained of as improperly rejected appeared, so far as could be judged from the papers before the committee, to be properly rejected. Several of the returns returned an aggregate of votes cast considerably in excess of the number of names on the poll book. In some of the other cases the law in regard to certifying the poll book and the oath was entirely neglected. In one case two companies appeared to have voted at the same poll, though the law required a separate poll to be opened for each company.

The committee reported resolutions declaring Mr. Coffroth entitled to be sworn in and providing a manner in which Mr. Koontz should contest the seat.

The minority held that neither party had such a *prima facie* title to the seat as would have justified the Clerk of the House in putting his name on the roll, but that Mr. Koontz had the sort of *prima facie* right that must have been contemplated by the House in the resolution referring the case. The returns of the two rival district boards of return judges were, on their faces, equally entitled to credit, but they were negatived by each other and by the proclamation of the governor refusing to recognize either. The county returns were not in any sense such official papers as could be relied upon. They were only to be taken by the return judges of each county to the district meeting, and after their use there there was not even a provision for their custody by any officer. The minority returns in the disputed counties would in any case be of no effect, and the majority returns were of doubtful authority under the law. It would be a safer rule in such cases to allow a dishonest minority temporarily to deprive a duly-elected member of his rights than to allow a dishonest majority to give the seat to one not elected. Going to the question of the propriety of the rejection of the military returns complained of, it appeared from the law that the *returns* were something separate and distinct from the poll books and tally sheets, and that the return judges were to base their canvass on the returns, and to count all intelligible returns, without regard to irregularities. Most of the irregularities complained of were in the poll books, and not in the returns at all. Where the signatures or certification of the oath on the poll books were deficient, the deficiency did not exist in most cases on all the papers. Where there was an excess of votes over names on the poll books it arose from the fact that votes would be received from more than one county, while the poll book returned would represent the votes of only the county to which it was returned. As there was no proof that the extra votes might not also have been counted in the county to which they belonged, the minority in each case deducted the excess from Mr. Koontz and counted the rest of the votes. In the case where members of two companies appeared to have voted together there was no proof that they might not have been merely detachments from the two companies, separated from the organized companies, in which case the votes would be legally cast together.

Counting all the rejected votes, except as above indicated, a majority was shown for Mr. Koontz, and the minority recommended that he be sworn in.

The House agreed with the majority, and Mr. Coffroth was sworn in.

After further testimony had been taken the case came before the committee on the merits, contestant alleging that the rejected military returns ought to have been counted, and also that illegal votes were cast for contestee, and contestee alleging that most of the returns were properly rejected, and also that certain returns counted for contestant ought to have been rejected.

The facts in regard to the rejected returns were more fully developed by the testimony taken, and the committee counted most of the returns where there was an excess of votes over the names on the poll books. The discrepancy arose from returning all the votes cast in one statement while transmitting the poll books to different counties. When duplicate statements of votes were also sent the committee made allowance for votes that would thus be counted twice; where only one statement of votes was sent the committee counted it. The defect in the returns in which the oath was not properly certified on the poll book was in each case cured by testimony that the judges were actually sworn. In one case they were sworn by an officer not authorized to administer oaths, but the committee held that having taken the oath in good faith they were officers *de facto*, whose acts were valid until shown to be false or fraudulent. The case where the two military companies voted together turned out to be a case of two separately organized companies voting at the same poll in violation of the law, and a majority of the committee favored rejecting this return. A minority favored counting it on the ground that the election was fair and the votes legal, but a decision of this point either way would not affect the result. If this vote was counted, the majority of Mr. Koontz would be 71; if it was not counted, his majority would be 40.

Contestee asked that certain returns be rejected, but there was in some cases no evidence, and in other cases no sufficient evidence that they had been included in the original count. Certified copies of some of the papers in evidence were very irregular, omitting the signatures of the officers or the certification of the oath, or being otherwise imperfect, but the certificate of the prothonotary to the copies was so worded that the copies might be garbled or imperfect copies without conflicting with the terms of the certificate. The committee rejected none of these returns. Contestee objected to one poll on the ground of military interference. There were some soldiers at the polls, but so far as appeared they were legal voters and had a right to be there. Their arms were stacked at a distance. There were some persons who did not vote on account of the presence of the soldiers who were known Democrats, and who, it was claimed, would hence have voted for contestee, but they were deserters who had been hiding from arrest, and they did not show themselves at the polls for fear of being arrested as deserters.

A few votes of paupers and students were attacked as illegal, but there was no proof that the paupers in one county poor-house, who were nonresidents, had had their votes counted, and there was nothing against the other paupers except that they were paupers, which, the committee held, did not deprive them of their votes in the absence of statute enactments. The evidence against the students was insufficient.

Mr. Koontz having received a majority of the votes, the committee unanimously recommended resolutions declaring him elected. The resolutions were passed by the House without debate or division.

[2 Bart., 25-46; 138-162.]

(8) THOMAS *vs.* ARNELL.

Law not complied with; no notice of contest or answer served. Committee would not hear case, but recommended that further time be granted. No action by the House.

Report by Mr. Dawes.

No notice of contest or answer had been served, but a few depositions seem to have been taken. Contestant presented a letter from the sitting member which he claimed was a waiver of the requirement of notice of contest. Without passing on the proper construction to be given the letter,

The committee were of opinion that it was not competent for the parties to entirely waive the requirements of the statute of 1851.

No issues having been made, it was manifestly out of the question for the committee to hear the case, and it must be dismissed unless the House should choose to grant further time to procure testimony in a regular way. Owing to the peculiar state of affairs in Tennessee and the fact that none of the members from the State had been admitted until near the close of the first session, the committee recommended a resolution giving the parties sixteen days for the service of notice and answer and eighteen days to take testimony. There seems to have been no action by the House.

[2 Bart., 162, 163.]

FORTIETH CONGRESS, 1867-1869.

Committee on Elections.

Mr. DAWES, Massachusetts,
SCOFIELD, Pennsylvania,
URSON, Michigan,
SHELLABARGER, Ohio,

Mr. COOK, Illinois,
POLAND, Vermont,
NICHOLSON, Delaware,
KERR, Indiana,
Mr. McCLURG, Missouri.

Mr. NICHOLSON subsequently resigned, and Mr. CHANLER, of New York, took his place.

Cases.

- (1) *Colorado case* (Hunt and Chilcott).
- (2) Columbus Delano *vs.* George W. Morgan, *Ohio*.
- (3) James H. Burch *vs.* Robert T. Van Horn, *Missouri*.
- (4) William McGrorty *vs.* William H. Hooper, *Utah*.
- (4) John Hogan *vs.* William A. Pile, *Missouri*.
- (6) *Kentucky members* (two cases).
- (7) G. G. Symes *vs.* Lawrence S. Trimble, *Kentucky*.
- (8) William F. Switzler *vs.* George W. Anderson (two cases), *Missouri*.
- (9) Samuel E. Smith *vs.* John Young Brown, *Kentucky*.
- (10) George D. Blakey *vs.* J. S. Golladay, *Kentucky*.
- (11) Samuel McKee *vs.* John D. Young (two cases), *Kentucky*.
- (12) Roderick R. Butler, *Kentucky*.
- (13) John H. Christy and John A. Wimpy, *Georgia*.
- (14) J. Francisco Chaves *vs.* Charles P. Clever, *New Mexico*.
- (15) Simon Jones *vs.* James Mann, *Louisiana*.
- (16) Caleb S. Hunt *vs.* J. Willis Menard, *Louisiana*.
- (17) Thomas A. Hamilton, *Tennessee*.
- (18) J. S. Casement, *Wyoming*.

(1) COLORADO CASE. (HUNT AND CHILCOTT.)

Prima facie case. Majority report that neither claimant be sworn in; minority report for Hunt. House seated Chilcott.

Majority report by Mr. Scofield; minority report by Mr. Kerr.

Mr. Hunt had a regular certificate of election, signed by the governor of the Territory, declaring him duly elected, but not reciting any canvass of votes or other data on which the result was based. Governor Cummings, who was Mr. Hunt's attorney, stated before the committee that two members of the canvassing board were of the opinion that Mr. Chilcott had the majority, and the other that Mr. Hunt had it. Considering himself a member of the board, he voted with the minority, and there being then a tie he decided the result himself and issued to Mr. Hunt a certificate of election, signed by himself and the secretary of the Territory.

The papers of Mr. Chilcott consisted of a certificate of the result of the count of the board of canvassers, signed by two members, show-

ing a majority for him, and a certificate of election, signed "Frank Hall, secretary and acting governor," dated some time later than the certificate of Mr. Hunt. The committee were of the opinion that these papers were not such credentials as would entitle Mr. Chilcott to the *prima facie* right to the seat, but that they did show that the certificate was issued to Mr. Hunt in violation of the law, which required that it be issued to the person having the highest number of votes. The committee recommended that neither claimant be sworn in on his *prima facie* title.

The minority recommended that Mr. Hunt be sworn in. He had the regular certificate of election such as other members of the House had, and there was no evidence competent to be considered on a *prima facie* case affecting the validity of this certificate. Governor Cummings had made no statement before the committee in the way of evidence, and the certificate of the "secretary and acting governor" was without authority.

The House refused to adopt the conclusions of either majority or minority, and by a vote of 91 to 36 gave the seat to Mr. Chilcott. Mr. Hunt was thus made contestant, but he shortly after abandoned the contest.

[2 Bart., 164-168.]

(2) DELANO vs. MORGAN.

Illegal votes; fraud. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Scofield; minority report by Mr. Kerr.

On the face of the returns contestee had a majority of 271 votes. Contestant claimed that this result would be overcome by eliminating illegal votes and fraudulent returns. A large number of votes were attacked on the ground that they were cast by deserters. Under the laws of Ohio a voter must be a citizen of the United States, and under the laws of the United States deserters were deemed to have relinquished their citizenship. The disqualification was not conviction of desertion, but the fact of desertion, and the committee held that the election boards and the committee had the right to determine this fact, just as the committee had the power to determine the fact of bribery and the election boards the fact of nonresidence or lunacy. All votes cast by persons proved to be deserters were, accordingly, rejected. The votes of 40 nonresidents, 2 aliens, and 8 minors were also deducted from contestee.

In one township one of the judges of election was a deserter, and hence not a qualified elector. The law required the election officers to be qualified electors. It had already been decided in several cases that where one of the judges did not act the return was invalid. The committee thought the case was still stronger where one of the judges was disqualified but nevertheless acted and in part controlled the action of the board. In this precinct 11 votes of deserters were received, showing that the action of this judge may have had a substantial influence, and the certificate to the poll book was essentially defective, in that it certified only to the *number of votes cast*, omitting to state, as required by law, that they were cast by *electors*. The committee threw out the vote of this township.

In two townships there were great irregularities and suspicious circumstances, and it was shown by the testimony of the voters that many more votes were cast for contestant than were returned for him. This was proof of fraud, but as in proving the fraud both parties had proved the votes actually cast, the committee counted them as proved, making changes in favor of contestant of 46 and 20 votes respectively.

The contestee charged illegal votes and bribery against contestant, and also asked that certain precincts be thrown out. The committee deducted the votes of 7 idiots, 8 minors, 22 nonresidents, and 6 bribed voters. A precinct which had had a large temporary increase of population on account of oil discoveries was asked to be thrown out on the ground of wholesale illegal voting. There was no definite proof of illegal voting, the increase of the vote was not so great as it would have been if many illegal votes were cast, and the committee refused to reject the votes. Twelve precincts were objected to because the judges adjourned for dinner, but the practice was common and no harm had resulted, and while the committee did not approve of the practice they were unwilling to disfranchise the voters. Another precinct was objected to because, under a special charter, a township and an incorporated town had voted at the same poll, contrary to the general law. The committee were inclined to think that the general law applied, but as 18 different elections had been held in the same way, under the same law, they did "not feel justified in setting aside an election held in pursuance of a construction so long sanctioned by the authorities of the State."

Under these findings contestant had a majority of 81 votes, and the committee recommended that he be seated.

The minority disagreed. The notice of contest was not sufficiently specific. It gave notice of illegal votes charged at many precincts, but gave only the number at each precinct, and the statement that they were illegal. It should have at least specified in what fact the illegality consisted. The evidence of the voters in the two townships where their evidence was taken was not sufficient to show fraud; but the minority counted the votes according to the testimony of the voters and not according to the returns. The alleged disqualification of a judge in another township by being a deserter was not a disqualification if proved, and it was not sufficiently proved. In any case he was a *de facto* officer. The minority did not agree with the majority in all their conclusions in regard to nonresidents, minors, etc. The charge that deserters voted, if material, was in very many cases not sufficiently proved; but where it was proved it should not disqualify the voters. The United States law under which the deserters were alleged not to be citizens was unconstitutional. It was an *ex post facto* law, and if it was intended to interfere with the qualifications of voters in the States it was an encroachment on the reserved rights of the States. None of these persons had ever been convicted of desertion by any tribunal, and Congress certainly could not convict persons of crime and inflict the penalty of disfranchisement by legislative enactment and proclamation.

The precinct whose population was chiefly made up of oil prospectors and speculators ought to be rejected, because a large part of the votes was not cast by permanent residents, and the election was marked by such irregularities and disregard of law that it was impossible to deduce the truth from the returns. In the city of Mount Vernon no

election was held according to law, the law requiring the township and city elections to be separate, and the city election to be held in the separate wards; and the whole vote should be rejected. The action of the judges in a number of precincts in adjourning for dinner was improper and illegal, but the minority agreed with the majority in not rejecting the votes.

Under the findings of the minority, contestee had a majority of 742 votes, and they recommended that he retain his seat.

The House agreed with the majority, and seated contestant by a vote of 80 to 38.

[2 Bart., 168-204.]

(3) BURCH *vs.* VAN HORN.

Votes rejected for disloyalty. Report for contestee. Contestee retained the seat.

Report by Mr. Poland.

The main allegation in this case was that a large number of legal voters had been refused the right to register or to vote. Contestee's majority was only 434, and more than 2,500 votes had been rejected by the officers of election, all but 8 of them being for contestant. The new constitution of Missouri provided that no one guilty of acts of disloyalty could vote, and specified with great minuteness what should be considered acts of disloyalty. No one was permitted to vote without taking an oath that he had committed none of the acts enumerated in the constitution. Contestant claimed that the convention which framed this constitution exceeded the powers given it by the legislative act by which it was called, and that this defect was not cured by its subsequent adoption by the people, because thousands of persons who were formerly voters were not permitted to vote by reason of not being able to take the oath prescribed by the proposed constitution. The committee held that inasmuch as this constitution had been recognized by all State and Federal authorities as the established constitution of the State, it was too late for the House to inquire into the validity of its adoption. The part of this constitution prohibiting disloyal persons from engaging in the practice of law and certain other lawful occupations had been declared unconstitutional by the Supreme Court of the United States, on the ground that such prohibition could only have been intended as a punishment for the disloyal acts, and was hence an *ex post facto* law. But the committee held that excluding persons from the elective franchise was not a punishment. No State permitted all persons to vote, and each State had plenary power to permit such persons to vote as it thought best.

The evidence tended to show that the provisions of the constitution were enforced very strictly by the election and registration officers, and there may have been instances of partisan unfairness. No testimony had been taken by contestee, and the testimony of contestant was perhaps such that under some circumstances, if it was not contradicted, it might raise sufficient presumption of unfairness as to call for the vacating of the election. But the evidence was very vague and indefinite, scarcely ever going to the individual voters. As in this case the law furnished contestant with the name of every rejected voter and the candidate for whom he offered to vote, it would have

been very easy for him to have proved the facts alleged by particular and specific evidence if they were true, and under such circumstances the production of indefinite and inconclusive evidence indicated inability to produce any other.

The committee consider also that in order to unseat a member of this House who has the regular certificate of election, and who is conceded to have received a majority of several hundred votes of the votes received and counted, they should be able to report whose votes were excluded that ought to have been counted; that it would not do for the committee or for the House to say that out of 2,500 rejected voters, all of whose names are unknown, they are satisfied that enough were legal voters and ought to have been counted to give the contestant a majority.

The committee reported resolutions declaring contestant elected, which were passed by the House without dissent.

[2 Bart., 205-211.]

(4) MCGRORTY *vs.* HOOPER.

Mormonism in Utah. Report for contestee. Contestee retained his seat.

Report by Mr. Chanler.

Mr. Chanler's report in this case consisted chiefly of a long account of the origin and history of the Mormon Church, and an analysis of its speculative affinities, none of which need be outlined here. Contestee received 15,068 votes; contestant 105. Contestee was not a polygamist, but contestant charged that as a member of the Mormon Church he had taken an oath inconsistent with his duties as an American citizen and as a Representative, and also that the Territory of Utah, under the control of the Mormon hierarchy, did not have a republican form of government, that its institutions were inimical to those of the United States, and that all the votes cast for Mr. Hooper were so cast under coercion.

The general conclusion of the report was that institutions dominated by such religious ideas as those of Mormonism were necessarily in a sense hostile to those of the United States, and that the evil of polygamy was one which demanded action by Congress, but that there had been no such overt acts of disloyalty or coercion of voters on the part of the people of Utah as called for setting aside this election.

The committee were unanimous in recommending resolutions that contestee was and contestant was not elected. The latter resolution was passed by the House, and the former laid on the table, which had the same effect as if it had passed.

[2 Bart., 211-281.]

(5) HOGAN *vs.* FILE.

Fraudulent registration and voting. Majority report for contestee; minority reports for contestant. Contestee retained the seat.

Majority report by Mr. Cook; minority reports by Mr. Chanler and Mr. Kerr.

Most of the questions in this case were questions of fact, arising under the execution of a newly adopted registration law. In one precinct the election officers, instead of using the certified copy of the registry list furnished them by the registering officers, had a more perfectly alphabetized copy made to facilitate voting. The men who

made and who used this copy swore that it was correct, and both the original list and the certified copy were at the poll and in use, and the committee held that the use of the alphabetized copy did not affect the validity of the election. But contestant contended that the copy used was incorrect and fraudulent, and in proof of his assertion presented a list of 154 names which he said were found on the poll list as voting, but were not found on either the original or certified copy of the registry list. The committee found that most of these names were German names, which in many cases had been written on the original list in German by the voters, or written by the clerks attempting to spell them by sound. The result was a large number of variations in spelling in the different lists. But the committee, by a careful comparison, found names sufficiently similar to be probably intended for the same person, to correspond with most of the names on contestant's list.

Certain votes were received by the election officers where the voters were registered on the original lists, but not on the copies, and the committee sustained this action. One of the polls was kept open some time after sunset. The committee expressly refrained from deciding whether the votes received ought to be counted, but in two or three other precincts, where the polls were closed at sunset and afterwards opened, they rejected the votes. They also rejected a large number of votes cast for contestant by persons whose names could not be found on the registry list. *Ex parte* affidavits, taken without notice, and after the close of the time for taking testimony, were introduced by contestant to show that persons who were counted as voting for contestee voted for contestant, but the committee did not receive them.

The committee found that contestee's majority was not overcome, and recommended a resolution declaring him elected.

Mr. Chanler and Mr. Kerr each presented minority reports, going over substantially the same ground, but in a slightly different way. They claimed that the attempt of the majority to account for the discrepancies in the lists was unsuccessful. A considerable number of names was not accounted for even by the majority, and of those accounted for very many of the names given as analogous to names on the poll book were also found correctly on it, showing either that the persons in question voted twice or that the supposed analogy in the names was an imaginary one. The "alphabetized" copy of the registry list was privately made by an unauthorized person, and was not verified except by counting the names. The testimony showed that fraudulent votes must have been admitted in some way, and evidently this copy was a fraudulent one made for the purpose. The precinct where it was used ought to be rejected, but if only the fraudulent votes were rejected the result would be the same. All the votes given after sunset ought to be rejected, and a large number of votes offered for contestant by persons who were regularly registered on the original lists, but who were told at the polls that their names were "not on the list," should be counted. The minority found that contestant was elected by a large majority if fraudulent precincts were rejected, and by a smaller majority if only individual votes were eliminated, and recommended that he be seated.

The resolution recommended by the majority, declaring contestee elected, was passed by a vote of 90 to 32.

[2 Bart., 281-327.]

(6) KENTUCKY MEMBERS.

Disloyalty. Question investigated, and part of the members admitted.

First report by Mr. Dawes; second report by Mr. Cook.

Protests were made against the swearing in of all the members-elect from Kentucky on the ground that they had been guilty of acts of disloyalty, and could not truthfully take the "ironclad oath." The credentials and papers were referred to the Committee on Elections, which reported the contents of such papers as had been referred to it, with a general expression of opinion that where specific and apparently well-grounded charges of personal disloyalty were made against a member-elect, they should be investigated before permitting him to take his seat, but where the charges were against the loyalty of the persons who voted for him, or against the validity of his election, they were matters pertaining to an ordinary contest, and should not prevent him from taking his seat.

On motion of Mr. Logan, of Illinois, the House passed a resolution directing the committee to make an investigation, the members not to be sworn in pending the investigation. A subcommittee was sent to Kentucky, and on its return the committee reported that Messrs. Beck, Jones, Grover, and Knott were not proved to have been engaged in armed hostility to the United States or to have given aid and comfort to its enemies. The committee recommended that they be sworn in, and the House agreed without dissent. Against Messrs. Trimble, Young, and Brown there were separate contests pending, in which one of the charges was disloyalty; and, as the committee had not yet examined the testimony taken in these contests, they made no recommendation in regard to these three cases.

[2 Bart., 327-370.]

(7) SYMES *vs.* TRIMBLE.

Disloyalty. Report for contestee. Contestee seated.

Report by Mr. Upson.

The charges of disloyalty against Mr. Trimble were chiefly to the effect that he had been engaged in trade across the rebel lines during the early part of the war. But the evidence showed that at the time Mr. Trimble was absent from the district, on account of the hostility of the rebel element to him, and that if any such trading was done by a firm in which he was interested, it was without his knowledge and consent. The evidence tending to show such transactions on the part of his firm was contradicted and the circumstances fully explained. Mr. Trimble had been a pronounced Union man and had run for Congress on the Union ticket, but after the emancipation proclamation he had opposed the manner and purpose of conducting the war and had expressed himself much as members of Congress opposed to the Administration had expressed themselves in Congress. The committee recommended resolutions declaring him entitled to be sworn in, and they were passed without division.

[2 Bart., 370-373.]

(8) SWITZLER *vs.* ANDERSON.

Intimidation; disregard of registration law; disloyalty of contestant. Majority report for contestant; report by Mr. McClurg for sitting member. Sitting member retained the seat.

Majority report by Mr. Poland; minority report by Mr. McClurg.

The secretary of state certified the election of the sitting member by a majority of 178 votes, but this count did not include the county of Callaway; if this county had been included, there would have been a majority of 1,122 votes for contestant. The refusal of the secretary of state to open the returns of this county was based on a certificate of the officer of registration for the county, appended to his copy of the registry list of the county, certifying that there had been an entire disregard of the registry law, and that such a state of intimidation existed throughout the county that it was impossible to enforce the law against the registration of disloyal persons. After many of the names on the list returned by him were written the words "Enrolled disloyal," "Under bond," "In rebel army," etc., written by himself. The committee held that this registering officer had no right to certify to these or any other facts, except to the correctness of the copy; that his statements written after the names of the voters were not evidence; and that the secretary of state ought to have opened and canvassed the returns of Callaway County and given the certificate to contestant. The committee examined in detail the testimony by which contestant sought to prove the truth of the facts alleged and found that the proof was not sufficient to warrant the rejection of the vote of the county.

From the mass of conflicting opinion on this subject and from the character of the threats proved, the committee comes to this conclusion: That there was no just and reasonable ground to fear personal violence or injury in consequence of appearing to make and support objections to registration; but that it was against the general and public opinion of the county that persons who had not committed disloyal acts should be disfranchised merely on the score of opinions and sympathies, and that probably many persons did refrain from making objections rather than encounter this general sentiment.

And from the general testimony submitted—

It would appear that a large number must have been registered who were disqualified by reason of having sympathized with those engaged in rebellion.

But none of the testimony was definite and specific, and the committee had already expressed its opinion (in which it had been sustained by the House) on the propriety of throwing out votes on such vague and indefinite testimony. If all the persons against whose names the registering officer had written remarks indicating disqualification or in regard to whom there was any specific evidence, even of an unsatisfactory character, were rejected, contestant would still have a majority; and the committee recommended resolutions declaring him elected.

Mr. McClurg, in a report signed by himself alone, dissented from the conclusions of the committee. The validity of the registration law of Missouri, disfranchising rebel sympathizers, had already been unanimously sustained by the committee and the House. It was perfectly evident from the evidence that this law had been in no sense enforced in Callaway County. Throughout the county whoever applied for registry was registered, and the evidence showed such a state of public sentiment as to have rendered it unsafe for registering officers to

enforce the law or loyal citizens to assist them by appearing as witnesses. The apparent majority of contestant was all due to the disloyal vote of this county, cast in defiance of law, and such proceedings should be rebuked by the House by refusing him a seat.

When the case came before the House, charges of disloyalty were made against the contestant by Mr. Benjamin, of Missouri, and the case was recommitted to the committee with instructions to investigate them. At the third session the committee reported, through Mr. Cook, that the charges were not sustained. Their only substantial basis was an article which had appeared in contestant's newspaper on the death of Colonel Ellsworth, and contestant denied authorship or responsibility for the article in question, and it was not in harmony with other articles in the paper.

The committee renewed its former recommendation that contestant be seated; but the House rejected the resolutions by a vote of 40 to 89, thus leaving contestee in his seat.

[2 Bart., 374-395.]

(9) SMITH vs. BROWN.

Disloyalty. Right of minority candidate to seat when majority candidate ineligible. Majority report to declare seat vacant; minority report for contestee. Seat declared vacant.

Majority report by Mr. Dawes; minority report by Mr. Kerr.

Contestant claimed that contestee had been guilty of disloyalty, and was consequently ineligible, and that as the disloyalty was well known to the voters who voted for him, they must, under the English rule, be held to have thrown their votes away, and that he, having received a majority of the remaining votes, was elected.

The specific act of disloyalty was a letter written by contestee to the Louisville Courier in 1861, correcting an ambiguous report of a speech made by him, and saying that what he did say was:

Not one man or one dollar will Kentucky furnish Lincoln to aid him in his unholy war against the South. If this Northern army shall attempt to cross our borders we will resist it unto the death; and if one man shall be found in our Commonwealth to volunteer to join them he ought, and I believe he will, be shot down before he leaves the State.

Contestee tried to explain this letter consistently with his loyalty, but the committee found that it admitted of no such interpretation as claimed, and that it was plainly an expression of hostility to the Union. They held that he could not truthfully take the oath that he had "voluntarily given no aid, countenance, counsel, or encouragement" to the rebellion. He was therefore not entitled to the seat.

Mr. Smith, the minority candidate, was also not entitled to the seat. Even if the English rule were held to apply to this country he would not come within it, for in England it was always held that the voters must have notice of the ineligibility of a candidate; and this doctrine of notice was held very strictly. There must be actual and formal notice at the polls, and of some unmistakable disqualification, and not of a doubtful conclusion from disputed facts. But the English rule had never been applied in this country and was hostile to the genius of our institutions. Mr. Cushing, in stating the English parliamentary rule, states that in his opinion the same rule applies in this country, but he gives no cases to sustain his statement, which is the

best of evidence that there are none. There had been numerous cases in the House and Senate where members were deprived of their seats because of ineligibility, but in no case had it been even claimed that any title was thereby given to the minority candidate. The English rule arose from the omnipotence of Parliament, and the character of statutory enactments given its decisions in election cases. No such rule could obtain in this country with the limited powers of Congress and the reserved rights of the States in regard to elections.

The committee therefore recommended resolutions declaring the seat vacant.

The minority held that the letter in question, properly interpreted, was not an act of disloyalty. The action of the House in this case was really a trial of the contestee on the charge of treason, and he should not be found guilty unless the truth of the charge was proved beyond a reasonable doubt. Interpreting the letter in the light of the times and circumstances, it was simply a profession of adherence to the neutrality policy of Kentucky, at that time favored by the best Union men of the State. The letter was in regard to a public discussion between contestee and Ex-Governor Helm, in which contestee appeared as a Union and Governor Helm as a secession advocate. Everyone understood at the time that Mr. Brown favored enforcing neutrality toward the South, and this letter was intended to emphasize the idea that he favored it toward the North as well. Mr. Brown had announced himself as a candidate for Congress on the Union ticket, and throughout the war he had done nothing which could be construed as an act of disloyalty. After the emancipation proclamation he had violently opposed the policy of the Administration and the conduct of the war, and had probably expressed this opposition in injudicious and intemperate language, but he ought not on this account to be found guilty of "constructive treason" by the House.

The House passed the resolutions declaring contestee and contestant not elected, by votes of 108 to 43, and 102 to 30, respectively.

[2 Bart. 395-417.]

(10) *BLAKEY vs. GOLLADAY.*

Right of minority candidate on death of majority candidate before canvass of votes. Report for contestee. Contestee seated.

Report by Mr. Dawes.

Mr. Golladay was elected to fill a vacancy, and there was no question as to his election and right to be seated, provided any vacancy existed, but Mr. Blakey claimed to have been elected at a prior election. At this election a very large majority of the votes was cast for his opponent, Mr. Hise, but Mr. Hise died before the votes were canvassed, and contestant contended that he being the only living person for whom any votes were returned, it was the duty of the board of canvassers to have certified to his election. The committee held that when the polls were closed the result was unalterably fixed, and the only duty of the board of canvassers was to ascertain and declare that result. The death of the member receiving the majority of the votes at any time after they were cast created a vacancy, whether they had been canvassed or not.

Contestant further contended that in all the counties but one the

law requiring the election board to contain members of all political parties was violated, and as he had a majority of the votes in the only county where the law was obeyed, he was elected. But the only evidence was the fact that nearly all the election officers voted at this election for Mr. Hise. This, the committee held, was not proof that the law had not been complied with, as the appointing officers could not be expected to determine the politics of the judges from the poll books of an election which had not yet taken place at the time of their appointment, and there was no proof how these persons had voted at former elections, or what their general political reputation was. And, even if it should be admitted that the law was violated, and that all the counties but one must be thrown out, contestant certainly could not be given the seat on the small majority received in that county.

The only objection to the right of contestee being the claim of contestant, the committee recommended that contestee be sworn in. The resolutions recommended were adopted without division.

[2 Bart. 417-421.]

(11) McKEE vs. YOUNG.

Loyalty; right of returned rebel soldiers to vote in Kentucky. First majority report to vacate seat; first minority report for contestee; second minority report for contestant; second majority report for contestant. Contestant seated.

First majority report by Mr. McClurg; first minority report by Mr. Kerr; second minority report by Mr. Upson; second majority report by Mr. Cook.

The committee found the charge of disloyalty against Mr. Young sustained by the evidence. There was the testimony of a number of witnesses who had heard him express sentiments in sympathy with the rebellion; two witnesses had seen food sent from his house to a rebel camp; he had at one time pointed out to a squad of rebel soldiers a house where a Union soldier was hiding, and advised them to "go and get him," which they did; he had been at a place where a rebel company was being organized, and pointed out a good gun to one of the men, and advised him to take it, under circumstances that indicated that he had brought the gun there; and it appeared that he was generally regarded in the community as a rebel sympathizer. For these reasons the committee held that he could not truthfully take the test oath, and was not entitled to be sworn in.

Contestant claimed the right to the seat in the first place on the ground that the known ineligibility of the majority candidate gave the seat to the person having the next highest number of votes, but the committee overruled this point on the same grounds as in a previous case. He then claimed to have received the majority of the votes legally cast. There was evidence tending to show that over 2,000 returned rebel soldiers voted for contestee, but the specific proof only showed 752 by name, or, leaving out those cast in precincts asked to be rejected on other grounds, 666. But the committee could find no law of Kentucky under which the votes of rebel soldiers could be rejected.

A number of precincts were attacked on the ground that all the officers of election were partisans of contestee, and a number of others

on the ground that part of the officers of election were returned rebel soldiers or sympathizers with the rebellion, who were not entitled to be appointed, on account of the recent act declaring that sympathizers with the rebellion should not be considered as constituting one of the parties entitled to representation on the election boards. If all these precincts in regard to which the proof was clear should be rejected, contestee would still have a majority of 82 votes, or if another precinct where the proof was not quite clear was also rejected, his majority would be 5 votes. There were also 8 votes cast for contestee by deserters, but the committee could find no law of Kentucky depriving deserters of their votes. As the rejection of all these precincts would not quite overcome contestee's returned majority of 1,479, it was not necessary to decide the legal points raised, or whether they ought to be rejected. The committee recommended resolutions declaring neither claimant entitled to the seat.

The minority strongly dissented from even the provisional recognition of the justice of contestant's claims found in the majority report. It would be preposterous for the House to attempt to say that returned rebel soldiers should not vote in Kentucky, when the State of Kentucky itself had passed no laws depriving them of their votes. Where the officers of election were charged to be all of one party, the charge was sought to be sustained by the poll books of the election in contest, an election made *after* their appointment. Under the recent decision in *Blakey vs. Golladay* this was not evidence of the fact sought to be shown. Besides, there was no pretense that these officers had not conducted the election fairly and honestly, and they were at least *de facto* officers. The returned rebels who acted as election officers were also at least officers *de facto*, and their acts would be valid even if there were any law of Kentucky prohibiting them from acting, which there was not.

The minority held also that contestee was entitled to the seat. The law under which he was sought to be excluded was strictly penal, and must be strictly construed. The intent of the law was to exclude persons guilty of treason, and the words of the law only provided for their exclusion on conviction of taking the oath falsely. The minority could not see how they could be excluded before conviction. At any rate, no one should be excluded except upon clear and conclusive proof of actual acts of disloyalty. There was no such proof in this case.

The minority earnestly argued that the law calling for the imposition of a test oath was unconstitutional. It was in effect the requirement of an additional qualification for Representatives beyond those mentioned in the Constitution. It had often been held that the States had no power to add to these qualifications, and it was equally clear that Congress had no such power. In this case, however, contestee asserted his ability truthfully to take the oath, and his willingness to do so, and the minority could see no reason for refusing him his seat.

Mr. Upson filed a dissenting report, contending that contestant was elected. Under the statement of the majority report contestee had only 5 majority, and there were 8 votes cast for him by deserters, which ought to be rejected under the decision in *Delano vs. Morgan*, giving contestant a majority of 3. And there were precincts overlooked in the majority report precisely similar to those provisionally rejected in it, which ought also to be rejected, thus increasing con-

testant's majority. Mr. Upson also held that the votes cast by the returned rebel soldiers should be rejected, on the ground that they were paroled prisoners, not yet pardoned. All the armies from which they could have come had surrendered under conditions which involved the paroling of all the men. The proclamation of amnesty issued by the President had expressly excepted "all persons who left their homes within the jurisdiction and protection of the United States and passed beyond the Federal military lines into the pretended Confederate States for the purpose of aiding the rebellion." This necessarily applied to all soldiers from Kentucky, and they were hence not pardoned, but were still prisoners of war. A prisoner of war had no more right to vote for Representatives in Congress than an enemy in the field.

Mr. Upson also argued that the statutes requiring the judges of election to be of opposite political parties and disqualifying rebel adherents from acting as election officers were mandatory, and that the precincts where these laws were violated should be rejected. The evidence in regard to the politics of the judges was the poll book of the election in contest, but as the judges were appointed only two months before the election, their votes at this election sufficiently showed their political affiliations at the time of their appointment.

The House recommitted the case, so far as the question of contestant's right to the seat was concerned. The committee then reported again, renewing their former conclusion as to the disloyalty of contestee, but coming also to the conclusion that contestant was elected. This result was reached by deducting the votes of returned rebel soldiers and all votes cast at precincts where returned rebel soldiers acted as election officers. The reasons given were substantially those given by Mr. Upson in the report previously presented by him.

The House agreed to this last report, giving the seat to contestant by a vote of 62 to 43.

[2 Bart., 422-461.]

(12) BUTLER.

Acceptance of membership in a seceding legislature by a person in fact loyal. Joint resolution relieving him from disabilities passed.

Report by Mr. Dawes.

Mr. Butler had been elected to the legislature of Tennessee after that State had sought to secede, and as a member of the legislature he had taken the oath of allegiance to the Confederate States. He could not therefore truthfully take the oath that he had not exercised "the functions of any office whatever under any authority or pretended authority in hostility to the United States." But it appeared that he had been elected to the legislature as the representative of the Union sentiment in his district, with the hope that he might be able to benefit those who were suffering for their loyalty. His district was so strongly Union that it had furnished more soldiers to the Federal Army than there were voters in it, and he was throughout the war known as one of the strongest and most influential Union men in it. He had been singled out for especial persecution by the rebels, his property destroyed and plundered, lives of his family put in danger, and himself arrested for treason. The committee recommended the passage of a joint resolution permitting that so much of the oath as

stood in the way of his admission might be omitted in administering the oath to Mr. Butler. The joint resolution was passed and Mr. Butler was sworn in.

[2 Bart., 461-464.]

(13) CHRISTY and WIMPY.

Disloyalty; right of minority candidate. Neither claimant admitted.

Report by Mr. Dawes.

The election under which these claimants claimed seats was held under the military government of Georgia. The certificate of Mr. Christy was signed by General Meade, then in command of the district by whose orders the election was held; that of Mr. Wimpy was signed by Governor Bullock, who was elected at the same election. It was conceded that Mr. Christy received a majority of about 100 votes, but he acknowledged that he had been the editor of a newspaper during the war which had supported the rebellion. He was hence ineligible.

The law of Georgia provided that when the majority candidate was ineligible, the candidate having the next highest number of votes should be elected. Mr. Wimpy claimed the seat under this provision, but the committee, without deciding whether the law in question applied to Congressional elections, held that Mr. Wimpy was also ineligible, having served for some time as an officer in the rebel army.

Both claimants claimed to be Union men, Mr. Christy claiming that he opposed secession, and only went out with his State, and Mr. Wimpy that he was forced into the army by the force of public sentiment; but the committee held that neither of them could truthfully take the oath, and recommended that neither be sworn in. The case was not reached in the House.

[2 Bart., 464-466.]

(14) CHAVES vs. CLEVER.

Fraud and irregularities. Report for contestant. Contestant seated.

Report by Mr. Pettis.

There were several precincts in which it was proved that alterations were fraudulently made in the returns and poll books after the close of the election, whereby contestee was returned as receiving several hundred votes which were never cast. In one precinct the place of voting was removed to an unusual and inconvenient place, and coarse and threatening language was used against persons intending to vote for contestant, but the committee did not reject the poll. Votes were returned from several precincts which had no legal existence at the time of the election, but were afterwards legally established by the legislature. The committee rejected these votes.

Contestee sought to offset these losses by having certain irregular returns, showing a majority for contestant, rejected. The committee rejected most of these returns, but contestant still had a majority of 389 votes, and the committee unanimously recommended that he be seated. The House agreed to the resolutions recommended without division.

[2 Bart., 467-471.]

(15; 16) JONES *vs.* MANN and HUNT *vs.* MENARD.

Fraud; intimidation; illegal rejection of returns; election to fill vacancy in new district. Majority report against all parties; minority report for Mr. Hunt. Majority report sustained.

Majority report by Mr. Upson; minority report by Mr. Kerr.

Mr. Mann had been certified as elected, and took his seat. Subsequently he died, and Messrs. Hunt and Menard both claimed to have been elected to fill the vacancy. Mr. Jones claimed that he had been elected instead of Mr. Mann in the first place, and that consequently there was no vacancy to fill.

Mr. Jones denied the validity of the certificate of the commanding general under which Mr. Mann was admitted. The committee held that the general was acting properly, under the reconstruction laws, and that the House had already settled the question of the validity of his certificates by admitting Mr. Mann and his colleagues upon them. The only evidence of contestant against the correctness of the result as certified was a very vague *ex parte* affidavit, taken after the death of Mr. Mann, which the committee did not consider. Contestant produced some evidence tending to show fraud and intimidation, particularly with reference to colored voters, but the evidence was very vague, and it was impossible from it to count up specific votes which should be deducted or added sufficient to overcome more than half of the returned majority of Mr. Mann. Contestant further contended that Mr. Mann was not at the time of his election an inhabitant of the State, and was therefore ineligible. The evidence was not clear or conclusive, but the committee held that it was immaterial whether he was ineligible or not, as under the principles already settled by the decisions of other cases the ineligibility of the majority candidate would give no title to the minority candidate. The committee were therefore unanimous in the opinion that Mr. Jones was not elected, and that the death of Mr. Mann had caused a vacancy.

The majority were of the opinion that neither Mr. Hunt nor Mr. Menard was elected to fill the vacancy. Mr. Menard was certified as elected, but it appeared that Mr. Hunt received an overwhelming majority of the vote as returned. According to the precinct returns the vote was: Hunt, 18,341; Menard, 8,678. The canvassing board threw out nearly all these returns, counting only 2,833 votes for Hunt and 5,107 for Menard. The reason given for the rejection of most of these returns was that they were made by the supervisors of registration, but the committee found that this was strictly in accordance with the law. Whatever the validity of the election, then, Mr. Menard did not receive a majority of the votes and was not elected. Mr. Menard, however, objected to considering any of the allegations or testimony, on the ground that no legal notice of contest was served on him. As to have waited the regular time for the service of notice and answer and the taking of testimony would have carried the contest until the expiration of the Congress, and as all the testimony of contestant was record evidence, and presented with his protest to the House, the committee found that much might be said in justification of the action of contestant; but the view of the election taken by the committee rendered it unnecessary to decide this question. The committee found the whole election void, both because not held in the right district

and because of violence and intimidation. The old Second district, from which Mr. Mann was elected, was entirely comprised within the parish of Orleans. Subsequent to the election the State was redistricted, and the new Second district included part of Orleans Parish not included in the old district and left out part of the parish included in the old district, and it included also several outside parishes, formerly part of the Third district. All the votes on which the certificate of election of Mr. Menard was based were cast in these outside parishes. The committee were of the opinion that the election should have been held in the district in whose representation the vacancy occurred. This question, so far as the committee could find, had only once before been before the House (in the case of Perkins *vs.* Morrison, 1 Bart., 142), and had then been decided adversely to the position taken by the committee in this case, but the report of the committee in that case was sustained by only a small majority, and the committee thought the reasoning of the minority in that case was the stronger. The very objection raised in that case—that the new districts might be so divided that it would be impossible to determine in which district the election should be held—was exemplified in this case. If it were not that this district was named the Second district, the election might with as much propriety have been held in the Third district.

There were some facts in connection with this election of which it was proper for the House to take notice.

It is well known that in the city of New Orleans and in many other parishes of Louisiana, for some weeks immediately preceding this elections, civil disturbance, disorder, and crime prevailed to such extent by reason of the lawlessness of the disloyal element prevalent there that the civil authorities were unable to put it down, being prohibited by law from calling out the militia to maintain the peace or to enforce the laws.

It appeared from the reports of the governor of Louisiana and the military authorities that such a condition prevailed as to render a valid election impossible. The extraordinary result of the election as compared with previous elections and the known political division of the voters, confirmed this conclusion. The committee therefore recommended resolutions declaring neither Mr. Hunt nor Mr. Menard elected.

The minority of the committee agreed that Mr. Jones was not elected at the first election, nor Mr. Menard at the second, but contended that Mr. Hunt was elected. The notice of contest given by Mr. Hunt was, in the light of the numerous precedents for a liberal construction of the law, legally and substantially sufficient. By the evidence of the official returns presented with the notice it appeared that Mr. Hunt had an overwhelming majority of the votes cast. The attempt of the majority to argue the election invalid on account of violence and intimidation was not based on anything in the record or properly before the committee.

It is apparent that the majority has traveled out of the record in the consideration of the case, abandoned the rights of the parties, ignored the merits of the contest, disregarded the constitutional rights and the interests of the constituency, taken issue with the House on its recent emphatic recognition of the validity of the election in question, and rendered a verdict upon a matter not at all in controversy.

As to the propriety of holding the election in the new district, the minority agreed with the decision of the House in the only previous case in which the question had been raised. When the legislature

established the new second district it repealed all previous laws on the subject, and the only district having legal existence in which the election could have been held was the one in which it was held. But if the opposite view of the law was taken the result would be the same. If all the votes outside of Orleans Parish were thrown out and the entire registered vote of the only ward in New Orleans which had been added to the new district deducted from Mr. Hunt, and the entire registered vote of the only ward of the old district not included in the new added to Mr. Menard, Mr. Hunt would still have a large majority. The minority therefore recommended that he be seated.

The resolution of the majority declaring Mr. Menard not elected was passed by a vote of 130 to 57, and that against Mr. Hunt by a vote of 131 to 41. The whole subject was then tabled.

[2 Bart., 471-499.]

(17) HAMILTON.

Claim for additional representation. Majority report adverse; minority report favorable. No action by House.

Majority report by Mr. Shellabarger; minority report by Mr. Heaton.

This report was upon a legislative rather than a judicial matter. Under the law Tennessee was only entitled to eight Representatives, and that number had already been admitted. Mr. Hamilton, who was elected from the State at large as a ninth Representative, acknowledged that he had no claim under the existing law, but contended that a law ought to be passed giving Tennessee an additional Representative. The apportionment of eight Representatives to Tennessee had been made on the basis of her free population and three-fifths of her slaves. By the voluntary emancipation and enfranchisement of the slaves the State had added to her representative population two-fifths of their number—more than sufficient to make one representative ratio.

The majority of the committee made an adverse report. The request was for Tennessee alone, and based on the especial consideration to which her praiseworthy conduct was supposed to entitle her. But under the Constitution Representatives were to be apportioned according to the *number* of inhabitants, and not according to any Congressional estimate of their merits. The only discretion left to Congress was in fixing the number which should constitute the basis of the apportionment and in adjusting fractional ratios. All the instances of an apparent exercise of discretion by Congress came within this limit. Congress had no right to apportion an additional Representative to Tennessee without also adding to the representation of other States whose representative population had been similarly increased. This had not been asked for, and was not the question before the committee. The case was not altered by the adoption of the fourteenth amendment, for that was not a provision for increasing the absolute representation of States, but for increasing their relative representation by decreasing that of other States. The case of Tennessee was not essentially different from that of other States, for emancipation was indirectly the result of the war in it as well as in them; and the colored people of the other States, who had suffered for two years longer the wrong of slavery, were entitled to no less consideration than those of Tennessee.

The committee therefore recommended that the claimant be not admitted.

The minority held that Tennessee was in justice entitled to an additional Representative. Many precedents were cited in which the House had exercised its own discretion in apportioning Representatives not in strict accordance with the census.

In a word, these acts establish the general proposition that Congress has complete jurisdiction to adjust the representative numbers of the House, and has repeatedly and constantly exercised it at discretion, according to the varied equity of each particular case.

The equities of this case required the additional representation. The fourteenth amendment was in effect a declaration to the States that if they enfranchised their former slaves they should be represented accordingly; otherwise their representation should be reduced. Under this the request of Tennessee was a request for an absolute constitutional right. The fact that she happened to be the first State to claim this right should not be allowed to prejudice the right. The minority therefore recommended the passage of a bill apportioning to Tennessee an additional Representative, to be elected from the State at large unless the legislature should otherwise provide.

There was no action by Congress.

[2 Bart., 499-516.]

(18) CASEMENT.

Delegate from Territory not yet organized not admitted.

Report by Mr. Cook.

Mr. Casement claimed to have been elected a Delegate from Wyoming. The Territory was not yet organized. The election under which he claimed the seat was held in 1867. A law for the organization of Wyoming was not passed until 1868, and at the date of the report it had not yet gone into effect. The election laws of Dakota were still in force in the proposed Territory. The election at which Mr. Casement was voted for was called by a mass meeting, and was not held in accordance with the proposed organic law or any other law. Any principle on which he could be admitted would also justify the admission of a Delegate from Alaska, if a mass meeting there should choose one. The committee recommended that the claimant be not admitted.

There was no action by the House.

[2 Bart., 516-518.]

FORTY-FIRST CONGRESS, 1869-1871.

Committee on Elections.

Mr. PAINE, Wisconsin.	Mr. STEVENSON, Ohio.
CHURCHILL, New York.	BURDETT, Missouri.
HEATON, North Carolina.	BURR, Illinois.
CESSNA, Pennsylvania.	RANDALL, Pennsylvania.
Mr. BUTLER, Tennessee.	

At the second session the following were added: -

Mr. BROOKS, Massachusetts.	Mr. KERR, Indiana.
DOX, Alabama.	McCARY, Iowa.
HALE, Maine.	POTTER, New York.

Owing to the large number of contests the House authorized the chairman of the committee to appoint subcommittees of 3 members each and assign cases to them; said subcommittees having power to report the cases assigned directly to the House. This assignment was made at the beginning of the second session, as follows:

To Messrs. Paine, Heaton, and Potter: *Belden vs. Bradford*, Colorado; *Cameron vs. Roots*, Arkansas; *Hinds vs. Sherrod*, Alabama; *Grafton vs. Conner*, Texas.

To Messrs. Churchill, Butler, and Burr: *Switzler vs. Dyer*, Missouri; *Zeigler vs. Rice*, Kentucky; *Shields vs. Van Horn*, Missouri; *Whittlesey vs. McKenzie*, Virginia.

To Messrs. Cessna, Randall, and Hale: *Taylor vs. Reading*, Pennsylvania. *Eggleston vs. Strader*, Ohio. *Reid vs. Julian*, Indiana. *Hoge vs. Reed* (*final case*), South Carolina. *Wallace vs. Simpson*, South Carolina.

To Messrs. Stevenson, Burdett, and Kerr: *Sypher vs. St. Martin*, Louisiana. *Hunt vs. Sheldon*, Louisiana. *Darrall vs. Bailey*, Louisiana. *Newsham vs. Ryan*, Louisiana. *Morey vs. McCranie*, Louisiana.

To Messrs. Brooks, Dox, and McCary: *Sheafe vs. Tillman*, Tennessee. *Leftwich vs. Smith*, Tennessee. *Boyden vs. Shober*, North Carolina. *Tucker vs. Booker*, Virginia. *Barnes vs. Adams*, Kentucky.

The cases reported at the first session and the cases of Segar and Rodgers are not included in these assignments. The cases italicised above, it will be noticed, were never reported to the House. Following is a list of the cases as reported:

Cases.

(1) Henry D. Foster *vs.* John Covode (*prima facie* case), *Pennsylvania*.

(2) Caleb S. Hunt *vs.* Lionel Allen Sheldon (*prima facie* case), *Louisiana*.

(3) S. L. Hoge *vs.* J. P. Reed (*prima facie* case), *South Carolina*.

(4) A. S. Wallace *vs.* William D. Simpson (*prima facie* case), *South Carolina*.

(5) Leonard Myers *vs.* John Moffett, *Pennsylvania*.

(6) *Georgia cases.*

- (7) John Covode *vs.* Henry D. Foster (final case), *Pennsylvania*.
- (8) Charles H. Van Wyck *vs.* George W. Greene, *New York*.
- (9) Caleb N. Taylor *vs.* John R. Reading, *Pennsylvania*.
- (10) J. Hale Sypher *vs.* Louis St. Martin, *Louisiana*.
- (11) Caleb S. Hunt *vs.* Lionel Allen Sheldon (final case), *Louisiana*.
- (12) Frank Morey *vs.* George W. McCranie, *Louisiana*.
- (13) J. P. Newsham *vs.* Michael Ryan, *Louisiana*.
- (14) A. S. Wallace *vs.* William D. Simpson (final case), *South Carolina*.
- (15) Charles Whittlesey *vs.* Lewis McKenzie, *Virginia*.
- (16) Chester B. Darrall *vs.* Adolphe Bailey, *Louisiana*.
- (17) Sidney M. Barnes *vs.* George M. Adams, *Kentucky*.
- (18) George Tucker *vs.* George W. Booker, *Virginia*.
- (19) William F. Switzler *vs.* David P. Dyer, *Missouri*.
- (20) Joseph Segar, *Virginia*.
- (21) John S. Reid *vs.* George W. Julian, *Indiana*.
- (22) John L. Zeigler *vs.* John M. Rice, *Kentucky*.
- (23) Benjamin Eggleston *vs.* Peter W. Strader, *Ohio*.
- (24) Nathaniel Boyden *vs.* Francis E. Shober, *North Carolina*.
- (25) C. A. Sheafe *vs.* Lewis Tillman, *Tennessee*.
- (26) James Shields *vs.* Robert T. Van Horn, *Missouri*.
- (27) John B. Rodgers, *Tennessee*.

(1) FOSTER *vs.* COVODE (*prima facie* case).

No certificate or proclamation of election. Majority report for Covode. Minority reports that no prima facie title shown. Neither claimant admitted.

Majority report by Mr. Cessna; minority reports by Mr. Paine and Mr. Burr.

The governor of Pennsylvania in his proclamation declaring who were elected to Congress refused to declare either candidate from this district elected. He afterwards transmitted to the Clerk of the House certain affidavits, and in the letter of transmission said that these affidavits "indicate the election of Hon. John Covode." The signature of the governor and the authenticity of the affidavits were certified by the secretary of the commonwealth. The House referred the proclamation of the governor, his letter, and the affidavits transmitted to the committee to report who, according to these papers, was *prima facie* entitled to the seat.

The committee reported that the proclamation of the governor was not evidence of any title in either claimant from this district. But the House had decided in the former case of Butler *vs.* Lehman that the governor of Pennsylvania had the right to go behind fraudulent returns and decide who was elected. As the proclamation of the governor was not required to be in any prescribed form it was merely notice of his decision. The letter of the governor to the Clerk of the House seemed to show the election of Mr. Covode, and having been made evidence by the resolution of the House referring the papers it established his *prima facie* right to the seat. If, on a *prima facie* case, it was proper to review the action of the governor, it should be said that the affidavits transmitted sustained his decision and showed frauds that no one could defend. The committee therefore recommended that Mr. Covode be sworn in pending the contest on the merits.

The minority held that of the three documents referred only one, the proclamation of the governor, was legal evidence, and that showed no one elected from this district. The letter to the Clerk of the House was not an act which the governor was required or authorized by law to do, and was wholly unofficial. It was a mere private letter, of no more value than any other private letter, and it only incidentally expressed the opinion that the affidavits indicated the election of Covode. It lacked the great seal of the State, and the attestation of the secretary could only establish the genuineness of the governor's signature. The affidavits transmitted were *ex parte*, not taken in pursuance of any law and wholly inadmissible. The mere fact of reference by the House did not decide the question of the competence of the papers as evidence. "That question is always to be decided by the committee and by the House." The minority therefore recommended a resolution declaring that on the papers referred no one was shown to have a *prima facie* right to the seat.

Messrs. Burr and Randall, who agreed to the minority report, presented an additional minority report, arguing the same points more at length, and discussing the case of *Butler vs. Lehman*, claimed to be a precedent. In that case the governor did not go behind any returns to investigate questions of illegal and fraudulent voting, but he simply refused to receive as correct one return which had been declared by the courts of the State to be a forgery. This was in no way an analogous case. The affidavits transmitted were not competent evidence for the consideration either of the House or the governor, but if they were taken as absolutely true they would only show that some votes had been rejected which should have been received and some received which should have been rejected. As there were no returns before the committee there was no basis for the readjustment of these votes.

The House did not admit Covode, but recommitted the whole case for investigation on the merits.

[2 Bart., 519-580.]

(2) HUNT *vs.* SHELDON (*prima facie* case).

Majority report for Sheldon, minority report for Hunt. Sheldon seated.

Majority report by Mr. Stevenson; minority report by Mr. Burr.

Mr. Sheldon had the certificate of election, but the certificate, as well as many other papers in this and other Louisiana cases, were referred to the committee with instructions to inquire into the validity of the election and the eligibility of the claimants. The committee reserved its decision upon the force to be given to the certificate of election above. Taking the returns, except those rejected by the State canvassing board, Mr. Sheldon had a majority of the votes. Whatever might be the result in a contest involving the validity of these returns and the sufficiency of the reasons for rejecting certain parishes, the returns were *prima facie* evidence of the right of contestee to be sworn in, provided the election was a valid one.

By the official reports of a committee of the legislature of Louisiana, referred to the committee, it appeared that in the parishes of Orleans and Jefferson a state of riot and violence prevailed before and at the election. In these two parishes 232 Republicans were killed or maltreated. The violence prevented nearly one-half the registered voters

from voting. These voters, if free to vote, would undoubtedly have voted against that disloyal party which prevented them from voting, in which case the Republican candidate would have received about 1,500 majority in the whole district. As the election in the other parishes was peaceable and a full vote was cast, it would be unjust to declare the whole election void. If the election was allowed to stand on the result in the peaceable parishes, Mr. Sheldon would have a larger majority than he had on the returns, as counted by the canvassing board. The committee therefore recommended that he be sworn in, pending the contest.

The minority dissented from this conclusion. Mr. Sheldon had a certificate of election, which, if not rebutted would be *prima facie* evidence of his title, but it was rebutted by a certificate of facts, issued to Mr. Hunt by the same board and of equal authority, showing that he had received an overwhelming majority of the votes. This certificate of facts showed also that the returns of the parish of Orleans were rejected because returned by the supervisors of registration, although an examination of the law showed that this is just the way they should have been returned. Three other parishes, casting with Orleans some 20,000 votes, three-fourths of the votes of the district, were rejected for slight informalities, and the certificate of election issued on the vote of three small parishes. There could be no justification for the rejection of these returns, and on the face of the facts shown by the two certificates, Mr. Hunt had much the better *prima facie* title.

The alleged violence in the parish of Orleans was not a question brought before the committee by the parties, and was not properly before them in a *prima facie* case. There was no legal evidence of the facts alleged, and the report of the legislative committee, on which the statements of the majority seemed to be based, was notoriously and transparently partisan.

This sort of logic, or law, when indulged in by a committee charged with the delicate and important duty of deciding a great question of the right to representation, can not be fitly characterized without appearing to violate the rules of parliamentary courtesy. In our judgment it deserves to be signally rebuked by the House.

The minority recommended that the name of Mr. Hunt be substituted for that of Mr. Sheldon in the resolutions recommended by the majority.

The recommendation of the majority was agreed to, and Mr. Sheldon seated, by a vote of 85 to 38.

[2 Bart., 530-540.]

(3) HOGE *vs.* REED (*prima facie* case).

Conflicting certificates issued. Majority report for contestant; minority report against prima facie right of either party. Contestant seated.

Majority report by Mr. Cessna; minority report by Mr. Burr.

The canvassing board in South Carolina consisted of four of the State officers, any three to have power to act. Mr. Reed presented a certificate of election in due form, dated December 2, 1868, certifying that he had received a majority of the votes and was elected, and signed by three of the canvassing board. Mr. Hoge presented a certificate of election, dated the same day, signed by all four members of the

canvassing board, certifying that he had received a majority of the *legal* votes, and was elected. He also presented a "statement" signed by all the members of the canvassing board, explaining their action, and a statement from one of the members of the board, withdrawing his signature from the certificate of Mr. Reed. Under a former resolution of the House the committee had already reported against Mr. Reed's right to be sworn in, on the ground of disloyalty, and had been sustained by the House, but in considering the claim of Mr. Hoge it was necessary to inquire whether it was negated by anything that would amount to a better title in Mr. Reed if he were eligible. The committee found that either certificate standing alone would be sufficient *prima facie* evidence of title, but the withdrawal of one of the signatures from the certificate of Mr. Reed left it without the requisite number of signatures. The right to withdraw a signature was plain, and it having been exercised, the certificate of Mr. Reed was invalidated, and that of Mr. Hoge was left. This entitled him *prima facie* to the seat, and the committee recommended that he be sworn in.

The minority held that the *prima facie* right on the certificates was with Mr. Reed, but as he had admitted his ineligibility under the fourteenth amendment, his claim was in abeyance unless an act removing his disabilities should be passed. But the title that he would have had but for his ineligibility negated the right of contestant. Under the law the canvassing board were to declare the result from the statements sent them from the county canvassing boards, and give the certificate of election to the candidate shown by them to have received the majority of the votes. Mr. Reed's certificate showed on its face that he had received a majority of the votes, and was hence in accordance with law. Mr. Hoge's certificate stated that he had received a majority of the *legal* votes, which was not what the law required the canvassers to certify. The certificate was dated December 2, 1868, but it was evident that it was issued much later. The "statement" of the canvassing board showed that at the time it was written the board had decided that Mr. Reed had the *prima facie* title, and it only expressed the judgment of the board that he was ineligible, and that in consequence Mr. Hoge, who was expressly declared to have received the next highest number of votes, ought to be seated on the final determination of the case. The wording of this statement precluded the idea that any certificate had been issued to Hoge when it was written. The statement was, curiously, not dated, but it referred to a certain affidavit which was dated December 8. The notice of contest of Mr. Hoge was served January 2, 1869, a month after the date of his certificate. He would never have assumed the attitude of contestant if he had then had a certificate of election. Mr. Hoge's certificate was therefore not valid. That of Mr. Reed was in all respects valid, unless the right to withdraw a signature was conceded. The minority held that if this right existed at all there must be some limit to the time within which it could be exercised. That limit was either the last of the five days on which the board were permitted to meet or it was the date of the performance of the next official act based on the former act. It was evident that this withdrawal did not take place within either of these limits. The minority recommended that neither claimant be sworn in.

The House sustained the report.

[2 Bart., 540-551.]

(4) WALLACE *vs.* SIMPSON.

Same facts as preceding case. House sustained minority, and recommitted the case for investigation on the merits.

Majority report by Mr. Burdett; minority report by Mr. Randall.

The facts in this case were precisely the same as in the preceding case of Hoge *vs.* Reed. The majority report covered the same ground as in that case, but somewhat more in detail; the minority report was almost word for word the same as in the previous case. In the majority report in this case the statement is made that the majority of the committee were of the opinion that the ineligibility of a majority candidate ought to involve the election of the candidate receiving the next highest number of votes, but on this question they yielded to the authority of the precedents of former Congresses.

The House, by a vote of 103 to 73, adopted the resolutions presented by the *minority*, giving the seat to neither claimant on his *prima facie* title, and then by a unanimous vote recommitted the whole case for investigation on the merits.

[2 Bart., 552-564.]

(5) MYERS *vs.* MOFFETT.

Fraud; illegal votes. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Stevenson; minority report by Mr. Randall.

Contestant charged the casting of illegal votes for contestee sufficient in number to overcome the returned majority, and also that two precincts should be thrown out on account of the fraudulent reception by the officers of election of large numbers of unassessed (unregistered) votes without requiring of the voters the proof of qualification prescribed by the law. Contestee made countercharges of illegal votes, and asked that one precinct be thrown out because of the violent ejection of the election officers from the polling place and the resultant failure of many voters to vote. The committee did not examine the evidence in regard to individual illegal votes, but took contestee's own statement, and counting against him the votes substantially conceded in his brief, and counting against contestant all the votes claimed by contestee, they found even then a majority for contestant without the rejection of any poll. But there were two polls which ought to be rejected. At both of these polls a very large number of votes were received from persons whose names were not on the assessment lists, without requiring of them the affidavits and vouchers required by law from such persons. It was made the duty of the judges of election, under very heavy penalties, to require this proof in all cases from unassessed persons, whether challenged or not, and the fact that in so large a number of cases this law was violated by the judges was evidence of fraud or collusion. This proof of fraud was strengthened by the failure of contestee to prove that any of these persons were in fact residents, and also in one precinct by the fact that the same election officers, at another election only a month later, had been guilty of most flagrant frauds in returning a large number of votes never cast by anyone. There was no evidence how most of the votes cast at this election by unregistered persons were

cast, and the only remedy for the fraud was the rejection of the whole poll. Rejecting these two precincts, the majority of contestant was largely increased.

There was no sufficient ground for rejecting the poll attacked by contestee. While there were some disturbances, it was in evidence that this was always a turbulent poll, and this election was quieter than usual. If the election officer who was ejected by the police was the duly appointed judge, it would be fatal to the election. But the committee found that under the law he was not the judge authorized to act at this poll, and that the law had been read to him, but he refused to leave, and it was necessary to call on the police to remove him. There may have been some partisans of contestee who did not vote on account of this occurrence, but they were perfectly free to vote, and were encouraged to do so and furnished with their own party ticket to vote. Many of them did vote, and if a few did not, their voluntary refusal was evidently in the hope of procuring the rejection of the poll.

Contestant having a majority in any way of looking at the case, the committee recommended that he be seated.

The minority reported for contestee. Rejecting the individual illegal votes so far as substantially agreed on by the parties, and also correcting some errors in casting up the returns which the majority had held not to be sufficiently proved, contestee still had a majority of the legal votes. There was no proof of fraud in the reception of unregistered votes, and the fact that the voters were not challenged indicated that they were actual residents, though not assessed. Where there was proof for whom their votes were cast they might be deducted, but where there was no proof they were as likely to have been cast for one candidate as for the other, and contestee ought not to be made to suffer by the rejection of polls where he received large majorities and where the election was proved by the testimony of the election officers to have been perfectly fair. The precinct asked to be rejected by contestee ought to be rejected. The polls were in the possession of a mob, the whole election was marked by rioting, and one of the election officers was ejected by violence. This would largely increase the majority of contestee, and the minority recommended resolutions declaring him entitled to his seat.

A large part of both reports was taken up with discussions of certain naturalization proceedings before judges of the supreme court sitting at *nisi prius*, but as no rulings were made affecting the result, and no legal principles announced, the arguments need not be outlined.

The resolutions of the majority, giving the seat to contestant, were passed by a vote of 113 to 38.

[2 Bart., 564-595.]

(6) GEORGIA CASES.

Seats claimed in two Congresses by virtue of one election. Claimants not admitted.

Report by Mr. Churchill.

Under an ordinance of the constitutional convention an election for Representatives in Congress was held in Georgia, beginning April 20, 1868. Neither the ballots voted for them nor the certificates of election specified to which Congress they were elected. Congress passed a law declaring that the State of Georgia should be entitled to representation as soon as certain fundamental conditions were complied with.

These conditions were complied with on July 8, 1868, and soon afterwards the persons elected at the April election presented their credentials, and were admitted to seats in the Fortieth Congress. At the beginning of the Forty-first Congress the same persons presented themselves with new certificates of election, based on the same election of April 20, 1868. The committee held that the office of Representative in the Forty-first Congress was entirely distinct from that of Representative in the Fortieth Congress, and if these persons were elected to the latter office they could not, under the same election, claim the former. By accepting seats in the Fortieth Congress they had estopped themselves from claiming that they were not elected to it, and it was clear that under the law they were rightfully elected to the Fortieth Congress. The law implied that Georgia should have the right to immediate representation, and as at the time that law became effective the Fortieth Congress was in session, these gentlemen who had been elected to represent the State when it should become entitled to representation properly applied for and were properly granted seats in that Congress. The committee therefore recommended that they be not admitted to the Forty-first Congress. The House agreed without division.

[2 Bart., 596-601.]

(7) COVODE *vs.* FOSTER.

Illegal votes; fraud; majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Churchill; minority report by Mr. Randall.

On the *prima facie* contest previously decided by the House neither party had been admitted, and the case had been recommitted to the committee for investigation on the merits.

On the face of the returns contestee had a majority of 41 votes. Adding to his vote certain votes illegally rejected by the election officers, and deducting from contestant the illegal votes proved against him, contestee would have a majority of 64 votes. To overcome this majority contestant claimed that two whole precincts should be excluded, and that a large number of illegal votes should be deducted from contestee.

The committee excluded the votes of the Dunbar and Youngstown precincts. At Dunbar there was difficulty in finding the ballot boxes, and until about 11 o'clock the ballots were deposited in the hat of one of the inspectors. The election officers had whisky in the room, and during the day consumed about half a gallon. The one who received the ballots and had charge of the hat was drunk and disorderly, putting his head out of the window and cursing and shouting. Several persons not officers of election were in the room all day, some of them intoxicated. During the time that the ballots were deposited in a hat these persons were so situated that they could easily have altered the contents of the hat. No attention was paid to challenges. Persons of foreign birth, claiming to be naturalized, were allowed to vote on showing papers of any sort without examination of the papers. A company of thirty or forty persons of foreign birth, mostly strangers, was marched up in military order to the polls and voted, the company being so placed that it was difficult for others to approach the polls and challenge the votes. No attention was paid to such challenges as were

made. At the close of the polls one of the clerks was taken sick, and was replaced by an unsworn outsider during the count. There were 6 more ballots than names on the poll list. From all these circumstances the committee concluded that the return of this precinct was too unreliable to be received, and neither party having made any other proof of the votes the whole poll was rejected.

The Youngstown district was also rejected. The assessor was shown to have placed the names of a number of persons on his "additional lists" without personal application as required by law. He failed to furnish the election officers with a certified copy of the list, and they used the list which had been posted up in a barroom for a month. The persons who were registered without personal application voted, and the election officers refused to pay any attention to challenges of these or other votes. The assessment list used by the officers disappeared after the election and had not since been seen. Persons challenged as not being registered were allowed to vote without making the proof required by law. The board were all Democrats, and no Democratic vote was refused by them.

Besides these two precincts the committee rejected the votes of a number of paupers who voted for contestee in the poorhouse precinct, though they had been sent there from other parts of the county, and of a number of nonresidents, minors, lunatics, and other disqualified persons. They added to the vote of contestant a number of votes offered for him and illegally rejected, including one vote offered by a voter who was deterred from voting it by threats of violence made in the presence of the election officers and not objected to by them. Whether the case was decided on these illegal votes alone, or either or both the polls in dispute were rejected, contestant was elected, and the committee recommended that he be seated.

The minority held that neither of these precincts should be rejected, and also differed as to the number of illegal votes. Each of the objections to the Dunbar precinct—the use of a hat for a ballot box, the intoxication of the judges, the excess of votes, the substitution of an unsworn outsider to aid in the count, the presence of outsiders in the room, etc.—was separately found to be insufficient to vitiate the election and combined they could be of no more effect. No poll ought to be rejected unless it was absolutely impossible to ascertain the true result, and the true method was not to reject the return and leave each party to prove the legal votes, but to require each party to prove the illegal votes and deduct these. The vote of the Youngstown precinct ought not to be rejected because of the failure of the assessor to perform one portion of his duty. He had performed all of it except the furnishing of a certified copy of the list to the judges, and they had rendered this irregularity immaterial by using the original copy instead.

The minority entered into a detailed analysis of the individual illegal votes, and found a larger number cast for contestant and a smaller number for contestee than were found by the majority. The pauper votes the minority did not reject. Making the deductions and additions according to the findings of the minority would leave contestee with a majority of 54 votes, and they recommended that he be seated.

The House agreed with the majority, and seated the contestant by a vote of 125 to 45.

[2 Bart., 600-631.]

(8.) VAN WYCK *vs.* GREENE.

Fraudulent naturalization. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Butler; minority report by Mr. Burr.

Both parties in this case charged the procurement of fraudulent naturalization papers, and contestee charged bribery. The committee found that a few irregularly naturalized persons voted for contestant, but that nearly all the fraudulent naturalization was in the interest of contestee. In the county of Orange, during the three months preceding the election, over 800 persons were naturalized. The average number in previous years was about 50. Naturalization papers were issued here and elsewhere by the clerk of the court without any examination of the applicant before the court. In a number of cases papers were issued by special deputy clerks, and in at least one case they were issued in a room removed from the court room. The officers conducting this naturalization were partisans of contestee and working in his interest. It might be fair to infer that all these naturalizations were illegal, and that all the persons so naturalized voted for contestee. The deduction of their votes on this basis would leave a majority for contestant. But the committee preferred to deduct only those shown to have voted illegally for contestee. Deductions were thus made in a number of precincts, but it is not very plain from the report upon what evidence the fact that this number of persons voted for contestee is established, or whether there was any proof of the illegality of the naturalization papers, except the fact that they were issued during a certain year. Deducting all these votes from contestee, and deducting from contestant such illegal votes as were proved against him, contestant was shown to have a majority of 139 votes. There were two precincts where the irregularities and the partisan reception of known fraudulent votes were of such a character as to justify the exclusion of the entire polls. This would largely increase contestant's majority, but as it was not asked for in the notice of contest the committee did not recommend that it be done.

The committee recommended resolutions declaring contestant elected.

The minority did not agree to the conclusions of the committee, and attacked the fairness of the statements of fact on which they were based. It was clearly shown that persons had been taken to New York and fraudulent naturalization papers procured for them in the interests of contestant, and that many fraudulent votes were cast for him. It was also proved that bribery was indulged in to a large extent in his behalf. No such proof was made against contestee. The naturalization papers objected to were all issued in the presence of the court, and nearly all the persons objected to as voting on them were shown to be entitled to naturalization, whether these papers were regular or not. The large number of naturalizations was accounted for by the fact that this was the first Presidential election since the war, and that during the war persons entitled to naturalization had not procured papers for fear of the draft. The regularity of the papers signed by deputy clerks did not need to be passed upon, as these papers were uniformly rejected by the election officers throughout the district. Persons voting on the other recently issued naturalization papers

which were regular in form were challenged and required to make proof of their right to vote. The testimony on which the majority sought to estimate the number of such persons voting for contestee was mostly vague guesses or hearsay. The majority evidently had not read the cross-examination of the witnesses cited by them. There was nothing against the validity of any of the papers objected to except that they were "issued last fall." The minority found that the title of contestee had been in no way overthrown and recommended that he retain the seat.

The House agreed with the majority, and gave the seat to contestant by a vote of 118 to 61.

[2 Bart., 631-660.]

(9) TAYLOR *vs.* READING.

Mistakes; irregularities; illegal votes. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Cessna; minority report by Mr. Randall.

The determination of this case depended on a large number of questions of fact, each involving very few votes. Few of them involve general questions of importance. On the face of the returns contestee had a majority of 41 votes. By correcting various mistakes, mostly conceded by contestant, and allowing certain rejected votes, this majority was increased to 144. From this majority it was conceded that 58 individual illegal votes should be deducted, and the committee deducted 51 more. On most of these illegal votes the decision of the committee was unanimous. There were differences in regard to certain soldier and pauper votes. The soldiers had been for years stationed in the precinct; some of them had resided there before enlisting, and some had reenlisted from there, though their former enlistment was from other places. The minority allowed all these votes, the majority deducted those of a few of the soldiers who had come from other places, and who had not reenlisted. The pauper votes were conceded by contestee as illegal on account of nonresidence, and were deducted by the committee, but the minority held that an official opinion of Attorney-General Brewster, given since the date of contestee's concession, and sustaining the legality of such votes, authorized the committee to count them. There were conflicts between the returns and the tally sheets in some cases. The committee examined all the circumstances, and where mistake in the returns was apparent it was corrected, but the conflict with the tally sheet alone was not considered sufficient to show mistake in the returns. The minority held that the tally sheet was the original record of the count, and should prevail. There were some precincts in which contestant proved that more votes were cast for him than were returned for him. There were indications of fraud in these cases which might justify throwing out the whole vote, but the committee preferred merely to correct the vote by adding to contestant and deducting from contestee the votes shown to have been wrongfully returned. There was a large number of votes cast for contestee in one ward by persons who were not assessed and who did not make at the polls the proof required by law. All these were deducted by the committee. The minority held as to some of them that the proof that they were not assessed under similar names, or that

they voted for contestee, was insufficient. The points of difference between the majority and minority, except as above indicated, were confined to questions of the weight of evidence in regard to individual votes. The majority found that contestant had a majority of 72 votes; the minority found that contestee had a majority of 28 votes. The House sustained the recommendation of the majority, and seated contestant by a vote of 114 to 45.

[2 Bart., 661-698.]

(10) SYPHER *vs.* ST. MARTIN.

Violence and intimidation. Report for contestant. Seat declared vacant.

Report by Mr. Stevenson.

This case is a later one than that of Hunt *vs.* Sheldon, and, the facts being substantially the same, they are not given fully in the report in this case.¹ The refusal of the House to sustain the committee in this case was in part a reversal of the decision in the former case.

This district was composed in part of certain wards of the city of New Orleans and neighboring parishes and in part of country parishes. The election in the country parishes was peaceable, and contestant received a majority of the votes cast in them. At former elections the Republican candidates had received a majority of the votes in the rest of the district also, but at this election, owing to the Kuklux outrages, only 84 Republican votes were cast in the part of the district covered by the operations of this organization. Following the precedent of Hunt *vs.* Sheldon, the committee threw out the violent parishes, and as contestant had a majority in the peaceable parishes, they recommended that he be seated. The claim of contestee had already been disposed of by a former report of the committee declaring him disqualified by disloyalty.

On the first vote the House sustained the report by a vote of 78 to 73. A motion to reconsider was passed by a vote of 83 to 79, and then, by a vote of 100 to 69, the seat was declared vacant.

[2 Bart., 699-703.]

(11) HUNT *vs.* SHELDON (*case on merits*).

Violence and intimidation. Majority report for contestee; minority report for contestant. Contestee retained the seat.

Majority report by Mr. Stevenson; minority report by Mr. Kerr.

As this was the first of the Louisiana cases reported, the report of the committee contained a full account of the general condition of affairs out of which all the cases grew. The main allegation in all the cases was that in certain parishes, constituting a large part of the State, the election was void by reason of violence and intimidation. At all the previous elections in these parishes since the beginning of the reconstruction period the Republican candidates had received a majority of the whole registered vote, but at this election the Republican vote suddenly fell to less than one-tenth the usual vote, and all

¹ The cases from 1 Bartlett and 2 Bartlett are given here in the order in which they are found in those compilations, instead of in chronological order

but 20 of the votes that were cast were cast in eight country parishes. In the remaining parishes practically no Republican votes were cast, some parishes casting only 1 or 2 votes and others none at all. The cause of this remarkable result was found in the events which shortly preceded the election. A secret military organization, known as the "Knights of the White Camellia," was formed, which embraced practically all the Democratic voters in the State, and was able, in the city of New Orleans, to muster a force of over 15,000 armed men, all sworn to obey the commands of their authorized leaders. Out of this organization grew the Kuklux Klan in the country parishes and the Innocents in the city—hands of men operating in hideous disguises and devoted to the grosser sort of outrages. At first violence was generally avoided, and a system of social and business ostracism against Republican voters, contrasted with treatment of the opposite sort to such as would join Democratic organizations, was relied upon to break the Republican power. These methods proving ineffective, violence and murder were resorted to, and for some time the city of New Orleans and neighboring parishes were in a state of anarchy. Not less than 2,000 Republicans were killed or injured. There being no State militia, the civil authorities were entirely without means of suppressing the disturbances, and the military force stationed at New Orleans was so small that the general in command declared that he had not enough force even to protect United States property if it should be attacked by the organization, which had taken practical control of the city. The result was that the riots and outrages continued until the civil authority was substantially surrendered to the riotous element by the appointment of a leading Democrat as chief of police. This produced a sort of peace, in the nature of a truce, and a comparatively peaceful condition was maintained up to and including the day of election, but only upon the express understanding that the Republicans would make no effort to poll their vote. Very many witnesses testified to the universal belief that if any attempt had been made to poll the Republican vote the scenes of violence and bloodshed would have been instantly renewed.

Under such a condition of affairs the committee held that the election was vitiated in the intimidated parishes. While there was no actual violence at the polls, the majority of the Republicans refrained from voting under an actual and reasonable fear that any attempt on their part to vote would result in violence similar to that which had already taken place. The committee thought the only safe rule to be adopted to meet and correct such a condition of affairs was to throw out the vote of all the intimidated parishes and declare the result from the vote of the peaceable parishes. It was proposed to apply this rule to all the Louisiana cases. Applying this rule to the case of Hunt vs. Sheldon, it appeared that the district in question was composed of six whole parishes and part of Orleans Parish. All the parishes, except Orleans and Jefferson, were peaceable, and cast a vote of: Hunt, 4,582; Sheldon, 7,928. On these votes Mr. Sheldon was elected. He had already been sworn in under a special resolution, and the committee recommended that he retain the seat.

The minority reported in favor of Mr. Hunt. On the face of all the returns he had received a majority of 10,826 votes. The certificate had been given to Mr. Sheldon by the action of the canvassing board in throwing out several parishes on technical grounds plainly

untenable. It was now proposed to throw out the parishes of Orleans and Jefferson, where more than half the votes were cast and where two-thirds of the registered voters lived, on the ground of violence and intimidation. But it was conceded that the election was in all respects quiet and peaceable, and that everyone who offered to vote voted as he pleased and without difficulty. An election ought not to be held void because a number or class of electors pretended that they were afraid to go to the polls, in the face of the fact that those who did go experienced no difficulty. The established rule in such cases was—

That to invalidate or make void an election on the ground of riot and intimidation it must appear that the proceedings at the election were interrupted and the ascertainment of the result prevented thereby.

All the previous cases in Congress involving this question had been based on allegations of violence on the day of election at the polls, but the election had never been held invalid, because it was not shown that the proceedings were interrupted or the ascertainment of the result prevented. If, however, the charges of intimidation in this case were sustained, a majority in the district could not be shown for Mr. Sheldon. If it were assumed that all the registered voters who did not vote in the parishes of Orleans and Jefferson would have voted for Mr. Sheldon, and their votes were so counted, they would still lack 68 votes of overcoming the returned majority of contestant. The minority therefore recommended that the seat be given to contestant. Mr. Kerr, who made the minority report, was "prevented by lack of time from further considering in this report the general condition of society in the district during the canvass that preceded the election," but promised to do so when the case was debated in the House.

The resolutions reported by the majority were agreed to by a vote of 114 to 51.

[2 Bart., 703-718.]

(12) MOREY *vs.* McCranie.

Violence and intimidation. Whole election held void.

Report by Mr. Stevenson.

This was another Louisiana case in which the election in a large part of the district was void for violence and intimidation. The House had in the previous case of Hunt *vs.* Sheldon approved the rule—

That where it appears that certain precincts and parishes (or counties) of a district have been carried by violence or intimidation, the returns therefrom shall be rejected and the result derived from the returns from the peaceable precincts and parishes (or counties).

But in the subsequent case of Sypher's *vs.* St. Martin, the House had refused to sustain a decision based upon this rule. The committee preferred not to take this action as a reversal of the rule, but—

accept the decision of the House in Sypher's case, not as a reversal but as a limitation of the rule adopted in Sheldon's case, and interpret the action of the House in Sypher's case to mean that the rule should not be so far extended as to apply to such a case where less than one-fourth of the legal electors of the district resided, and one-fifth of the registered vote was cast, within the peaceable parishes and precincts, and the claimant received but a small majority of that vote.

Applying these rules to this case, it appeared that the peaceable parishes contained about one-third of the registered vote. In these parishes contestant received a small plurality but not a majority of the

votes. If certain parishes where the evidence was not quite so conclusive were retained, contestee would have a small plurality. In either case the claims were negatived by the precedent of Sypher's case. Contestee was also prevented from taking the seat by reason of having taken part in the rebellion. The committee recommended resolutions declaring that neither claimant was entitled to the seat. The House agreed without division.

[2 Bart., 719-723.]

(13) NEWSHAM *vs.* RYAN.

Violence and intimidation. Report for contestant. Contestant seated.

Report by Mr. Burdett.

Contestant alleged that the election in five out of the ten parishes of the district was void for intimidation, and also that contestee was ineligible under the fourteenth amendment. The committee found that contestee had, as a member of the State legislature, before the war, taken the oath to support the Constitution of the United States. During the war he was shown to have made a speech to a new company of rebel soldiers, urging them to fight bravely, and he had himself been lieutenant of a company of home guards, and worn the recognized uniform of a Confederate officer. He asserted that he had all the time privately desired the success of the Union, but these acts did not indicate it, and it appeared that he had been generally recognized as an adherent to the rebellion. While those of his neighbors who were known to be Union sympathizers, even in a quiet way, were grossly maltreated, he was always well treated by the rebel authorities. The committee therefore found him ineligible under the fourteenth amendment.

In four of the disputed parishes only three Republican votes were cast, though at previous elections the majority of the voters had been Republicans. This result was brought about by the same policy of violence and intimidation found in the other Louisiana cases (see *c. g.*, Hunt *vs.* Sheldon). If these four parishes were rejected, contestant would have a majority of 649 votes in the remaining six. In the six retained parishes about two-thirds of the votes of the district were cast. If the other parish objected to, in which only 43 Republican votes were cast, was rejected, the majority of contestant would be 1,308. There was much intimidation in this parish, but less than in the other four. In the retained parishes, also, there was a condition of affairs which probably caused a larger Democratic and smaller Republican vote than would otherwise have been cast.

The committee recommended that contestant be seated. The House passed the resolution by a vote of 79 to 71. A motion to reconsider was laid on the table by a vote of 95 to 77.

[2 Bart., 724-731.]

(14) WALLACE *vs.* SIMPSON. (*Case on merits*).

Ineligibility of contestee. Violence and intimidation. Report for contestant. Contestant seated.

Report by Mr. Cessna.

On the *prima facie* case neither party had been sworn in. On the case on the merits the subcommittee unanimously reported in favor of

contestant. The report was based on three grounds: (1) That the ineligibility of contestee involved the election of contestant; (2) that the election was void in six of the nine counties, and contestant had a majority in the other counties; and (3) that, if no counties were rejected, enough voters were prevented from voting by violence and intimidation to have given the majority in the district to contestant if they had voted. These three propositions all led to the same conclusion, but the first proposition was agreed to only by Mr. Cessna, who drew the report. Mr. Hale agreed to the second and third, Mr. Randall probably only to the third.

(1) Mr. Simpson, the contestee, was notoriously ineligible, under the fourteenth amendment. He had been a member of the legislature before the war and taken the oath to support the Constitution of the United States. He had voted for the ordinance of secession, been a colonel in the Confederate army, and a member of the Confederate congress. All these were facts of which the electors were bound to take notice, and it abundantly appeared that they did have actual notice of them. Under these circumstances Mr. Cessna thought that the votes cast for contestee ought to be considered as thrown away. Such was the English rule. There was no American precedent to the contrary. In the only previous case in which the question had been raised the disqualification was not notorious. The question grew out of the conditions produced by the rebellion, and if there were no precedents it was because the rebellion itself was without precedent. If a majority of the voters of a district voted blank ballots, or for an imaginary person, their votes would not be considered, and it ought to be the same when they voted for a person notoriously ineligible.

(2) In six of the nine counties of the district the freedom of the election was destroyed by violence and Ku Klux outrages.

The same system prevailed in each one of these six counties. Clubs were formed; resolutions passed; laborers discharged for voting their sentiments; men denounced; custom taken from them; their property burned; houses fired into; some stripped and flogged; others crippled, scourged, waylaid, and robbed; pictures of Union men taken and sent around to Democratic roughs, so that they might know whom to murder; cannon fired all of the night before the election, so as to frighten the negroes and keep them from the polls; the whole district filled with Winchester rifles (fourteen shooters); many Union men, both white and black, hung up to the trees and shot down in the woods and in the streets; and many others compelled to vote the Democratic ticket against their will, in order to save their lives.

The same persons who committed the outrages before the election were at the polls armed and making threats. Where no attempt was made by Republicans to vote the election was comparatively quiet, but where they did attempt to vote there was violence at the polls in exact proportion to their persistence. The votes of all these counties ought to be thrown out, and the election adjudged to contestant on the basis of his majority in the other three counties.

(3) If the vote of no county was thrown out, contestee had on the returns a majority of 4,291. But the testimony showed that 5,700 voters had been prevented from voting by violence and intimidation. If these votes had been permitted to be cast, contestant would have been elected.

The committee recommended that contestant be seated, and the House agreed *nem. con.*

[2 Bart., 731-746.]

(15) WHITTLESEY vs. MCKENZIE.

Disloyalty. Report for contestee. Contestee retained the seat.

Report by Mr. Churchill.

Contestant claimed that contestee was ineligible under the fourteenth amendment, and that in consequence of the ineligibility of contestee, he was himself elected. The alleged acts of disloyalty were all performed before the passage by the State of Virginia of the ordinance of secession. After the passage of that ordinance contestee was throughout the war an undoubted Union man. But he had as a member of the legislature of Virginia voted for the resolution declaring that if the differences between the States could not be adjusted "every consideration of honor and interest demand that Virginia shall unite her destiny with the slaveholding States of the South." He had also voted for the act authorizing the borrowing of money and issue of treasury notes for the purpose of providing for the defense of the State. As a member of the common council of the city of Alexandria he had voted for an appropriation of \$200 to arm two militia companies, both of which afterwards went into the Confederate army. But all these acts were before the passage of the ordinance of secession, and in connection with them contestee had not given adherence to any other power than the United States, except the State of Virginia, which at that time was not hostile to the United States. The two resolutions of the legislature were voted for by the Union members, and did not involve disloyalty. The appropriation to the militia companies was a large reduction from the amount proposed by the rebel sympathizers, and was considered at the time a Union act.

The committee unanimously recommended a resolution retaining contestee in his seat. The House agreed without division.

[2 Bart., 746-754.]

(16) DARRALL vs. BAILEY.

Violence and intimidation. Report for contestant. Contestant seated.

Report by Mr. Stevenson.

There were twelve parishes in this district. The election was not contested in seven of the parishes, casting considerably over half of the vote of the district. In the other five parishes contestant claimed that the election was void for violence and intimidation, and the committee sustained his claim. In one parish there was a two-days' massacre by armed bands of men, and over 200 negroes were killed. After that for weeks no colored man dared venture out without a badge of protection, issued by the secret order which had conducted the rioting. In three neighboring parishes the same condition of riot prevailed and many Republicans were killed. No Republican votes were cast, though the majority of the voters were Republican. In another parish the parish judge and sheriff, both Republicans, were assassinated, and a reign of terror prevailed. Only a few Republicans voted, and these could not have done so if troops had not come into the parish on the night before the election.

Contestant had a majority of 245 votes in the peaceable parishes, and the committee recommended that he be seated. The House agreed, by a vote of 67 to 64. A motion to reconsider was laid on the table by a vote of 96 to 77.

[2 Bart., 754-759.]

(17) BARNES *vs.* ADAMS.

Irregularities; illegal votes; violence and intimidation. Report for contestee. Contestee retained the seat.

Report by Mr. McCrary.

Contestant claimed that many ex-rebel soldiers voted for contestee, and that their votes were illegal; that some of the officers of election were ineligible on account of disloyalty; that in some precincts the officers of election were not equally divided between the two parties, as required by law; that many illegal votes were cast; and that at some precincts the election was void for violence or fraud. He also charged in his evidence and argument, but not in his notice of contest, that some of the officers of election were not sworn.

The committee found that there was no law of Kentucky, or of the United States, depriving persons who had been common soldiers in the rebel army of the right to vote. In the case of McKee *vs.* Young their votes had been rejected on the ground that they were paroled prisoners of war, but at the time of this election the war had been over for three years, and their *status* as prisoners had certainly ceased to exist.

Under the law of Kentucky the officers of election were required to be equally divided between the political parties, but by an act of March 15, 1862, it was provided that those who had engaged in, advised, aided, or adhered to the rebellion "shall not be deemed one of the political parties in this Commonwealth within the provisions of the act." Some of the election officers had been in the rebel army, or adherents to the rebellion, and contestant claimed that the votes of precincts where such officers presided should be thrown out. But the committee held that the act was directed against the secession party in existence when the act was passed and not against individuals. After that party had ceased to exist the persons who had belonged to it were not disqualified from serving as representatives of one of the recognized political parties; and even if they were disqualified, they were officers *de facto*, acting under color of authority, and in the absence of fraud their acts affecting third parties were valid.

The allegation that some of the officers of election were not sworn was not made in the notice of contest, and this ought to be decisive of the question. But if it were not, there is—

a principle of law which your committee believe to be well settled by judicial decisions, and most salutary in its operations, which is conclusive of this point, as well as of several other points in this case. It is this: That in order to give validity to the official acts of an officer of election so far as they affect third parties or the public, and in the absence of fraud, it is only necessary that such officer shall have *color* of authority. It is sufficient if he be an officer *de facto* and not a mere usurper. This doctrine has been recognized and enforced by many of the highest courts of this country, and among others by the following:

People *vs.* Cook, New York (4 Selden, 67); Taylor *vs.* Taylor *et al.* (10 Minnesota, 107); Baird *vs.* Bank of Washington, Pa. (11 S. & R., 414); Pritchett *et al.* *vs.* The People, Illinois (1 Gilm., 529); The People *vs.* Ammons (5 Gilm., 107); St. Louis County Court *vs.* Sparks (10 Mo., 121); Whitley *vs.* McKune (10 Cal., 352); The People *vs.* Cook, New York (14 Barbour, 259); Greenleaf *vs.* Low (4 Denio, 168); Weeks *vs.* Ellis (2 Barbour, 324); Keyser *vs.* McKisson (2 Rawls,

139); *McGregor vs. Balch* (14 Vermont, 428). Quotations from and comments on each of these cases are given.

After a careful examination of the authorities the committee is satisfied that no principle of law is better settled by judicial decisions, and that no authority can be found emanating from a respectable court in conflict with those cited. The cases which have been decided by this House are not so harmonious or so free from difficulty. These will now be referred to briefly.

The case of *Jackson vs. Wayne* (Cl. and H., 47): In this case it was held that where the law required three magistrates to preside at an election, a return by three persons, two of whom were not magistrates, was defective. An examination of the whole case, however, shows that fraud was charged and proven, and the case is therefore not authority for the doctrine that a fair election at which the people have expressed their voice fully and freely should be set aside on the ground that one or more of the officers were such *de facto* only and not *de jure*.

McFarland vs. Culpepper (Cl. and H., 221): In this case it seems to have been held, without much consideration or discussion, that a failure on the part of election officers to take the required oath vitiates the election. It is not quite clear that the case was one in which there was no fraud. Much of the evidence was ruled out because not properly taken, and finally the seat which was contested was declared vacant.

Easton vs. Scott (Cl. and H., 272): In this case the failure of some of the election officers to be sworn is one of the many objections urged against the validity of the election. Upon the whole case the seat was declared vacant. This case, however, was not decided upon the sole ground that the officers were not sworn. There were other objections, and among them that the election was held *viva voce* when the law required that it be by ballot, and that there was fraudulent voting and fraudulent rejection of legal votes.

Draper vs. Johnston (Cl. and H., 702): In this case the vote of a precinct presided over by officers not sworn was thrown out. The point does not seem to have been discussed or the soundness of the law laid down to have been questioned.

Howard vs. Cooper (1 Bart., 275): This case was decided upon various grounds. There were illegal votes and frauds alleged and proved to the satisfaction of the committee. Among other things it was shown that at one precinct there were but two inspectors, whereas the law required three. This was held to vitiate the vote of the precinct where such officers presided. At this same precinct, however, the committee found that illegal votes were cast.

In the case of *Delano vs. Morgan* (Fortieth Congress¹) the vote of one township was thrown out, upon the ground that one of the three judges of election was a deserter from the Union Army, and, therefore, not capable of taking or holding the office. In the discussion of that case the chairman of the committee (Mr. Dawes, of Massachusetts) put the decision upon the ground that there was an express statute declaring that a person guilty of desertion should "be incapable and forever disqualified to hold any office under the Government." He insisted that such a person could not be an officer even *de facto*. (*Vide Congressional Globe*, vol. 67, p. 26808.)

It is worthy of remark that while some of the decisions of this House seem in conflict with the doctrine of this report, that doctrine itself has never been directly questioned. It may have been ignored, but no report can be found in which it has been denied in express terms or even seriously doubted. On the contrary, wherever this principle is referred to at all in any of the reports in cases decided by this House it has been approved.

There are a number of decisions of this House quite in harmony with the law as it is laid down by the courts, as shown by the judicial decisions hereinbefore quoted. We notice the following:

Milliken vs. Fuller (1 Bart., 176): In this case the election at a certain precinct was held by officers who were not chosen according to law, having been elected in April, when by law they should have been elected in March. The report of the committee, which was unanimous and which was adopted by the House, contains this language:

"The committee is unanimously of the opinion that the persons officiating were officers *de facto*, acting in good faith, and *as no fraud is alleged* the votes from the district were rightfully counted for the sitting member."

In *Clark vs. Hall* (1 Bart., 215) the report of the committee has this language:

"Your committee would not reject for mere informality a county abstract which truly presents the aggregates of the votes actually cast in the precincts."

¹ 2 Bart., 168.

In the case of Flanders and Hahn (1 Bart., 443) the committee used this language: "The principal and only aim of the law is to secure fair elections, and the non-observance of directory provisions can not annul an election carried on with all the essentials of an election, and with perfect fairness."

And, finally, in the case of Blair *vs.* Barrett (1 Bart., 313), after a careful review of the whole subject, the committee, through its chairman, Mr. Dawes, of Massachusetts, states the law precisely in accordance with the views now taken by your committee. We extract as follows:

"Had it appeared from the evidence that the election had been fairly conducted at these precincts, and there were no traces of fraud, no taint of the ballot box, the committee would not have been willing to have recommended a rejection of these polls. The honest electors should not be disfranchised and their voice stifled from a mere omission of the officers of election to take the oath of office."

The question, therefore, regarded in the light of precedent or authority alone, would stand about as follows: The judicial decisions are all to the effect that the acts of officers *de facto*, so far as they affect third parties or the public in the absence of fraud, are as valid as those of an officer *de jure*. The decisions of this House are to some extent conflicting; the point has seldom been presented upon its own merits, separated from questions of fraud; and in the few cases where this seems to have been the case the rulings are not harmonious. In one of the most recent and important cases (Blair *vs.* Barrett), in which there was an exceedingly able report, the doctrine of the courts, as above stated, is recognized and indorsed. The question is, therefore, a settled question in the courts of the country, and is, so far as this House is concerned, to say the least, an open one.

Your committee feels constrained to adhere to the law as it exists and is administered in all the courts of the country, not only because of the very great authority by which it is supported, but for the further reason, as stated in the outset, that we believe the rule to be most wise and salutary. The officers of election are chosen of necessity from among all classes of the people; they are numbered in every State by thousands; they are often men unaccustomed to the formalities of legal proceedings. Omissions and mistakes in the discharge of their ministerial duties are almost inevitable. If this House shall establish the doctrine that an election is void because an officer thereof is not in all respects duly qualified, or because the same is not conducted strictly according to law, notwithstanding that it may have been a fair and free election, the result will be very many contests, and, what is more, injustice will be done in many cases. It will enable those who are so disposed to seize upon mere technicality in order to defeat the will of the majority.

As this is the leading case on this question, and as the rule here laid down has since been generally followed, it has seemed proper to quote this part of the report in full.

The only other issues in the case were the allegations of fraud or violence at certain precincts and of illegal voting.

At one of the precincts there had been rioting and Ku Klux outrages before the election and threatening notices had been posted up, but on the day of election a truce was declared, and while both parties went to the polls armed there was no violence at the polls and the full vote of both parties was cast. The committee did not reject this poll. Other precincts were attacked chiefly on the ground of the reception of a large number of illegal votes, but as these votes could generally be purged, and as it would have been possible in all cases (the election being *nova voce*) for the contestant to have made specific proof what votes were illegally cast for contestee, the committee did not reject any of these precincts. The poll books of five precincts were not certified by any officer of election, and they were rejected. After all these corrections were made, the deduction of individual illegal votes according to the construction of the evidence most favorable to contestant would still leave contestee a majority. The committee therefore reported resolutions declaring him elected.

The resolutions were adopted without division.

[2 Bart., 760-772.]

by showing such disqualification in each individual case by the voter's own oath, or other adequate proof, and then showing for whom he voted, so that the House could make the proper deductions in deciding this case. This the sitting member has not attempted to do, and failing this, has not a right to ask the House to reject their votes upon secondary and far less satisfactory proof.

The committee therefore held that the vote of Monroe County should be counted.

The votes of some precincts where fraud was apparent were rejected. In each case it appeared that more votes were returned as being cast than were found on the list of qualified voters. The custodians of the ballot boxes had refused to allow them to be opened, and it was hence impossible to purge the returns by ascertaining what votes were cast by legal voters. There was no alternative but to reject the returns. One or two precincts which had been rejected by the county courts for technical reasons were counted by the committee. On the whole case, if the vote of Monroe County was not rejected contestant had a majority of 559 votes, and the committee recommended that he be seated.

The minority (Mr. Cessna) agreed in regard to the rejection of the precincts rejected for fraud, and rejected one or two in regard to which the majority found the evidence insufficient, and also held that the vote of Monroe County should be rejected, which would elect contestee by a majority of 911. The legislature of the State of Missouri had already held that there was no valid election in Monroe County. It was clear to the minority that the registration in this county was carried on in reckless violation of the law, as the result of a corrupt conspiracy entered into by the superintendent of registration for a consideration. The circumstances of the appointment of the members of the board who finally acted showed conclusively that two of them were selected for the express purpose of acting in harmony with the third, who was opposed to a strict enforcement of the law. The board had power to summon witnesses before it, but it summoned none, and the condition of affairs was such that it was unsafe for anyone to appear as a voluntary witness. The number of voters registered by this board was four times greater than the number registered two years before, though there was every reason for believing that the former registration was a full one, and there had been no material increase in the population of the county. It was a historical fact that the vast majority of the people of this county were disloyal during the war, and that it furnished some twelve hundred soldiers to the rebel army. Witnesses who had examined the registry lists under which this election was held testified that they found the names of very many persons who had borne arms in the rebellion, but refused to give their names on the ground that it would not be safe. There was certainly as strong ground for the rejection of this county as there was for the rejection of Calloway County in a case from the same district in the preceding Congress (Switzler *vs.* Anderson), with the addition of the very important fact that in this case the fraud was shown to be the result of a corrupt conspiracy. The minority recommended that the vote of this county be rejected, and that contestee retain his seat.

The House adopted the resolution recommended by the *minority*, retaining contestee in his seat, by a vote of 108 to 55.

[2 Bart., 777-810.]

(20) SEGAR.

Claim for additional representation. Majority report adverse; minority report favorable to claimant. Claimant not admitted.

Majority report by Mr. Paine; minority report by Mr. Stevenson. Under the apportionment act of 1850 Virginia was entitled to eleven Representatives. When the State of West Virginia was admitted, it was with three Representatives, leaving, if the original number was to be preserved, eight for Virginia. The constitutional convention called under the reconstruction laws passed an ordinance providing for the election of eight Representatives from eight specified districts, and a ninth Representative from the State at large. Mr. Segar was elected from the State at large. The committee reported against his right to a seat. The ordinance under which he had been elected was new legislation; it had never been submitted to the people or to Congress for ratification, and the State had no right to fix the number of its Representatives. All the other reconstructed States had been admitted with the same number of Representatives they were entitled to under the old apportionment, and there was no reason why Virginia should be an exception. By the enfranchisement of the former slaves Virginia now had a representative population large enough to entitle her to an additional Representative, but all the other Southern States were in the same condition, and a number of Western States had received large additions to their population by immigration. If they must wait for the apportionment under the census of 1870 there was no reason why Virginia should not also wait.

A minority of the committee reported in favor of the claimant. There had never been any law depriving Virginia of her full eleven Representatives, and it would be unsafe to infer such a law from the fact that West Virginia had been admitted with three Representatives. The whole reconstruction proceedings of Virginia had been approved by Congress, thus ratifying the provision providing for the election of a ninth Representative at large. The State had a representative population more than large enough to entitle it to nine representatives, and law and equity both called for the admission of claimant.

The House adopted the resolutions presented by the majority, refusing to admit claimant, without division.

[2 Bart., 810-822.]

(21) REID vs. JULIAN.

Fraud; irregularities. Majority report for contestee; minority report for contestant. Contestee retained the seat.

Majority report by Mr. Cessna; minority report by Mr. Randall.

If all the precinct returns had been counted, the contestant would have a majority on the face of the returns, but the county canvassers of Wayne County counted the north poll and refused to count the south poll of Wayne Township. This gave contestee the majority. If both polls should be counted or both rejected, contestant would have the majority. The question of counting or rejecting these polls was the main issue in the case. A few charges of mistakes and irregularities were made in regard to other polls, and the majority and minority differed somewhat in regard to them, but they did not control the

case. These two precincts of Wayne Township had been separated for the first time at this election. Only one registry had been made for the whole township, and duplicate copies of it were used at the two polls. The officers officiating at both polls were residents of the northern precinct. The committee examined the question, both from the point of view of purging the poll, and of rejecting the returns and counting only votes proved *aliunde*. From the first standpoint, it was evident that the returns were incorrect and at least required purging. Contestee was returned as receiving only 475 votes, and he called 508 witnesses who swore clearly that they were qualified voters and voted for him. The votes of 43 others were satisfactorily proved by their own testimony or that of persons who gave them tickets and saw them vote them. The evidence of the voters themselves was "as full, complete, and reliable as it is possible for human testimony to be given. It would be received in any court of justice in the country, and held sufficient to establish any fact in a civil, or even criminal case." But the contestee insisted, and the committee sustained him, that the whole return should be rejected, and only votes proved *aliunde* counted. It was well settled that a whole poll should be rejected either for (1) want of authority in the election board, (2) fraud in conducting the election, or (3) such irregularities or misconduct as render the result uncertain. This poll should be rejected on the first and third grounds, and if fraud also was not proved against the election officers, it was proved that they gave abundant opportunity to others to commit it. No injustice could be done to either party or to any legal voter by throwing out a fraudulent poll. Both parties could make proof of the legal votes cast for them; and if contestant had not done so in this case it was evident that it was because to have done so would only have confirmed the proof of fraud.

Aside from the testimony of the voters showing a result different from the returns, there were many fatal irregularities. There was no lawful registration of voters. Only one of the registering officers was a resident of the south precinct, while a majority were residents of the north precinct. The registry was therefore legal as to the north and illegal as to the south precinct. Some voters from the north precinct voted in the south precinct, and the rulings of the election officers were such that any might have done so. The general character and sympathies of the voters in the two precincts were similar, and yet in the southern ward contestee ran proportionally much further behind his ticket than in the northern ward. The board adjourned for supper before the completion of the count; outsiders were allowed in the room; the ballot box was left unguarded during the adjournment; the inspectors were chosen by the crowd instead of by the judges, and the ballots were carried outside the precinct to be counted—all in violation of law. Under the law the election officers were required to be residents of the election district, but in this case the inspector and both judges resided outside of the district. They could not be officers *de facto*, for a person could not be an officer *de facto* who did not possess the qualifications requisite for officers *de jure*.

If no poll was rejected, but certain corrections required by the evidence were made, and the votes proved for contestee in the south poll of Wayne Township in excess of the return were added to his vote and deducted from that of contestant, contestee would have a majority of 64 votes. If this poll were rejected, and the votes proved *aliunde*

counted, contestee would have a majority of 602 votes. The committee recommended that he retain his seat.

The minority (Mr. Randall) dissented. If any reasons could be given for the rejection of the south poll, they were equally valid against the north poll, and whether both were rejected or both counted the result would be the same. The registry in both polls was equally irregular. The officers officiating at the south poll were at least officers *de facto*, whose acts were valid in the absence of fraud. The result of the election for governor was announced at the south poll before the completion of the whole count, but the law prohibiting this was merely directory, and, at any rate, this could not vitiate any votes except those for governor. In the north ward the vote was similarly announced on both governor and Congressman, so that contestee had nothing to gain on this point. In both wards the election was held at engine houses, and in the evening, for convenience, the counting was done in other places, where fire and lights could be had. Both boards adjourned for supper, but the board in the south ward carefully locked the ballot box and the room where it was left, while the other board left both unlocked. These irregularities were not sufficient to reject either ward, and certainly they gave no excuse for singling out the south ward for rejection.

The evidence was entirely insufficient to show fraud. The testimony of the officers of election showed that no fraud was committed or permitted. A recount of the ballots made at the instance of contestant did not differ materially from the original count. The presumption of the correctness of the returns could only be overthrown by the best evidence, which was the ballots themselves, and not oral testimony. But if the testimony of the voters was received, there were only 496 who testified clearly that they voted for contestee. The excess could be added to his vote and deducted from contestant, and contestant would still have a majority of 85 votes. The minority recommended that he be seated.

The House, by a vote of 127 to 50, agreed to the resolutions presented by the majority, and contestee retained the seat.

[2 Bart., 822-871.]

(22) ZEIGLER vs. RICE.

Disloyalty. Majority report to declare seat vacant; minority report for contestee. Contestee retained the seat.

Majority report by Mr. Butler; minority report by Mr. Burr.

Contestant charged that contestee was ineligible under the fourteenth amendment. The whole committee held that if this was so it gave no claim to contestant. The majority held that the charge was sustained. Contestee, as a member of the legislature of Kentucky, had taken the oath to support the Constitution of the United States. He had afterwards voted for the resolution, declaring that if the Government should attempt to coerce the Southern States, Kentucky would furnish means to resist the invasion of the South. This resolution was supported by many of the strongest Union men in Kentucky at the time, and the committee held that a vote for it before the war had actually commenced was not an act of disloyalty. But the testimony showed that contestee was from that time on a secessionist. When the rebel army was driven out of Kentucky he went out before it, and did not return

until it returned. He was, during the war, captured near the rebel lines, and claimed protection as a Confederate officer. He had admitted at the time that he was on his way to doing recruiting service for the rebel army. The committee recommended that the seat be declared vacant.

The minority (Mr. Burr) held that the charges entirely failed of proof. So far from contestee being a secessionist, the testimony showed that all his influence exerted itself in the opposite direction, and that a whole regiment of volunteers refused to enter the rebel army on account of his refusal to join it, and most of them afterwards enlisted in the Union Army. He had gone out of Kentucky, in the first place, to collect some money, and had remained out in order to avoid some desperate characters who were hostile to him, and were likely to take advantage of the unsettled state of affairs to assassinate him with impunity. The witnesses who testified to his admissions at the time of his capture were all impeached, and their testimony was so inconsistent that all of it could not be true. It was fully contradicted by the testimony of General Garfield, before whom contestee was brought when captured, and who released him as not being even a suspected person.

The House adopted, without division, the resolutions presented by the *minority*, and contestee retained the seat.

[2 Bart., 871-897.]

(23) EGGLESTON *vs.* STRADER.

Irregularities. Report for contestee. Contestee retained the seat.

Report by Mr. Hale.

Contestee had a majority of 211 votes. Contestant asked that the vote of two wards in the city of Cincinnati be thrown out. The rejection of either would elect him.

The First Ward was asked to be thrown out because of lack of authority in the election board. There was no proof of fraud. Two members of the board, one a Democrat and one a Republican, were present at the opening of the polls, and a third, a Democrat, was elected by the voters present, under the law. Later in the day a Democratic officer left on account of sickness in his family, and another Democrat was selected in his place by the election board, without objection from anyone, and sworn in. The regularly appointed officer returned once or twice during the day, and whenever he was present he acted. The substitute judge was undignified and disorderly in his conduct during the day, but not to such an extent as to intimidate anyone. He with the other Democratic judge, voted to receive some 25 votes which the Republican judge thought were illegal, but a difference of opinion on this number of votes in a large poll was no sign of fraud. Contestant claimed that the substitute judge was not even an officer *de facto*, because he did not serve by color of anything that under any circumstances could have been a legal appointment, there being no vacancy in the election board, and no such officer known to the law as a temporary judge. But the committee held that—

It takes but little to constitute an officer *de facto* as affects the right of the public. The exercise of apparent authority under color of right, thus inviting public trust and negating the idea of usurpation, is sufficient. There need have been no vacancy in the office claimed to be holden; indeed, no such office may have ever existed.

The Thirteenth Ward was also attacked. There was an excess of 9 ballots in the box over the number of names on the poll list, but the testimony showed that this was due to the rush at the polls during part of the day, rendering it impossible for the clerks to get down all the names. There was loud talking and pushing and crowding at the polls during the day, but most of the testimony was to the effect that it was not such as to intimidate anyone. Some of the witnesses thought that from 3 to 8 persons were prevented from voting. It was also said that the votes of some colored persons who were legal voters were rejected, but the testimony was very unsatisfactory. But allowing contestant the votes of all the colored voters in the ward, and of all that anyone thought might have been prevented from voting, and deducting from contestee the 9 extra votes, and the 25 votes in the other ward, contestee would still have a majority, and the committee recommended that he retain his seat.

The House adopted the resolutions without debate or division.
[2 Bart., 897-904.]

(24) *BOYDEN vs. SHOBER.*

Fraud; irregularities. Report for contestee. Contestee retained the seat.

Report by Mr. McCrary.

Contestant charged that voters were misled by a forged circular and deterred from voting by threats and intimidation, and that illiterate voters were deceived by pasting the names of the Democratic candidates on Republican ballots. The committee found that votes were probably lost to contestant from all these causes, but there was nothing to connect contestee with the wrongful acts, or to show that enough votes were affected to change the result. It was also claimed that the election was void because only one ballot box was provided at each poll, instead of two, as required by law. There was some doubt as to the construction of the law, but conceding the construction contended for by contestant, the law was merely directory, and irregularity in its observance ought not to void the election.

There were charges against the regularity of the credentials of contestee, but that question had been settled by the action of the House in permitting him to be sworn in. Contestee was unable to take the "ironclad oath," but his disabilities had been removed by act of Congress.

The committee recommended that contestee retain his seat, and the House agreed without division.

[2 Bart., 904-906.]

(25) *SHEAFE vs. TILLMAN.*

Fraud; intimidation; irregularities. Majority report for contestee; minority report for contestant. Contestee retained the seat.

Majority report by Mr. Brooks; minority report by Mr. Dox.

According to the vote as returned contestant had a majority of 1,156 votes, but the governor rejected one county and parts of several other counties, and gave the certificate to contestee, who had a majority of 432 votes in the remainder of the district. The committee were

unanimous in holding that the governor had no such power to reject counties and precincts, but on the question whether, under the evidence, they ought to be rejected by the House, they differed.

In the county of Lincoln the registration had been set aside by a proclamation of the governor, issued under the law authorizing him to remove registrars and set aside registrations. Under the law the election was to be held in each county under the direction of the superintendent of registration and by officers chosen by him. The registrar took the place of the sheriff under the old law. Under the old law, if the sheriff could not act the coroner was to take his place, or, in his absence, some person appointed by the county court. There was a general impression in this county that the superintendent of registration had been removed, and that therefore no legal election could be held, and many voters remained away from the polls. The county court the day before the election appointed the coroner to organize the election, and he held an election in seven of the twenty-five districts of the county. Contestant received all but five of the votes that were cast. The committee threw out this county. If the governor had, as was contended, no constitutional power to remove the registrar, then he was still in office and was the only officer competent to hold the election. If he was constitutionally removed, the county court had no right to appoint the coroner in his place, for by the new law the appointment of all such officers was vested wholly in the governor, and all laws in conflict therewith were repealed. The coroner was not even an officer *de facto*, for he did not hold his office under color of legal authority; he was a mere usurper and all his acts were void. He was chosen by the court so late that no due notice of the election was given; the election was only held in a small part of the county and many voters refrained from voting; and it further appeared that the Kuklux Klan was organized in this county and intimidated voters. On all these accounts the committee rejected the vote of the county.

Precincts in a number of other counties were thrown out by the governor because the election officers did not appear to have been sworn. The committee adhered to the ruling in *Barnes vs. Adams*, and held that it was not imperative that the officers should be sworn where there was no fraud, but in each of these counties it was shown that the Kuklux Klan had appeared and committed outrages during the summer preceding the election, and under such circumstances the committee thought that the precincts where the election was not conducted strictly according to law should be thrown out. Throwing out all these votes, contestee had a majority of 296 votes, and the committee recommended that he retain the seat.

The minority disagreed. The election in Lincoln County was strictly in accordance with law. The registrar was given by the law all the power relating to elections formerly belonging to the sheriff, but the law substituting the coroner for the sheriff, in his absence, or empowering the county court to fill a vacancy had not been repealed. It was admitted by contestee that the two or three thousand voters who did not vote in this county on account of the action of the governor in setting aside the registration would have voted for contestant. This action had been decided by the supreme court of the State to be unconstitutional. There was no evidence that Kuklux outrages in this district intimidated enough votes to affect the result of the election. It was doubtful in any case if they would have had an effect favorable

to contestant, as he had throughout the canvass denounced this organization. The minority recommended the seating of contestant.

The House, by a vote of 123 to 60, adopted the resolutions recommended by the majority, and contestee retained the seat.

[2 Bart., 907-922.]

(26) SHIELDS *vs.* VAN HORN.

Fraudulent registration. Majority report for contestee; minority report for contestant. Contestee retained the seat.

Majority report by Mr. Churchill; minority report by Mr. Burr.

According to the returns, contestant had a majority of 983 votes, but the secretary of state of Missouri threw out the votes of two counties, thereby giving to contestee a majority of 867 votes. The committee were unanimous in holding that this action of the secretary of state was illegal, and it had been so decided by the supreme court of the State. But contestee claimed that one of these two counties ought to be rejected by the House on account of fraudulent registration. It appeared that Mr. Phelan, the superintendent of registration for the senatorial district of which this county was a part, had been appointed by the governor as a Republican, and had represented himself as such an extreme Republican that the governor at first hesitated to appoint him, and cautioned him not to be unjustly stringent in the enforcement of the law. Mr. Phelan appointed three Republicans as the board of registration in Jackson County, and tried to induce them to adopt rules more stringent than the law required. He tried to get the nomination for sheriff on the Republican ticket, and failing in this, he became very angry, and threatened to have revenge. He then, for a money consideration, agreed with the Democrats to manage the registration for their benefit. He removed his Republican appointees and appointed Democrats in their places, one of them being a party to the corrupt arrangement. These registrars failed to follow the law, which required them to examine all applicants to see if they had been guilty of any of the disqualifying acts, and registered all applicants who would take the oath of loyalty. The result was that they registered 5,186 names, while only 2,284 were registered at the prior, and 2,967 at the subsequent, registration. There was in addition specific proof that a considerable number of the persons registered were disqualified. Throwing out the vote of this county contestee still had a majority, and the committee recommended that he retain the seat.

The minority (Mr. Burr) held that the vote of Jackson County should be counted. The action of the secretary of state in rejecting it was clearly illegal, and it was *prima facie* legal. The evidence as to the alleged corruption of Superintendent Phelan was very confused and unsatisfactory. The persons appointed by him were shown to be of good character. The weight of the evidence showed that they followed the law in registering applicants. The evidence that persons were registered who were disqualified was vague and inconclusive. If contestee and his friends desired to object to the registration of anyone they were required by the law to make their objections to the registering officers at the time of registering, and they should have done it then.

The House adopted the resolution presented by the committee without division, and contestee retained the seat.

[2 Bart., 922-941.]

(27) RODGERS.

Claim for additional representation. Majority report favorable; minority report adverse. No action by the House.

Majority report by Mr. Heaton; minority report by Mr. Churchill. The facts in this case were the same as those in the case of Hamilton, in the Fortieth Congress, and the arguments advanced for and against the claim were the same, the only difference being that in this case the majority report was the favorable one and the minority report adverse. There was no action by the House.

[2 Bart., 941-950.]

FORTY-SECOND CONGRESS, 1871-1873.

Committee on Elections, first session.

Mr. McCrARY, Iowa,	Mr. KERR, Indiana,
HALE, Maine,	POTTER, New York,
POLAND, Vermont,	ARTHUR, Kentucky,
UPSON, Ohio,	THOMAS, North Carolina,
Mr. HAZELTON, Wisconsin.	

Committee on Elections, second session.

Mr. McCrARY, Iowa,	Mr. ARTHUR, Kentucky,
HOAR, Massachusetts,	MERRICK, Maryland,
EAMES, Rhode Island,	RICE, Illinois,
HAZELTON, Wisconsin,	THOMAS, North Carolina,
Mr. PERRY, Ohio.	

(Mr. PERRY was excused from further service on the committee, and Mr. CHARLES FOSTER, of Ohio, appointed in his place.)

Cases.

- (1) *Tennessee election.*
- (2) W. T. Clarke, *Texas.*
- (3) Thomas Boles *vs.* John Edwards, *Arkansas.*
- (4) Lewis McKenzie *vs.* Elliott M. Braxton, *Virginia.*
- (5) Election frauds in *Arkansas.*
- (6) John Cessna *vs.* Benjamin F. Meyers, *Pennsylvania.*
- (7) B. W. Norris *vs.* W. A. Handley, *Alabama.*
- (8) David S. Gooding *vs.* Jeremiah M. Wilson, *Indiana.*
- (9) W. A. Burleigh and S. L. Spink *vs.* M. K. Armstrong, *Dakota Territory.*
- (10) D. C. Giddings *vs.* W. T. Clarke, *Texas.*
- (11) Isaac G. McKissick *vs.* Alexander Wallace, *South Carolina.*
- (12) Christopher C. Bowen *vs.* Robert C. De Large, *South Carolina.*
- (13) Silas L. Niblack *vs.* Josiah T. Walls, *Florida.*
- (14) J. Hale Sypher, *Louisiana.*

(1) TENNESSEE ELECTION.

Date of holding election. Election held valid.

Report by Mr. McCrary.

The members returned from the State of Tennessee were elected at an election held November 8, 1870. A protest was filed against their right to their seats on the ground that by the law of Tennessee in force at the time of the election the election should have been held in August, 1871. The code of Tennessee, adopted in 1858, fixed the time for the election of Representatives in Congress "on the first Thursday in August in every second year, dating from August, 1833."

By an act of 1868 it was provided that the elections should thereafter be held in November, and it was under this act that the election was held. It was contended that by an act approved June 16, 1870, this law had been repealed and that of 1858 reenacted. The committee held that if this contention could be sustained "the election in question was void, as having been held on the wrong day." An examination of the legislation in question showed, however, that such could not have been the legislative intent. The act of 1870 was entitled "An act to regulate the elective franchise in accordance with article 4, section 1, of the constitution of the State." The second section of the act in terms repealed three separate acts regulating the elective franchise, but did not include the act of 1868 fixing November as the time for holding Congressional elections. The third section was, "That title 6, chapter 2, articles 3, 4, 5, 6, 7, and 8 of the code of Tennessee, relating to elections by the people, be, and the same are hereby, reenacted and revived, except as altered or repealed by this act." The provision fixing elections in August is included in the portion of the code of 1858 above named.

The constitution of Tennessee contained the following provision:

No bill shall become a law which embraces more than one subject; that subject to be expressed in the title. All acts which repeal, revive, or amend former laws shall recite in their caption, or otherwise, the title or substance of the law repealed, revived, or amended.

The committee held that if the intent was to reenact all the provisions of the above-named articles of the code, the intent must have been to violate the constitution in several important particulars. These articles contained provisions upon several subjects connected with "elections by the people," whereas the repealing and reenacting act of 1870 was by title and substance "An act to regulate the elective franchise," and under the constitution of Tennessee should be construed in harmony with its title. It did not, by title or otherwise, mention the act of 1868 as being repealed, and did not by title or substance, but only by section and article, mention the portions of the code of 1858 reenacted. These portions of the code contained provisions fixing the time for the elections of State officers different from that now fixed by the constitution itself, and to this extent, at least, could not be constitutionally revived. Hence the provisions of the chapter and articles of the code referred to could not have been intended to be revived *in toto*. The intention must have been to revive only such portions as referred to the subject mentioned in the title of the act of 1870, and thus construed it could not have had the effect of repealing the act of 1868 and reviving that of 1858 in regard to the time of holding elections. This opinion was strengthened by the fact that the act had been similarly construed by all the authorities of Tennessee having anything to do with its construction and enforcement.

The opinion was expressed by the committee that the constitutional provision that "no bill shall become a law which embraces more than one subject, that subject to be expressed in the title," was mandatory, and that those portions of any law not included in the subject expressed in the title would be void. In regard to construction of State laws by State authorities it was said:

It is a well established and most salutary rule that where the proper authorities of the State government have given a construction to their own constitution or statutes, that construction will be followed by the Federal authorities. This rule is

absolutely necessary to the harmonious working of our complex governments, State and national, and your committee are not disposed to be the first to depart from it.

The committee were unanimous in their decision, and it was sustained by the House, without division, April 11, 1870.

[Smith, 3-6.]

(2) W. T. CLARK.

Prima facie case. (For case on merits see *Giddings vs. Clark*, post.)
Sufficiency of certificate of the governor of Texas.

Majority report by Mr. Hoar; minority report by Mr. Rice.

On the first day of the session the credentials of Mr. Clark were presented by Mr. McCrary, with the statement that they were not in the usual form. The credentials were referred to the Committee on Elections. The majority of the committee reported in favor of the *prima facie* right of Mr. Clark to the seat, the minority in favor of D. C. Giddings, his competitor. The House, after some discussion, adopted the conclusions of the majority by a vote of 102 to 78.

Under the laws of Texas the precinct officers were to make out their returns and transmit them to the governor and secretary of state. If there should have been intimidation or corruption, they were to include with the returns a statement to that effect, made under oath, and corroborated by the oaths of three citizens. The returns were to be tabulated by the secretary of state, in the presence of the governor and attorney-general, first setting down the votes of the precincts where the election is not complained of. They were then to examine the returns from the precincts from which they were accompanied by statements of violence or corruption, and if these would not change the result, they were to be canvassed and compiled. If they would change the result, the retiring officers were to examine further testimony with power to send for persons and papers, and if such illegalities were shown as to materially affect the result, they were to reject the returns from the precincts where they occurred. The governor, acting under this law, had furnished a certificate to Mr. Clark, certifying him to be elected, and including a tabular copy of the returns, with remarks as to the causes of the rejection of certain returns. It did not appear on the face of this certificate that any protests had been filed with the returns from the rejected precincts, and it did appear that if all the returns had been counted by the governor Mr. Giddings would have had the majority.

It was questioned whether this law was intended to apply to elections for members of Congress, the only provision expressly mentioning such elections being one providing that "a certificate of the returns of the election for such Representatives shall be entered of record by the secretary of state and signed by the governor," and a copy delivered to the person elected and another sent to the Clerk of the House. But another section of the act provided that it should apply to "all officers whose election is not otherwise provided for."

The majority of the committee held that the act did apply to Congressional elections, and that the judicial powers thereby granted, having been exercised by the returning board, and a certificate of the result of their decision having been forwarded by the governor, it was sufficient *prima facie* evidence of the right to the seat. Although it did not appear that the questions upon which the returns were

rejected came before the returning board in the manner prescribed by law, in the absence of contrary proof the proceedings were presumed to be legal.

It is enough for a *prima facie* case if the certificate came from the proper officer of the State, and clearly shows that the person claiming under it has been adjudged to be duly elected by the official or board on whom the law of the State has imposed the duty of ascertaining and declaring the result.

The minority of the committee denied the right of the governor to issue any certificate of election at all, the law only providing that he should forward "a certificate of the returns." The law giving the State officers judicial power did not apply to Congressional elections. The tabular statement of the vote included with the return of the governor showed that Mr. Giddings had received a majority of the votes cast, and the governor having no right to reject any of the votes, Mr. Giddings had a *prima facie* right to the seat. Mr. Rice, the author of the minority report, stated the principle on which it was based more clearly in the debate than in the report. He said:

I undertake to say that the law is this: That a certificate of election given by an officer authorized by law to give it, when it contains nothing more than the declaration that the party to whom it was given was duly elected to an office, is *prima facie* evidence that a party holding it was duly elected and has a right to such office. But I maintain further that when it contains facts upon which its conclusion is based, showing that conclusion to be false, such facts destroy the legality of the certificate, and it is thereby bad to all intents and purposes as a certificate of election. (Congressional Globe, vol. 87, p. 341, January 10, 1872.)

[Smith, 6-17.]

(3) BOLES *vs.* EDWARDS.

Prima facie case. Contestee admitted. Case on merits; testimony offered by contestee excluded, and seat given to contestant.

Reports by Mr. Hazelton.

The name of neither party was put on the roll by the Clerk of the House. Mr. Edwards seems to have had a certificate of election, and Mr. Boles certified copies of the returns showing that he had received the majority of the votes. The credentials were referred to the Committee on Elections, which reported that Mr. Edwards, having the certificate of election, was entitled to the seat pending the contest. He was sworn in. Mr. Boles then served a notice of contest, and took testimony regularly, within the sixty days. Before he served his answer, Mr. Edwards introduced a resolution in the House extending the time for taking testimony sixty days. This was referred to the Committee on Elections, but no action was had. Mr. Edwards took no testimony, and at the end of the sixty days made application for further time, resting his application on the ground that contestant had taken testimony during the whole sixty days, and that it had been necessary for him to attend at the taking of the testimony, so that he had had no time to prepare his own case. But it appeared that he had only attended at the taking of the testimony once, and then for only a few minutes, and the committee unanimously reported that inasmuch as the law permitted both parties to take testimony at the same time, and only provided for an extension of time by the House for taking *supplementary* testimony, the application should be refused.

The policy of the House has been adverse to granting extensions. Procrastination in these cases diminishes the object of the investigation and cheapens the value of

the final decision. The law is intended to furnish ample opportunity for taking testimony. Parties should be held to a rigid rule of diligence under it, and no extension ought to be allowed where there is reason to believe that had the applicant brought himself within such rule there would have been no occasion for the application.

The case coming before the committee on its merits, the contestee submitted as his evidence the report of a joint select committee of the legislature of Arkansas, and a decision of the supreme court of Arkansas, both having reference to the election in Pulaski County. The committee unanimously rejected them as evidence, because one of them was not a judicial decision, neither of them was in a proceeding between the parties to the present case, and it would be a delegation of the judicial power of the House to permit another body to discharge its duties. The case, therefore, came before the committee on the testimony of contestant. It appeared that contestant had a majority of 2 votes outside of Pulaski County, and a very large majority in that county; so even, allowing the claims of contestee, and either rejecting Pulaski County entirely or counting its vote on either of several plans suggested in his "testimony," the contestant would be entitled to the seat.

The resolutions presented were adopted without opposition, and Mr. Boles took his seat.

[Smith, 18, 19; 58, 59.]

(4) MCKENZIE vs. BRAXTON.

Imperfect ballots; numbered ballots; uncertified returns. Sitting member retained the seat.

Report by Mr. McCrary.

According to the official table of votes as certified by the State board of canvassers, votes were cast for Elliott M. Braxton, Lewis McKenzie, E. M. Braxton, and L. McKenzie. The board had counted the votes containing only the initials of the candidates as well as those containing the full names, and awarded the certificate to Braxton. Contestant denied the correctness of the decision, and also claimed to have proved, by copies of the returns and other evidence, that votes were cast for Elliott Braxton and C. M. Braxton and Braxton in addition to those included in the official canvass. He also attacked certain precincts on the ground that the returns were not certified, and others because the ballots had been numbered by the judges. He had originally charged also intimidation, violence, and fraud, but conceded that he had not established the charges. The committee found without hesitation that the ballots giving the true initials, E. M. Braxton, were sufficient, and also that those containing the name Elliott Braxton should be counted, both because the intention of the voter was clearly proved and because the law knows only one Christian name. If these votes be counted, and all the votes cast for C. M. Braxton and Braxton, all the precincts from which the returns were not certified, and all the precincts mentioned in the notice of contest where the ballots were numbered be rejected, contestee has still a majority. The committee were, however, of the opinion that if a return was not certified the omission went no further than to destroy its value as *prima facie* evidence of the vote; if the actual state of the vote was proved by other evidence, it should be counted. The statute of Virginia in force until nearly the time of the election had required the ballots to be numbered. It had been repealed,

but some of the judges, not knowing of the repeal, had numbered the ballots. It was not claimed that the numbering was done for any improper purpose, or that any harm had resulted, and the committee were of the opinion that the votes should be counted. The cases of the ballots cast for Braxton and alleged to have been cast for C. M. Braxton were not decided, being immaterial. The committee unanimously reported in favor of the right of Mr. Braxton to retain the seat, and the House passed the resolutions without opposition.

[Smith, 19-26.]

(5) ELECTION FRAUDS IN ARKANSAS.

No member of the House affected.

A joint committee of the Senate and House was appointed to inquire into the condition of the insurrectionary States. It took certain testimony in regard to the election in Pulaski County, Ark., and the issue by Governor (now Senator) Powell Clayton of a certificate of election to the Forty-second Congress, to Mr. Edwards, who was alleged to have received only a minority of votes on the face of the returns. This evidence they reported to their respective Houses with the statement that it tended to impeach the official character of Senator Clayton and to affect the right of Mr. Edwards to his seat. In the House the evidence was referred to the Committee on Elections, and that committee reported, as a part of the report in *Boles vs. Edwards*, that the evidence reported contained "nothing reflecting on the character of any member of the House." As will be seen from the report in that case, however, when the case was decided on its merits Mr. Edwards was deprived of his seat.

[Smith, 26-58.]

(6) *CESSNA vs. MEYERS.*

Illegal votes, residence of paupers, students, and railway employees. Sitting member retained the seat.

[As this case is typical of a large class of cases constantly arising, and the report is the fullest and probably the best discussion of the legal questions involved, the report is given in full. Part of it will be found quoted in the appendix to the second edition of McCrary on Elections.]

[February 7, 1872.]

Mr. HOAR, from the Committee of Elections, made the following report:

The Committee of Elections, to whom was referred the memorial of John Cessna, claiming to be admitted to the seat from the Sixteenth Congressional district of Pennsylvania, respectfully report:

The case has required the consideration of many very interesting questions of law, and an examination, by itself, of the evidence in regard to the right to vote of each of several hundred persons. The committee have given it patient and thorough study.

The majority for the sitting member according to the returns, when correctly added, is 14. The contestant has shown that more than 14 illegal votes were cast for his antagonist, and would have established

his claim to the seat were it not for illegal votes which were cast for the contestant himself, the evidence of which, so far as appears, first came to his knowledge when introduced in the case. The questions of law which have arisen are, some of them, exceedingly doubtful, and there are statements of the law in the reports of previous cases which would be quite likely to induce an expectation on the part of the contestant of a different result in the whole matter. He seems, therefore, to have been well warranted in the belief that his duty to the people required him to claim the seat. The whole case has been conducted with entire propriety on both sides.

The majority for the sitting member, as found by the return judges, is 15. There is a mistake in the footing, and 1 should be deducted, leaving 14. The contestant claims that 328 illegal votes were cast for the sitting member, that 2 lawful votes which were cast for himself were not counted, and that 8 legal votes which were offered for him were rejected. The sitting member, joining issue on these allegations, claims also that 341 votes were illegally thrown for contestant. Of these contestant admits that 81 have been proved to be illegal.

The provisions of the constitution of Pennsylvania concerning the qualification of voters are as follows.

Article III, section 7. In elections by the citizens every (white) freeman of the age of twenty-one years, *having resided* in this State one year, and in the election district where he offers to vote ten days immediately preceding such election, and within two years paid a State or county tax, which shall have been assessed at least ten days before the election, shall enjoy the rights of an elector. But a citizen of the United States who had previously been a qualified voter of this State, and removed therefrom and returned, and who shall have resided in the election district and paid taxes as aforesaid, shall be entitled to vote after residing in the State six months: *Provided*, That (white) freemen citizens of the United States, between the ages of twenty-one and twenty-two years, and having resided in the State one year and in the election district ten days as aforesaid, shall be entitled to vote although they shall not have paid taxes.

The contestant claims, first, that he received a majority of the votes cast at the election by lawfully qualified voters; and, second, that the votes of certain other persons, lawfully qualified, who desired to vote for him were excluded, either from the box or the count, by the mistake or misconduct of the election officers. The result to which an examination of the first claim has brought us renders it needless to consider the second.

The questions which it is material to consider relate either to the qualification of voters, under the clause in the constitution of Pennsylvania just cited, or to the rules of evidence which should govern the House in election cases.

Under these constitutional provisions the burden of proof, when either party insists that a vote should be deducted from those cast and returned for his competitor, is upon that party to show that the person whose vote is in question voted; that the vote was for the competitor; that the voter lacked some of the following qualifications, viz: Citizenship of the United States, the age of 21, residence in the election district for ten days just previous to the election, residence in the State one year just previous to the election, or for six months if previously a qualified voter, payment within two years of a State or county tax, assessed at least ten days before the election, or, in lieu thereof, being between 21 and 22 years old.

It is claimed by the contestant that a considerable number of those

who voted for his competitor lacked the qualification of residence in the election district. The largest number to whom this objection applies came into the election district for the purpose of working upon a railroad in process of construction therein, were employed in building said railroad, and were not proved to have formed any intention to reside in the district after its completion. The length of time which the completion of the road would be likely to occupy was not distinctly proved, but it is shown that persons who were in fact at work upon it continued in the district for a longer period than eighteen months. The committee have carefully considered the legal question which is thus raised.

The word "residence" used in the constitution of Pennsylvania in describing the qualification of voters is equivalent to "domicile," not in the sense in which a man may have a commercial domicile or residence in one country, while his domicile of origin and of allegiance is in another, but in the broadest sense of the term. As it is upon the meaning of this word that the case chiefly turns, it will be well to consider it a little more fully.

The word "domicile" or "residence," as used in law, is incapable of exact definition. Inquiries into it are very apt to be confused by taking the tests which have been found satisfactory in some cases and attempting to apply them as inflexible rules in all. Probably the definition which is most expressive to the American mind is that a man's domicile is "where he has his home." Two or three rules, however, are well established. A man must have a domicile somewhere; a domicile once gained remains until a new one is acquired; no man can have two domiciles at the same time. With these exceptions, it will, we believe, be found that nearly every rule laid down on the subject in the books, even if generally useful, fails to be of universal application, and would be opposed to the common sense of mankind if extended to some states of fact that may arise. For instance, Vattel defines domicile to be *a fixed residence in any place with an intention of always staying there*. On this Judge Story (Conflict of Laws, sec. 43) well remarks:

This is not an accurate statement. It would be more correct to say that that place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom.

But certainly Judge Story's definition is not much better. A man's domicile remains after he forms the intention of removing therefrom, and sometimes even after he removes, until he gets another. A man may acquire a domicile, if he be personally present in a place and elect that as his home, even if he never design to remain there always, but design at the end of some short time to remove and acquire another. A clergyman of the Methodist Church who is settled for two years may surely make his home for two years with his flock, although he meant, at the end of that period, to remove and gain another. So of the principle upon which the contestant most relies in the present case.

He claims—and many expressions can be found used by commentators and in judicial decisions which seem to support the claim—that personal presence in a place with intent to remain there only for a limited time and for the accomplishment of a temporary purpose, and to depart when that purpose is accomplished, will not constitute a residence. This is true as a general rule. It is true of those persons, probably the greater number, who, while so present and engaged in

business, have some other principal seat of their interests and affections elsewhere. Most men have some permanent home, the claims of which outweigh those of a place of temporary sojourn. The place where a man's property is, where his family is, the place to which he goes back from time to time whenever no temporary occasion calls him elsewhere, the domicile of his origin, where the permanent and ordinary business of his life is conducted—that is to the ordinary man the place of his home. But we are now dealing with a class of persons who have no property, who have no family, or whose family moves with them from place to place, who have no place to return to from temporary absences, the domicile of whose origin is in another country, and has been in the most solemn manner renounced, and the ordinary business of whose life consists in successive temporary employments in different places.

Suppose a man, single, with no property, to come from Ireland and be employed all his life on railroads or other like works in different places in succession. If he does not acquire a residence he can never become a citizen, because he never would reside in this country at all. It seems to us that to such persons the general rule above stated does not apply. But where a man who has no interests or relations in life which afford a presumption that his home is elsewhere, comes into an election district for the purpose of working on a railroad for a definite or an indefinite period, being without family or having his family with him, expecting that the question whether he shall remain or go elsewhere is to depend upon the chances of his obtaining work, having abandoned, both in fact and in intention, all former residences, and intends to make that his home while his work lasts—that will constitute his residence, both for the purpose of such jurisdiction over him as residence confers and for the purpose of exercising his privileges as a citizen. Of course the intent above supposed must be in good faith and an intent to make such district the home for all purposes. The party's intent to vote in the district where he is, he knowing all the time that his home is elsewhere, will not answer the law.

The rule is stated by Chief Justice Shaw, in *Lyman vs. Fiske* (5 Peck, 234), as follows:

It is difficult to give an exact definition of habitancy. In general terms, one may be designated as an inhabitant of that place which constitutes the principal seat of his residence, of his business pursuits, connections, attachments, and of his political and municipal relations. It is manifest, therefore, that it embraces the fact of residence at a place with the intent to regard it his home. The act and the intent must concur, and the intent may be inferred from declarations and conduct. It is often a question of great difficulty, depending upon minute and complicated circumstances, leaving the question in so much doubt that a slight circumstance may turn the balance. In such a case the mere declaration of the party, made in good faith of his election to make the one place rather than the other his home, would be sufficient to turn the scale.

The article in the appendix to volume 4 of Dr. Lieber's *Encyclopædia Americana*, title *Domicile*, written by Judge Story, is perhaps the best treatise on this subject to be found. He says:

In a strict and legal sense, that is properly the domicile of a person where he has fixed his true permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning.

It is often a mere question of intention. If a person has actually removed to another place, with an intention of remaining there for an indefinite time and as a place of present domicile, it becomes his place

of domicile, notwithstanding he may have a floating intention to go back at some future period. *A fortiori* would this be true if his "floating intention" were to go elsewhere in future and not to go back, as in such case the abandonment of his former home would be complete.

In the Allentown election case (Brightly's Collection of the Leading Cases on the Law of Elections of the United States, 475), it is said:

Unmarried men, who have fully severed the parental relation, and who have entered the world to labor for themselves, usually acquire a residence in the district where they are employed, if the election officers be satisfied they are honestly there pursuing their employment, with no fixed residence elsewhere, and that they have not come into the district as "colonizers"—that is, for the mere purpose of voting, and going elsewhere as soon as the election is held. The unmarried man who seeks employment from point to point, as opportunity offers, and who has severed the parental relation, becomes a laborer, producing for himself, and thus adds to the productive wealth of the community in which he resides, being willing not only to enjoy political privileges, but also to assume and discharge political and civil duties.

A fortiori would this reasoning apply to the married laborer who takes his family with him.

The habits of our people, compared with many other nations, are migratory. To persons, especially young men, in many most useful occupations, the choice of a residence is often experimental and temporary. The home is chosen with intent to retain it until the opportunity shall offer of a better. But if it be chosen as a home, and not as a mere place of temporary sojourn, to which some other place, which is more truly the principal seat of the affections or interests, has a superior claim, we see not why the policy of the law should not attach to it all the privileges which belong to residence, as it is quite clear that it is the residence in the common and popular acceptance of the term.

The case of *Barnes vs. Adams* (3 Con. El. Cas., 771¹) does not, when carefully examined, conflict with these rules. The passage cited from that case is not a statement of the grounds on which the House or even the committee determined the case, but a concession to the party against whom it was decided. It therefore, if it bore the meaning contended for, would not be authority in future cases. But the language taken together, it seems to us, means only that going into an election precinct for a temporary purpose, with the intent to leave it when that purpose is accomplished, no other intent and no other fact appearing, is not enough to gain a residence. In this view, it is not in conflict with the opinion here expressed.

It is true that, as was remarked in the outset, a former residence continues until a new one is gained. But in determining the question whether a new one has been gained, the fact that everything which constituted the old one—dwelling house, personal presence, business relations, intent to remain—has been abandoned, is a most significant fact.

5. We have, then, to apply these principles to the evidence in the case.

The contestant claims that three principal classes of persons who voted for the sitting member were disqualified by reason of nonresidence, viz, persons who came into the district for the purpose of working on the railroad; students at the university, who came from other districts solely for the sake of pursuing their studies, and paupers

¹ 2 Bart., 771.

supported in a poorhouse common to all the districts in the county, who came to the poorhouse from another district, and voted in the district where it is situated.

The cases of the railroad laborers and contractors should be disposed of by the following rules:

1. Where no other fact appears than that a person, otherwise qualified, came into the election district for the purpose of working on the railroad for an indefinite period, or until it should be completed, and voted at the election, it may or may not be true that his residence was in the district. His vote having been accepted by the election officers, and the burden being on the other side to show that they erred, we are not warranted in deducting the vote.

2. Where, in addition, it appears that such voter had no dwelling house elsewhere, had his family with him, and himself considered the voting place as his home until his work on the railroad should be over, we consider his residence in the district affirmatively established.

3. On the other hand, where it appears that he elected to retain a home, or left a family or a dwelling place elsewhere, or any other like circumstances appear, negating a residence in the voting precinct, the vote should be deducted from the candidate for whom it is proved to have been cast.

The principles applicable to the students are not dissimilar. The law, as it applies to this class of persons, is fully and admirably stated by the supreme court of Massachusetts, in an opinion given to the legislature, and reported in *Fifth Metcalf*, and which is cited with approbation in nearly all the subsequent discussions of the subject. Under the rule there laid down, the fact that the citizen came into the place where he claims a residence for the sole purpose of pursuing his studies at a school or college there situate, and has no design of remaining there after his studies terminate, is not necessarily inconsistent with a legal residence, or want of legal residence, in such place. This is to be determined by all the circumstances of each case. Among such circumstances, the intent of the party, the existence or absence of other ties or interests elsewhere, the dwelling place of the parents, or, in the case of an orphan just of age, of such near friends as he had been accustomed to make his home with in his minority, would of course be of the highest importance. (See *Putnam vs. Johnson*, 10 Mass., 488.)

The case of the paupers presents greater difficulty. Under the laws of Pennsylvania it is conceded they may be entitled to vote. In several contested-election cases cited by the contestant it is stated by the committee that, in the absence of statute regulations on the subject, a pauper abiding in a public almshouse, locally situated in a different district from that where he dwells when he becomes a pauper, and by which he is supported, away from his original home, does not thereby change his residence, but is held constructively to remain at his old home. (*Monroe vs. Jackson*, 2 Elect. Cas., 98¹; *Covode vs. Foster*,² Forty-first Congress; *Taylor vs. Reading*,³ Forty-first Congress.)

And there are some strong reasons for this opinion. The pauper is under a species of confinement. He must submit to regulations imposed by others and the place of his abode may be changed without his consent. Having few of the other elements which ordinarily

¹ 1 Bart., 98.

² 2 Bart., 519, 600.

³ 2 Bart., 661.

make up a domicile, the element of choice also in his case almost wholly disappears. There are also serious reasons of expediency against permitting a class of persons who are necessarily so dependent upon the will of one public officer to vote in a town or district in whose concerns they have no interest. On the other hand, the pauper's right to vote is recognized by law. It can practically very seldom be exercised except in the near neighborhood of the almshouse. In the case of a person so poor and helpless as to expect to be a lifelong inmate of the poorhouse it is, in every sense in which the word can be used, really and truly his residence—his home. And it is important that these constitutional provisions as to suffrage should be carried out in their simplest and most natural sense, without the introduction of artificial or technical construction. It will, however, be unnecessary to determine this question, as will hereafter appear.

Another question of importance which has arisen in the discussion of the cause is the question whether evidence of the declarations of alleged voters, made not under oath, in the country, should be received to show the fact that they voted, or for whom, or that they were not legally entitled to vote.

Some of the committee think that such evidence ought in no case to be admitted, except of course so far as declarations made at the time of the party's intent or understanding as to his then present residence, or his purpose in a removal, is admissible as part of the *res gestæ*. All of the committee are of opinion that such evidence is to be received with the greatest caution, to be resorted to only when no better is to be had, and only acted on when the declarations are clearly proved and are themselves clear and satisfactory. As this question has been quite fully considered it may be proper briefly to discuss it here.

While the practice of the English House of Commons is not uniform, the general current of the precedents is in favor of admitting the declarations of voters as evidence.

The opinions of several American courts and of some text writers of approved authority are the same way. The correctness of this practice has been earnestly questioned in this House, and there is one decision against it; but, on the whole, the practice here seems to be in favor of its admission. In England, where the vote for members of Parliament is *viva voce*, the fact that the alleged voter voted, and for whom, is susceptible commonly of easy proof by the record. In one case, however, where the poll list had been lost, the parol declaration of a voter how he voted seems to have been received without question. In *State vs. Olin* (23 Wis., 319) it is stated that the declaration of a voter is admissible to prove that he voted, and for whom, as well as to prove his disqualification. The general doctrine is usually put upon the ground that the voter is a party to the proceeding, and his declarations against the validity of his vote are to be admitted against him as such. If this were true it would be quite clear that his declarations ought not to be received until he is first shown, *aliunde*, not only to have voted, but to have voted for the party against whom he is called. Otherwise it would be in the power of an illegal voter to neutralize wrongfully 2 of the votes cast for a political opponent—first, by voting for his own candidate; second, by asserting to some witness afterwards that he voted the other way, and so having his vote deducted from the party against whom it was cast.

But it is not true that a voter is a party in any such sense as that

his declarations are admissible on that ground. He is not a party to the record. His interest is not legal or personal. It is frequently of the slightest possible nature. If he were a party, then his admissions should be competent as to the whole case—as to the votes of others, the conduct of the election officers, etc., which it is well settled they are not. Another reason given is that the inquiry is of a public nature and that it should not be limited to the technical rules of evidence established for private causes. This is doubtless true. It is an inquiry of a public nature and an inquiry of the highest interest and consequence to the public. Some rules of evidence applicable to such an inquiry must be established. It is nowhere, so far as we know, claimed that in any other particular the ordinary rules of evidence should be relaxed in the determination of election cases. The sitting member is a party deeply interested in the establishment of his right to an honorable office. The people of the district especially, and the people of the whole country are interested in the question who shall have a voice in framing the laws. The votes are received by election officers, who see the voter in person, who act publicly in the presence of the people, who may administer an oath to the person offering to vote, and who are themselves sworn to the performance of their duties. The judgment of these officers ought not to be reversed and the grave interests of the people imperiled by the admissions of persons not under oath and admitting their own misconduct.

The practice of admitting this kind of evidence originated in England. So far as it has been adopted in this country it has been without much discussion of the reasons on which it was founded. In England, as has been said, the vote was *viva voce*. The fact that the party voted, and for whom, was susceptible of easy and undisputable proof by the record. The privilege of voting for members of Parliament was a franchise of considerable dignity, enjoyed by few. It commonly depended on the ownership of a freehold, the title to which did not, as with us, appear on public registries, but would be seriously endangered by admissions of the freeholder which disparaged it. An admission by the voter of his own want of qualification was therefore ordinarily an admission against his right to a special and rare franchise, and an admission which seriously impaired his title to his real estate, an admission so strongly against the interest of the party making it would seldom be made unless it was true. It furnishes no analogy for a people who regard voting not as a privilege of the few, but as the right of all; where the vote, instead of being *viva voce*, is studiously protected from publicity, and where such admissions, instead of having every probability in favor of their truth, may so easily be made the means of accomplishing great injustice and fraud, without fear either of detection or punishment.

It may be said that the principle of the secret ballot protects the voter from disclosing how he voted, and, in the absence of power to compel him to testify and furnish the best evidence, renders the resort to other evidence necessary. The committee are not prepared to admit that the policy which shields the vote of the citizen from being made known without his consent is of more importance than an inquiry into the purity and result of the election itself. If it is, it can not protect the illegal voter from disclosing how he voted. If it is, it would be quite doubtful whether the same policy should not prevent the use of the machinery of the law to discover and make public the fact in

whatever way it may be proved. It is the publicity of the vote, not the interrogation of the voter in regard to it, that the secret ballot is designed to prevent. There would seem to be no need to resort to hearsay evidence on this ground unless the voter has first been called, and, being interrogated, asserts his privilege and refuses to answer. Even in that case a still more conclusive objection to hearsay testimony of this character is this: It is not at all likely to be either true or trustworthy.

The rule that admits secondary evidence when the best can not be had only admits evidence which can be relied on to prove the fact, as sworn copies when an original is lost or the testimony of a witness to the contents of a lost instrument. Hearsay evidence is not admitted in such cases, and is only admitted in cases where hearsay evidence is, in the ordinary experience of mankind, found to be generally correct, as in matters of pedigree and the like. But a man who is so anxious to conceal how he voted as to refuse to disclose it on oath, even when the disclosure is demanded in the interest of public justice, and who is presumed to have voted fraudulently—for otherwise in most cases the inquiry is of no consequence—would be quite as likely to have made false statements on the subject if he had made any. To permit such statements to be received, to overcome the judgment of the election officers, who admit the vote publicly, in the face of a challenge and with the right to scrutinize the voter, would seem to be exceedingly dangerous.

The action of the House heretofore does not seem to have been so decided or uniform as to preclude it from now acting upon what may seem to it the reasonable rule, even if it should think it best to reject this class of evidence wholly. But as both parties have taken their evidence, apparently with the expectation that this class of evidence would be received, and as, in view of the numerous and respectable authorities, it is not unlikely the House may follow the English rule, we have applied that to the evidence, with the limitation, of the reasonableness of which it would seem there can be no question, that evidence of hearsay declarations of the voter can only be acted upon when the fact that he voted has been shown by evidence *aliunde*, and when the declarations have been clearly proved, and are themselves clear and satisfactory.

The result of the whole case, then, is as follows:

The majority for the sitting member, as returned, is 14.

The contestant admits that 81 illegal votes were cast for him. But as in 6 cases this admission seems to us to have been made on an erroneous view of the law, we have deducted from the contestant but 75 of this number, leaving the majority for him to overcome 89. The sitting member has proved that at least 15 of the votes cast for contestant in addition to those admitted were illegal, which would leave to the sitting member a majority of 104.

Assuming that all the persons who are alleged by contestant to have voted for the sitting member did so vote; assuming that all those persons who came into the election district to pursue their studies were not legal voters in the district; assuming that all the paupers who were committed to the almshouse from any other district than that where they voted were not entitled to vote therein; receiving evidence of declarations of persons in the country as to their disqualifications, and acting upon them where they are corroborated by other evidence or as

clearly and satisfactorily proved, and in all these respects we take the view of the law most favorable to contestant; deducting also from the sitting member all votes cast by persons not naturalized, or not of age, or who had not paid a tax or dwelt the required time in the State, but, on the other hand, not sustaining his claim that persons who came into the district for the purpose of working on the railroad can not be held to have acquired a residence there unless they are also shown to have formed the intention of remaining there permanently after the work was done, we find that the contestant has failed to overcome the sitting member's majority of 101, above stated. In dealing with the evidence as to each of the numerous individuals—679 in all—the committee formed different conclusions of fact in some instances; but taking the result in every case where the committee differed as to the facts most favorable to the contestant, it is as above set forth.

The committee therefore recommend the accompanying resolution:

Resolved, That Benjamin F. Meyers is entitled to retain the seat which he now holds from the Sixteenth Congressional district of Pennsylvania.

The resolution was adopted by the House without division; so Mr. Meyers retained the seat.

[Smith, 60-68.]

(7) NORRIS *vs.* HANDLEY.

Violence, intimidation, and illegal rejection of returns. Charges not sufficiently sustained to overcome returned majority, and sitting member retained the seat.

Report by Mr. McCrary.

According to the returns the sitting member had a majority of 3,142 votes. Contestant charged that the returns from a number of precincts where he had received a majority had been illegally rejected by State and county canvassing boards, and that he had been deprived of a large number of votes throughout the district by violence, intimidation, and fraud. On this latter charge the case turned, as the other wrongs complained of did not in any case affect enough votes to overthrow the majority returned.

The law empowered the board of county canvassers to throw out precinct returns or portions of them "upon good and sufficient evidence that fraud has been perpetrated or unlawful or wrongful means resorted to to prevent electors from freely and fearlessly casting their ballots;" this rejection "to be final unless appeal is taken within ten days to the probate court."

The committee held that the fact that no appeal had been taken to the probate court could not estop the House from investigating the legality of the rejection of the votes or returns. Although the power thus given to the county canvassing board was "extraordinary, not to say dangerous," yet the action of the board under the statute must be regarded as *prima facie* correct. The boards had in this case, however, mostly acted upon insufficient evidence, and the committee upon examination reversed most of their decisions. The State board of canvassers had thrown out the vote of a county because the return was signed by but one of the three county canvassers. This was proper under the statute requiring it to be signed by a majority; but the House has power to go behind the return, and the committee,

from an examination of all the evidence, counted the vote of all but one precinct of this county. In two other precincts voters had probably been deprived of their votes by deception; in one case by being told that the supply of paper had run out and they could not be registered, and in the other case by the circulation of Democratic tickets with the heading "Republican ticket." But in both these cases the evidence of the fraud was vague and indefinite and entirely failed to show the number of votes affected, so no remedy could be applied.

The evidence relied on to establish intimidation was extremely vague and unsatisfactory, consisting almost solely of hearsay and general reputation. Not one witness testified that he himself was prevented from voting by intimidation. "There can be no doubt that testimony of this character ought to be held insufficient of itself to establish the fact of intimidation. It ought at least to be corroborated by other facts, such as the unexplained failure of large numbers of those alleged to have been intimidated to vote, before the House could safely act upon it."

But considering the testimony without regard to strict rules of law, it clearly failed to sustain the charges. Outrages were proved to have been committed for the purpose of intimidating the freedmen, and they are "denounced as infamous" in the report; but if, in spite of these occurrences, "if the freedmen * * * did in fact vote, this is an end of controversy." By comparing the number of votes cast with the number of males over 21 in the district as shown by the census of 1870, just taken, it appeared that 88 per cent of the whole number voted. This is a larger proportion than is usually found in peaceable elections. In a number of precincts where a large number of negroes, presumably Republicans, lived no votes were cast for Mr. Norris. But this was explained by the fact that the negroes, for their own protection, had adopted the plan of gathering at one or two precincts in each county and casting their entire vote there.

The committee presented a resolution declaring that W. A. Handley was entitled to retain his seat, which was passed by the House without debate or division.

[Smith, 68-78.]

(8) GOODING vs. WILSON.

Unofficial recounts; illegal votes. Majority report in favor of sitting member; minority report in favor of contestant. Sitting member retained the seat.

Majority report by Mr. Perry; minority report by Mr. Arthur.

On the face of the returns the sitting member had a majority of 4 votes.

Contestant charged (1) that the election officers in a number of precincts giving a majority for contestee were not qualified; (2) that mistakes were made to the disadvantage of contestant in the official count in several precincts, as shown by subsequent counts of the ballots; and (3) illegal votes.

Contestee replied (1) that the election officers were not qualified in at least an equal number of precincts giving a majority for the contestant; (2) that the recounts by which mistakes were sought to be shown were unofficial and made under such circumstances as not to be trustworthy; and (3) that illegal votes were cast for contestant. Other

questions of irregularity and illegality were raised by both sides, but did not enter into the determination of the result.

The first specification above was abandoned by both sides; under the third, taking the statement of results given in the minority report most favorable to contestant, contestee would still have a majority of 2 votes; so the case turned on the second point, whether the official count was to be set aside and the results of subsequent unofficial counts accepted in its stead. The majority report called attention to the fact that no person had ever been deprived of his seat in the House by the result of subsequent unofficial counts, though there were some cases in which it was stated that under some circumstances such counts might be accepted.¹

The conditions under which a recount could be accepted were thus stated in the majority report:

On principle it would seem that if such a thing were, in the absence of fraud in the official count, in any case admissible, it should be permitted only when the ballot boxes had been so kept as to be conclusive of the identity of the ballots and when the subsequent count was made with safeguards equivalent to those provided by law.

To these two conditions Judge McCrary, in the debate, added a third, that it should affirmatively appear that the boxes have been preserved by the officers required by the State law to preserve them and in a manner in all respects in strict compliance with that law. The doctrine of the minority, as brought out more clearly in the debate than in the report, was substantially as follows: The official count is *prima facie* correct, but it may be overthrown by evidence, especially when there are circumstances indicating the probability of a mistake. A recount properly conducted is such evidence, and there is no presumption of fraud in such a recount or in the keeping of the ballots previous to it. To establish such presumption of fraud the party denying the correctness of the recount must show circumstances indicating not merely that fraud could have been committed, but that there was at least a probability that it actually was committed.

Applying the law as laid down by the majority to the facts in this case, none of the recounts could be accepted. In no case was the ballot box preserved by the officer in whose custody the law placed it, and in each case it was so preserved that it could easily have been tampered with, though in only one case was there any evidence in any way indicating that it had been tampered with. In that case the ballot box had an imperfect lock. It was twice found open and the tally sheets in some way disappeared from it. In another case the recount was made by the inspector. He had forgotten what its result was, but told several people at the time, who swear to what he told them. He swears that he supposes they testified correctly, but that he believes the official count was the correct one. In another case there were three unofficial counts, all differing from each other and from the official count. The official count was carefully made. In another case there were two unofficial counts, one made by the officer in charge of the box, sustaining the official count, and the other made by a friend of contestant, after the box had left the custody of the officer in charge of it, showing a gain of 2 votes for contestant. The only other case is more interesting. The law required two tally sheets to be kept, one

¹ Since that time, however, at least one person has been deprived of his seat upon such evidence. *English vs. Peelle*, 48th Congress, Mobley, 171.

to be filed with the clerk of the court, the other to be kept in the ballot box. Two certified copies of the tally sheet in the clerk's office showed three marks (thus ///), apparently counted, like the other sets of marks (thus /X/), as 5. The other tally sheet was not produced, and seems to have disappeared from the ballot box. The only witness called testified somewhat vaguely that both tally sheets were alike. The official count was in accordance with the footing of the tally sheet in evidence, giving 2 more votes for contestee than the number of marks after his name on the tally sheet. The ballots were not produced, or examined by anyone, and the officer of election who first noticed the peculiarity of the tally sheet (some time after the election) was not called. The committee said:

It is clear that if there was a mistake it could have been, and should have been, better proved.

All these recounts were accepted by the minority in their report, but the circumstances were not detailed or arguments given. They were all rejected by the majority. The majority found that of the 35 illegal votes charged to have been cast for contestee 4 were illegal and of the 28 charged to have been cast for contestant 8 were illegal. The minority found 9 illegal votes for contestee and 7 for contestant. Two votes counted for contestee were ballots bearing simply the name "Wilson." They were counted by the majority and rejected by the minority. The return from one precinct giving 89 majority for contestant was not certified, and the testimony relied on to establish the vote was not technically admissible, but the vote was counted in both reports.

After some debate, the resolutions proposed by the minority were rejected by a vote of 64 to 105, and that presented by the majority adopted without division.

[Smith, 79-88.]

(9) BURLEIGH AND SPINK *vs.* ARMSTRONG.

Illegal votes. Elections held on military and Indian reservations. Sitting Delegate retained the seat.

Report by Mr. Merrick.

The vote as returned was: Spink, 1,023; Burleigh 1,102; Armstrong, 1,198. Contestants alleged that the elections held on military and Indian reservations were illegal, and that large numbers of votes of Indians and nonresidents had been cast. The law organizing the Territory of Dakota provided that the territory which by treaties with Indian tribes was not to be made part of any State or Territory without the consent of those tribes should not become a part of the Territory until the consent of the tribes was obtained.

It is quite apparent from the terms of this organic act that it was not competent for the authorities of the Territory to hold an election or exercise any other jurisdictional act within any part of the Indian reservation.

The votes cast in these reservations were excluded.

But with regard to the election held within the military reservations of Fort Sully and Fort Randall (or the Ellis precinct), the committee have reached the conclusion that there is nothing in the terms of the organic act nor in the general policy of the law forbidding an election to be held at such places. The contestants have insisted that the rule which disqualifies persons from voting within any State who reside within forts or other territory to which the title and jurisdiction has been ceded by the State to the Federal Government applies to the military reservations which

have been designated by the Executive within the Territories belonging to the United States. But forasmuch as there is no conflict of sovereignty between the Government and the Territory, and the latter holds all its jurisdiction and subordination to the controlling power of Congress, and the military reservations are not permanently severed from the body of the public lands, but are simply set apart and withheld from private ownership by an Executive order to the Commissioner of the Land Office, and may be and often are restored to the common stock of the public domain when the occasion for their temporary occupancy has ceased at the pleasure of Congress, and which requires no concurrent act of any State authority to give it efficacy, the residents upon such reservations, although abiding thereon by the mere sufferance of the United States authorities, do not in any just sense cease to be inhabitants or residents of the Territory within which such military reservation may be situated.

A large number of illegal votes were charged to have been and probably were cast, as was to have been expected from the condition of any frontier country. But so far as appears they were not cast for one candidate more than another. There was nothing connecting any of the candidates with procuring them to be cast, and deducting all in regard to which there was definite proof, the sitting member still had a majority. The House concurred in the opinion of the committee without division. [Smith, 89-91.]

(10) GIDDINGS vs. CLARK.

Application of sitting member for further time refused. Decision of the State canvassing board rejecting returns reviewed, and votes restored when sustained by evidence. Seat given to contestant.

Report by Mr. McCrary.

The sitting member had been given the seat by the action of the State canvassing board of Texas in rejecting the votes of a number of precincts and counties and of the House in deciding the certificate of the governor to be *prima facie* evidence of the right to the seat. (See case of W. T. Clark, *ante*, p. 263.) After notice of contest and answer had been served the House, in pursuance of an agreement between the parties, ordered that the sixty days allowed by law for taking testimony should commence to run on February 1, 1872. The contestant took testimony diligently within the time, but the contestee took no testimony at all, and, nearly a month after the time for taking testimony had expired, came before the committee with an application to have the time extended. This application was accompanied by the affidavits of the sitting member and other persons, setting forth that a combination had been formed among the friends of contestant to indict the officers of election and other persons who would be needed as witnesses by the contestee and by this system of persecution to prevent them from testifying. It was asserted that numerous indictments had been found, which produced a feeling of alarm in the district, but that a better state of feeling now prevailed, and if time were granted testimony could now be taken. The affidavits were exceedingly vague and general, dealing with conclusions and opinions rather than with specific facts. The committee unanimously decided that the application ought to be refused, giving six reasons for their opinion. The first one is as follows:

1. It must be borne in mind that the party now asking an extension is the sitting member. He is now, and has been during a large part of the term, exercising the functions and receiving the emoluments of the office in question. In a litigation of this character the thing in controversy grows daily less and does not, as in most ordinary lawsuits, remain intact, to be recovered by the successful party in the end.

In this particular case the extension asked for would be very nearly equivalent to a final decision of the case in favor of the sitting member upon the merits. We are now near the close of the second session of the Congress. If the parties are to be sent back to Texas to take further testimony, of course no further action can be taken until the opening of the third and last session, which is of but ninety days' duration, and would be necessarily far spent before a final decision could be reached. It does not follow from these considerations that a sitting member can in no case be allowed an extension after the time allowed by law for taking testimony expires, but your committee think it does follow that no such extension should ever be granted to a sitting member unless it clearly appears that by the exercise of great diligence he has been unable to procure his testimony, and that he is able, if an extension be granted, to obtain such material evidence as will establish his right to the seat, or that by reason of the fault or misconduct of the contestant he has been unable to prepare his case.

The other five reasons given are, in substance: (2) The affidavits do not state facts from which it can reasonably be inferred that the sitting member could not, by an exercise of due diligence, have taken his testimony. The opinion of the affiants is that certain indictments were malicious; but no facts are given to support the conclusion, and even if it be taken as true, it is not asserted that any of the witnesses were imprisoned or otherwise placed beyond the reach of subpoena. (3) There is no evidence that the sitting member, by the issuance of subpoenas or notices to take testimony or otherwise, made a single attempt to take testimony. (4) The affidavits state that a better state of feeling now exists, but not a single witness claims that he himself was formerly afraid to testify and is now willing. If the better state of feeling does exist, such affidavits could and should have been procured. (5) Of the twenty-four counties in the district, it is only charged that fear prevailed in five. Testimony might have been taken in others, the law permitting it to be taken anywhere in the district. (6) "The affidavits relied upon are fatally defective in this, that they do not state the names of the witnesses whose testimony is wanted, nor the particular facts which can be proven by their testimony."

Proceeding, then, to the examination of the case upon the testimony in evidence and treating the rejection of returns by the State officers as presumptively correct, it appeared that the vote of Bosque County had been rejected because "no official returns were received." But manifestly some sort of returns were received, and, as nearly as could be inferred from the evidence, the irregularity in them was that they were certified by a registrar who had been removed shortly before the election, but who, not being notified of his removal, and his successor not having qualified, had continued to act under color of authority and at least as officer *de facto*. His official acts affecting third parties and the public would be held valid, and in addition there was full proof in the record both of the legality of the election and of the vote actually cast.

The vote of Brazos County had been thrown out because the ballots had been numbered in violation of the statute. But, as the statute affixed a penalty for marking the ballot and did not declare that the ballot shall be thrown out, and as the construction put on the statute by the State officers would enable the officers of election to disfranchise legal voters, the committee were of the opinion that the votes ought to be received.

In Washington County there had been two boxes, one used chiefly by white men, the other chiefly by colored. The State officers had rejected the "white man's box" on the ground that the law did not admit of two boxes, and that this box was not presided over by even one

lawful officer. But the testimony showed that the two boxes were at different windows in the same room, both equally in or out of the custody of the election officers; the vote was so large that two boxes were a practical necessity and had been customary; white men voted chiefly, but not exclusively, at one box and colored at the other, as a matter of convenience; but at least once during the day the boxes were changed and each put in the window where the other had been. Under these circumstances the boxes must stand or fall together, and in either case, whether the whole vote of the county be counted or rejected and regardless of how the other questions in the case were decided, the contestant had a majority.

In Limestone County a large part of the colored vote failed to be cast. The town where the election was held was occupied by an armed and organized force. Pickets were stationed on all the roads leading to the town, and no person was allowed to enter without a pass. The witnesses asserted that voters were allowed to come and go in peace, and that the negroes were urged to vote; but they did not vote, and the committee said:

It is clear that they abstained from doing so for reasons which most men would consider good and sufficient.

In Hill County one of the clerks of the election swore that, with the connivance of the registrar, he abstracted 300 Democratic ballots from the box and substituted Republican ballots. As the previous questions discussed were decisive of the case, the committee did not discuss the credibility of this testimony or the other questions raised, but submitted resolutions declaring that Mr. Clark was not, and Mr. Giddings was, entitled to the seat. The House adopted the resolutions without division, and Mr. Giddings was sworn in.

[Smith, 91-98.]

(11) McKISSICK vs. WALLACE.

Fraud and irregularities. Testimony insufficient, and sitting member retained the seat.

Report by Mr. Hazelton.

The sitting member received a majority of 3,304 votes on the face of the returns. Contestant charged irregularities and frauds, but his testimony was almost entirely hearsay and dealt in generalities. The committee decided that it was entirely insufficient to sustain the allegations and was not sufficiently definite and tangible to warrant any action on the part of the committee assailing the apparent or *prima facie* right of the contestee to the seat. In regard to the South Carolina election law, approved March 1, 1870, the committee said:

The law under which the election was held seems to be well calculated to cover if not to encourage fraud, inasmuch as it neither requires registration of the voters nor a public canvass of the votes at the close of the polls, but allows the managers of each precinct, or one of them, to retain possession of the boxes containing the ballots uncounted for three days, at the end of which time they are required to deliver them over to the commissioners of election for their county, together with the poll list, and these latter offices may retain the boxes for ten days longer before making the canvass. But the committee, having no power over this law, must content itself with simply calling attention to it.

The committee were unanimous in their decision, and the House passed the resolution presented, declaring Alexander S. Wallace entitled to the seat without division.

[Smith, 98, 99.]

(12) BOWEN *vs.* DE LARGE.

Frauds and irregularities. Incompatible office. Bribery by contestant. Seat declared vacant.

Report by Mr. Hoar.

The case came before the committee at the second session, but the sitting member asked for further time on the ground that his counsel had possession of the testimony and refused to surrender it, having been bribed by the contestant to act for him. The allegation was proved to the satisfaction of the committee, and Mr. De Large was given further time to take his testimony. Part of the committee were of the opinion that the act of the contestant was sufficient to justify a refusal to permit him to proceed with the contest.

When the testimony had been taken, it appeared that the contestant had since the beginning of the Congress held and performed the duties of two offices in South Carolina, each of which was, by the constitution of the State and in the nature of things, incompatible with the office of Representative in Congress. The irregularities shown by the testimony were so great that it was impossible to determine who was elected, and the committee unanimously recommended that the seat be declared vacant. The House concurred without division.

[Smith, 99, 100.]

(13) NIBLACK *vs.* WALLS.

Fraud, intimidation, and irregularities. Seat given to contestant.

Report by Mr. McCrary.

According to all the county returns, contestant received a majority of 192 votes. But the State canvassers rejected the returns from counties giving a vote of 1,604 for Niblack and 783 for Walls, and thus awarded the certificate to Walls by a majority of 629. The sitting member conceded that part of these counties were rejected for technical reasons and should be counted, but asserted that three of them were properly rejected and that a number of precincts in addition must be rejected or additional votes counted for him on account of violence and intimidation.

In the first of the three counties thus remaining in controversy it appeared that the county canvassers had rejected three of the five precincts. Proof was furnished of the vote in the three rejected precincts, and contestant conceded that they should be counted. No proof of the vote in one of the other precincts was furnished, and in the remaining one the proof was that at least 42 votes had been cast for sitting member, while none had been returned for him.

In the second county the returns had been rejected because they were not made out in duplicate, nor forwarded within the time required by law, and because, instead of having been sealed and forwarded by mail to the governor, they had been sent to contestant by a messenger, opened by another, and by him delivered to the governor. The first objection was considered as immaterial, as the only difference between the duplicate returns was the date, but to overcome the second the committee caused the testimony of two of the three county canvassers to be procured. They identified the copies of the returns in evidence as being correct copies of those forwarded by them, and the committee counted the vote.

In the third county the return was signed by but one of the three canvassing officers. Although opportunity was given, as in the previous case, to cure the defect or establish the vote by testimony, none had been taken, and the committee did not count the vote.

In Gadsen County it was shown that there was an organized effort on the part of friends of contestant to prevent a full vote being given for the contestee. There was a show of violence and deadly weapons at the polls, and a crowding around the windows to keep the colored voters from reaching it. Twenty-nine voters swore that they had attempted to vote for contestant, but were prevented, and the committee added their votes to his poll.

In two other cases there were disturbances at the polls, alleged to have been for the purpose of intimidating voters, but there was no definite proof how many or what persons were intimidated, and by reference to the census of 1870, just taken, it appeared that there was a very full vote. The committee declined to reject the vote of these precincts. The vote of three other precincts rejected by county canvassers was proved *abundant* and counted by the committee. Restoring all these votes, a majority of 137 votes is shown for Mr. Niblack. The committee unanimously recommended that he be given the seat, and the House concurred.

[Smith, 101-106.]

(14) J. HALE SYPHER.

Charges of fraud. Case not investigated for lack of time.

Report by Mr. McCrary.

It was alleged that in the testimony taken before the Senate Committee on Privileges and Elections there were indications that Mr. Sypher had fraudulently procured his election. A resolution passed the House directing the Committee on Elections to inquire into the matter, but as most of the witnesses were in Louisiana, and the resolution did not come before the committee until within seven days of the expiration of the Congress, there was no time to procure testimony, and the committee asked to be discharged from further consideration of the case. The House concurred.

[Smith, 107.]

FORTY-THIRD CONGRESS (R.) 1873-1875.

Committee on Elections.

Mr. SMITH, New York,	Mr. HARRISON, Tennessee,
THOMAS, North Carolina,	HYDE, Missouri,
HAZELTON, Wisconsin,	SPEAR, Pennsylvania,
TODD, Pennsylvania,	LAMAR, Mississippi,
PIKE, New Hampshire,	CROSSLAND, Kentucky,
Mr. ROBINSON, Ohio.	

Cases.

- (1) John J. Davis *vs.* Benjamin Wilson; J. Marshall Hagans *vs.* Benjamin F. Martin, *West Virginia*.
- (2) Thomas M. Gunter *vs.* W. W. Wilshire (two cases), *Arkansas*.
- (3) Andrew Sloan *vs.* Morgan Rawls, *Georgia*.
- (4) John M. Burns *vs.* John D. Young, *Kentucky*.
- (5) George R. Maxwell *vs.* George Q. Cannon, *Utah Territory*.
- (6) John M. Bradley *vs.* Wm. J. Hynes, *Arkansas*.
- (7) George A. Sheridan *vs.* P. B. S. Pinchback (two cases), *Louisiana*.
- (8) Marcus L. Bell *vs.* O. P. Snyder, *Arkansas*.
- (9) George Q. Cannon, *Utah Territory*.
- (10) Lucien C. Gause *vs.* Asa Hodges, *Arkansas*.
- (11) Effingham Lawrence *vs.* J. Hale Sypher, *Louisiana*.

The question of providing a way for deciding contests in the election of President and Vice-President was also referred to the committee and reported on.

(1) DAVIS *vs.* WILSON and HAGANS *vs.* MARTIN.

Legal time for holding Congressional election in West Virginia. A majority of the committee reported in favor of Messrs. Wilson and Martin, a minority in favor of Messrs. Davis and Hagans, and another minority in favor of ordering a new election. The House sustained the first minority report, and Messrs. Davis and Hagans were sworn in.

Reports by Mr. Smith, Mr. Todd, Mr. Harrison, Mr. Spear, and Mr. Hazelton.

Under the old law of Virginia, and under the code in force up to 1872, the elections of Representatives in Congress were held on the *fourth Thursday* in October in every second year. As expressed in the code, "The general election for State, district, county, and township officers, and members of the legislature" was fixed on that day, and in a separate section it was specified that "at the said elections * * * there shall be elected," among other things, *Representatives in Congress*, every second year.

The new constitution, submitted to the people for ratification on August 22, 1872, provided:

The general elections of State and county officers and members of the legislature shall be held on the *second Tuesday* of October, until otherwise provided by law.

But the constitution also provided that it should be submitted to the people for ratification on the *fourth Thursday of August*, 1872, at an election to be held by the officers authorized to hold general elections, and—

On the same day, * * * elections shall be held at the several places of voting in each county for senators and members of the house of delegates, and all officers, executive, judicial, county, or district, required by this constitution to be elected by the people.

These elections were to be of no effect unless the constitution was ratified, but if it was ratified the constitution was to be of full effect from and including the day on which it was ratified. The election was held, the constitution ratified, and a full State ticket elected, and in two districts Congressional elections were also held and Messrs. Davis and Hagans elected. On the fourth Thursday in October elections were also held in all the districts, and Messrs. Wilson, Martin, and Hereford elected. Mr. Hereford received a certificate and took his seat without opposition. The governor issued certificates to Messrs. Davis and Hagans, certifying that they were elected, provided the fourth Thursday of August was the legal day of election, and to Messrs. Wilson and Martin like credentials, certifying that they were elected, provided the fourth Thursday of October was the legal day. Subsequently, under an act of the legislature, formal certificates were given to Messrs. Wilson and Martin. The House refused to admit either candidates on their certificates, and referred their credentials to the Committee on Elections.

The case turned on the construction to be given the provisions of the code and constitution above referred to; the argument can not be properly given without going more into detail than is possible in a brief outline. There were three opinions presented and strongly supported—one that the election was properly held on the fourth Thursday in August, another that it was properly held on the fourth Thursday in October, and another that it should have been held on the second Tuesday in October, the date fixed by the new constitution for holding "general elections" in the future. In the last case none of the claimants would be entitled to the seats. A majority of the committee, consisting of Messrs. Smith, Thomas, Crossland, Speer, and Lamar, supported the October election. Mr. Todd was of the same opinion on the testimony presented, but believed that the October election should have been inquired into to see if it was not void on account of the lightness of the vote and irregularities. Messrs. Harrison and Hyde did not consider either election valid. Messrs. Speer, Lamar, and Crossland, who signed the majority report, submitted a separate report, setting forth more fully the reasons for their views. Messrs. Hazelton and Robinson supported the August election. After several days' debate the resolutions submitted by Messrs. Hazelton and Robinson were adopted by a vote of 134 to 82, and Messrs. Davis and Hagans were sworn in.

The contention of those who supported the October election was that it was not in any case competent for the constitutional convention to

fix the day of the Congressional election at a day other than that fixed by the legislature, nor was it competent for the legislature to prescribe the date by fixing it on an "occasion," the time of which occasion might be changed by another authority than the legislature. Therefore the legislature in providing that members of Congress should be elected at a general election which was fixed for a certain day must have intended to fix the Congressional election on that day, and not merely to attach it to the general election, to be held on whatever day subsequent changes in the law might fix that election. It must remain on the fourth Thursday in October until the legislature should prescribe another day. Moreover, the election held on the fourth Thursday in August, 1872, was not a general election, for, although State and county officers and members of the legislature were elected at it, it was a special election held for a special purpose, at a special time. Representatives in Congress were not expressly or by necessary implication included in the officers to be voted for at it.

Those who favored the August election held that the Congressional election had been made a part of the "general election," and must be held at whatever time the general election was held. The election in August, 1872, was a general election, though not held at the time set for the general election in subsequent years, because it was held by the same officers, and the same officers were to be elected at it as in the future at the general elections.

Those who advocated ordering a new election held that the August election in 1872 was a special election; that the Congressional election could not legally be separated from the "general election," and as, under the constitution ratified August 22, 1872, the "general election" was thereafter to be held on the second Tuesday in October, the Congressional election should have been held on that day, although all the other officers ordinarily elected at a general election had, in this year, already been elected at the special election in August.

[Smith, 108-130.]

(2) GUNTER vs. WILSHIRE.

Prima facie case. Sufficiency of abstract of votes certified by the governor. Mr. Wilshire admitted. Case on merits. Imperfect ballots. Contestant given the seat.

Majority report on *prima facie* case by Mr. Thomas; minority report on *prima facie* case by Mr. Lamar; unanimous report on case on merits by Mr. Robinson.

The Clerk of the House refused to place the name of any person on the rolls as Representative from the Third district of Arkansas. The credentials were referred to the Committee on Elections, a majority of which reported that Mr. Wilshire was entitled to be sworn in on the *prima facie* title established by his credentials. A minority reported that neither party had a *prima facie* right to the seat, and recommended that the seat remain vacant until the case could be decided on its merits.

The credentials of Mr. Wilshire were:

(1) A certificate from the secretary of state, presenting a tabular statement of the votes cast, showing 12,522 votes for W. W. Wilshire, 11,961 for Thos. M. Gunter, 407 for Thos. M. Gunther, and 1,127 "scattering," and certifying that the table had been cast up and ar-

ranged by the secretary of state, in the presence of the acting governor, within the time and in the manner prescribed by statute.

(2) A proclamation by the governor and a certificate, each containing the same table of votes, showing 12,644 votes for W. W. Wilshire, 11,499 for Thos. M. Gunter, 12 for Wilshire, 591 for Gunther, and, in a footnote, 1,456 scattering votes in Pulaski County polled for Guntee, S. M. Gunter, T. M. Guntee, Thos. M. Guntee, T. Ros. Gunter, and Thomas M. Crenter. Other footnotes asserted that two counties ought to be rejected, one because it had never been made a part of the Third Congressional district by any act of the legislature, and the other because "there are no returns from the clerk of Scott County."

The certificate and proclamation were certified to be made by the governor because of the failure of the acting governor to make them, and set forth the facts as above, but contained no direct statement that either party was elected.

The majority of the committee reported that no strict adherence to any prescribed form could be required in a *prima facie* case; that the failure of Acting Governor Handley to certify the result ought not to prejudice the right of anyone to the seat, and that the certificate of Governor Baxter was in effect a certificate that Mr. Wilshire had received a majority of the votes.

The minority held that no certificate of election had been issued. A certificate of *the vote*, exactly like the one presented by Mr. Wilshire, had been at the same time issued to his competitor. It showed that a certain number of votes had been cast for W. W. Wilshire, a certain number for Thomas M. Gunter, *eo nomine*, and certain others in unspecified proportions for Thomas M. Crenter and for Thomas M. Gunter, under various imperfect ways of spelling his name. If only a small proportion had been cast for Thomas M. Crenter, and the rest were counted for Mr. Gunter, he would have a majority. He asserted that such was in fact the case, and offered testimony to prove it. As the statement of vote in the governor's certificate did not necessarily show which candidate had received the majority, and there was not even a statement of the opinion of the governor that either one was elected, the seat ought to remain vacant until the case could be decided on its merits.

The resolution submitted by the minority was lost by a vote of 116 to 117, and that submitted by the majority carried by a vote of 118 to 97. Mr. Wilshire was sworn in the next day, a motion to reconsider the last previous vote having first been laid on the table by a vote of 135 to 129.

The case coming before the committee on the merits, it was unanimously decided in favor of contestant. It was proved that the contestant and contestee were the only candidates for Congress at the election, and the committee were satisfied from the evidence that all the scattering votes, except those returned for S. M. Guntee and Thomas M. Crenter, were in fact cast for contestant. No evidence was produced in regard to these last two names, and the committee did not consider this similarity sufficient to count them for contestant without evidence. Counting all these votes for contestant, he is shown to have received a majority of 857 votes. Many other issues were raised in the case the result of which would be to still further increase the majority of contestant, but the committee did not discuss them in their report.

The resolutions presented by the committee were adopted by the House without debate or division.

[Smith, 130-143; 233-239.]

(3) SLOAN *vs.* RAWLS.

Fraud and irregularities. Majority report in favor of contestant. Minority report in favor of sitting member. Contestant given the seat.

Majority report by Mr. Hyde; minority report by Mr. Speer.

According to all the returns filed with the secretary of state, contestant had a majority of 12 votes. But by an error of the managers in consolidating the vote in one county, by their failure in another county to count the return of a precinct received by them the day after they had finished consolidating the returns, and by their rejection of the votes of three precincts in another county on the ground that the precincts had no legal existence, the majority was given to Mr. Rawls, he having received a majority of the remaining votes. The first two errors above were corrected by both the majority and minority of the committee, and the case really turned on the third point, whether the votes of three precincts of Chatham county, casting 1,239 votes for contestant and 2 for contestee, could properly be counted. Both sides seemed to assume that if the precincts were not in fact established by law the votes cast at them must be rejected, and when Mr. Hoar in the debate raised the question whether there might not be such a thing as a precinct *de facto*, at which the votes cast should be counted if they were cast by qualified voters and correctly returned, Mr. Smith, the chairman of the committee, expressed his opinion in the negative. The majority of the committee counted the vote of these three precincts, and also the vote of two other rejected precincts, one of them showing a small majority for contestee and the other a considerable majority for contestant. They also discussed a number of other issues raised the decision of which on strict rules of law would largely increase the majority of 136 thus shown for contestant. But in each case the strictly legal decision of these questions would involve the rejection of precincts or counties part of whose vote at least was honestly cast and correctly returned and as they would not in any view be decisive of the case the committee allowed the votes to stand. The minority report disagreed with the views of the majority of the committee on all these points, and also expressed findings against the claims of contestant on a number of issues not mentioned in the majority report. The case was debated for several days, and the House finally adopted the resolutions presented by the majority by a vote of 135 to 74, and Mr. Sloan was sworn in.

Under the law of Georgia the court-house of each county was made a voting place, and the ordinary of each county was empowered to establish or abolish other voting places in the county. On October 22, 1868, the ordinary of Chatham County made an order reciting that "It being necessary that election precincts should be established in the county in order to facilitate the election to be held on the 3d day of November next, it is therefore ordered that election precincts be, and they are hereby, established" at 3 specified places. Elections were held in these precincts in 1868. The election of 1870 was held under a special law establishing precincts for that election alone; and elections were also held in them in 1872. About a month

after the election of 1872 an order was entered by the ordinary abolishing the precincts. Since 1868 there had been two or three county and local elections, at which these precincts had not been used. The majority of the committee were of the opinion that the preamble to the order establishing the precincts could not be construed into an order abolishing them the day after the first election held at them; that the law providing for the election of 1870, being by its terms limited to that election, did not abolish precincts except for the purposes of that election; and that the precincts continued in legal existence until they were formally abolished about a month after the election of 1872.

The minority held that the precincts had been established for the election of 1868 alone. The ordinary testified that such was his intention when he established them, and the fact that they had not been used at any subsequent election until that of 1872 seemed to indicate a public understanding to the same effect. Moreover, the act providing for the election of 1870, while a special act for a special election, provided that polls should be opened only in organized towns by managers appointed in a certain way, and contained a general clause repealing all acts inconsistent with its provisions. The act under which these precincts had been established was inconsistent with the provision of the act of 1870, and the precincts established under it, even if still in legal existence in 1870, were abolished by the repealing clause of that act. The election in these precincts in 1872 was a device of contestant's. The officers of election did not live in the precincts, but were sent out from Savannah. The votes cast were all but two cast for contestant. The officers of election voted at the elections where they held elections, though not residents; and it was very probable that many other illegal votes were cast. At one of the precincts there was no house and the election was held in the road, the officers sitting in two carriages. Supervisors of election had been appointed, but none of the Democratic supervisors had attended, as the party of contestee was entirely unrepresented. For all these reasons the minority sustained the action of the managers in rejecting the vote of these precincts.

Two other rejected returns were counted by the majority. In one precinct the managers of election had refused to complete the count of the vote, and it was completed by one manager and a clerk. The return of the United States supervisors, the testimony of one of them, and of one of the managers of the election, showed that the vote cast was 189 for Sloan and 113 for Rawls, and the committee so counted it. In another precinct the managers did not subscribe the oath and forwarded their returns irregularly to the secretary of state. The returns showed 31 votes for Rawls and 4 for Sloan. They were rejected by the county managers. The committee were of the opinion that strict rules of law would require the rejection of this return, but as there was no evidence of fraud and some evidence of the correctness of the vote the committee counted it. The minority also counted this precinct, but declined to count the other on the ground that the action of the supervisor of election justified the managers in refusing to count the vote, and that the testimony of the supervisor was impeached.

The above are all the issues on which definite rulings were made by the committee affecting the result, but the following were also discussed: In one precinct Mr. Sloan was returned as receiving 35 votes. The

Republican ticket distributor testified that he issued 74 tickets to men who took them and went to the box to deposit them. At least 67 of those voting were known as Republicans. Sixty of them testified that they voted the Republican ticket, and all but 5 swore that they intended to vote for Mr. Sloan. The majority of the committee held that this was not such evidence of fraud as would justify the rejection of the return, but that the votes proved in excess of the return might be counted for the candidate for whom they were cast. They did not, however, count them in this case, it being unnecessary. The minority held that an examination of the testimony of the voters showed that a large part of them did not know for whom they voted, and eliminating such the number remaining was even less than the number returned for Mr. Sloan.

In Bullock County the precinct returns were placed in the hands of an outsider, who kept them for some time, consolidated them himself, and signed the names of the precinct managers to the consolidated returns without their knowledge or consent. Some time later the returns were forwarded in an indirect way to the secretary of state, and were counted. The committee held that the consolidated return was of no value, but counted the precinct returns, although they were covered with suspicion, except one precinct return which did not show on its face in what precinct or county the election was held. The minority insisted that there was positive proof of the correctness of the returns, and that if one precinct return was to be rejected for informalities there were others which ought also to be rejected. No votes were returned for contestant in this county.

In the city of Savannah four ballot boxes, presided over by four sets of election officers, were opened in the court-house, so situated as to render it impossible for the United States supervisors to supervise the election at all of them. These four ballot boxes in one voting precinct the committee found to be in violation of the Georgia law, which provided that there should not be more than one voting place in each militia district, and also subversive of the supervision law of Congress; but in this case it was not necessary to reject the votes. The minority found that the use of the four boxes, being customary and practically necessary on account of the large number of voters, was proper.

The minority of the committee deducted from contestant his majority of 205 received at the precinct of Jeffersonton, Camden County. This place had formerly been the county seat, and hence the court-house had been a voting place. The county seat had been transferred to another town a short time before the election, and the minority held that this abolished the voting place at the building formerly used as a court-house. The majority held that the act changing the county seat did not abolish the voting place at the old county seat.

[Smith, 144-178.]

(4) BURNS *vs.* YOUNG.

Irregularities. Distinguishing marks on ballots. Sitting member retained the seat.

Report by Mr. Crossland.

This was the first Congressional election in Kentucky where the vote was by ballot, as required by the act of Congress approved February

28, 1871. The act of the Kentucky legislature contained very elaborate directions in regard to the manner of conducting the election, many of which were not strictly followed by the officers of election. According to the returns, contestee received a majority of 188 votes, which contestant sought to overthrow on account of various irregularities. Contestee made countercharges of irregularities, and especially charged that large numbers of votes cast for contestant by ballots containing the contestant's name with the prefix "Hon." were in violation of the statute prohibiting distinguishing marks. The committee held that this was not such a distinguishing mark as to require the rejection of the votes, and counted votes which had been rejected for this reason by the county boards and refused to reject others. In one county the vote certified by the county board showed 9 less votes for Burns than the aggregate of the precinct returns. The county board had refused to permit anyone to be present at the count, and the committee, believing this practice to be reprehensible and dangerous, counted the vote according to the precinct returns. The other irregularities shown were about equally in precincts where the contestant and contestee had majorities. Most of them were not of such a nature as to vitiate the returns, and where they were the secondary proof of the actual vote cast showed a result not differing from the returns. The committee unanimously reported in favor of the sitting member, and the House sustained his right to the seat without division.

[Smith, 179-181.]

(5) MAXWELL *vs.* CANNON.

Ineligibility on account of polygamy. Question of jurisdiction. Sitting member retained the seat.

Majority report by Mr. Hazelton; minority report by Mr. Harrison. According to the returns of the election in Utah Territory Mr. Cannon had received 20,969 votes and Mr. Maxwell 1,942. Mr. Maxwell claimed the seat on the ground that most of the precincts must be thrown out on account of the numbering of the ballots, the admission of women to vote, coercion of voters, and irregularities, and that he had received a majority in the remaining precincts. He also charged that Mr. Cannon, being a polygamist, was ineligible, and that the voters had notice of his ineligibility, and their votes must therefore be disregarded and the seat given to the candidate receiving the highest number of the remaining votes. The committee discussed only the latter charges, as the irregularities would not be in any case sufficient either to invalidate the election or overcome the overwhelming majority of contestee. The claim of Mr. Maxwell to be elected was unanimously rejected, on the principle that American usage and the precedents of the House did not permit the seat to be given to the minority candidate even where the voters had notice of the ineligibility of the majority candidate.

In deciding the right of Mr. Cannon to hold the seat the committee were confronted by the question of jurisdiction. The case was referred to the committee under the usual order, along with other cases. The Committee on Elections had been organized under the provision of the Constitution that "each House shall be the judge of the elections, returns, and qualifications of its own members," and had never taken

jurisdiction, except by special reference, of any cases not included in this provision. The only qualifications within its province to examine into were the constitutional qualifications of age, residence, and citizenship, all of which it was conceded Mr. Cannon possessed.

This case was the case of a Delegate, and not of a member, but the committee concluded that the qualifications required were in this case the same. Congress might have established any qualifications it chose for Territorial Delegates, but it had prescribed none, except by extending the Constitution to the Territory of Utah so far as applicable. This was equivalent to making the qualifications of the Delegate similar to those of a member. Mr. Webster had been quoted in support of the doctrine that Congress could not by law extend the Constitution over the Territories, but Congress certainly had the power to make it a part of the statutory laws of the Territory, which in this case would have the same effect.

The contestee, having all the constitutional qualifications, and having been duly elected and sworn in without condition or reservation, could be reached only under the power of expulsion. The committee therefore recommended the adoption of resolutions declaring that the contestant was not elected and not entitled to the seat, and that Mr. Cannon was elected and returned.

Mr. Harrison presented a minority report complaining that the resolutions presented by the committee, while declaring Mr. Cannon elected, did not declare him entitled to retain the seat. It was conceded that Mr. Cannon was elected, and possessed all the constitutional qualifications. The House had no right to require any others. Congress might by law have made ineligibility to office a part of the penalty of polygamy in the Territories, but it had not done so. Mr. Cannon was, therefore, absolutely qualified, and so far as the jurisdiction of the Committee on Elections was concerned (or that of the House by a majority vote), was absolutely entitled to his seat. The resolutions presented by the committee tended to break down the distinction between the power of the House, by a majority vote, to judge of the elections, qualifications, and returns of its members, and its power, by a two-thirds vote, to expel a member. Mr. Harrison therefore recommended that there be added to the resolutions of the committee a declaration that Mr. Cannon was entitled to retain the seat.

After some debate in the House the resolutions of the committee were adopted by unanimous consent, and the resolution of Mr. Harrison was then added to them, by a vote of 109 to 76. A resolution committing the charges against Mr. Cannon to the Committee on Elections, to report to the House for action, was then passed by a vote of 137 to 51. For the action of the committee and House, see the case of George Q. Cannon, *post*.

[Smith, 182-195.]

(6) BRADLEY *vs.* HYNES.

Charges of dishonorable conduct against sitting member. Committee discharged from further consideration of the case.

Report by Mr. Pike.

Messrs. Bradley and Hynes were both candidates for Representative at large from Arkansas. Mr. Hynes received the certificate. Mr. Bradley served a notice of contest fourteen days after the time for

serving it had expired, but Mr. Hynes did not see a copy of it until more than a month later, and never received the copy, which was served by leaving it at a boarding house where he had formerly boarded. The testimony was all taken after the time for taking testimony had expired. After it had been taken Mr. Bradley served on Mr. Hynes a notice acknowledging that he had not proved his case, and withdrawing the contest.

After the organization of the House Mr. Bradley presented a memorial under oath alleging that he had been duly elected to Congress in place of Mr. Hynes, but by the fraudulent act of the county clerk of Pulaski County and other officers, he had been deprived of the certificate. After having regularly instituted a contest he had been induced to abandon it by the payment of \$500 in money and the promise of \$1,000 additional.

The committee received a statement from the sitting member which set forth that the testimony taken had only the more firmly established his election, but that considering the fact that the contest would suspend the payment of his salary until December 1, and subject him to many inconveniences, he had consented, at the request of the contestant, to pay him \$500 in consideration of the withdrawal of the contest. The committee did not approve of this act of Mr. Hynes, but found that there was nothing criminal about it, and as an examination of the testimony showed that he had no cause to fear the result of the contest it was not done for the purpose of securing his seat in Congress corruptly. They asked to be discharged from the further consideration of the case, which was agreed to by the House without division.

[Smith, 240-247.]

(7) SHERIDAN *vs.* PINCHBACK.

(1) *Prima facie* case. *Question of the legality of the various Louisiana returning boards. Admissibility of testimony taken before a Senate committee. The majority reported in favor of the seat remaining vacant until further testimony could be taken; the minority recommended the seating of Mr. Sheridan. The House sustained the majority.*

Majority report by Mr. Smith; minority report by Mr. Lamar.

Mr. Pinchback presented a certificate of election, signed by himself as acting governor of Louisiana, and also one signed by Governor Kellogg. Mr. Sheridan presented a certificate signed by Governor Warmoth. Within the legal time after the issue of the first certificate Mr. Sheridan served a notice of contest, to which Mr. Pinchback made no answer. The committee unanimously reported that Mr. Pinchback was not entitled to be sworn in on his certificates (which were his only evidence), as they were based on the return of the board known as the "Lynch board," which board it was a matter of public history, of which the House could take notice, had never had possession of the returns, and hence could not have canvassed them. The majority of the committee reported that Mr. Sheridan was also not entitled to be sworn in on his certificate. He had served in due time a notice of contest, to which no answer had been made, but the committee were of the opinion that his case was not on this account any stronger than it would have been if no one were contesting his seat, and the committee had been instructed to inquire whether he

was elected. The certificate of Governor Warmoth was not sufficient proof of his right, for, "waiving the question whether in any case a governor's certificate alone is sufficient proof *upon the merits* of title to a seat in this House, it seems clear to your committee that its effect as proof rests upon the presumption that it is the official declaration of an official canvass of the votes," and Mr. Sheridan had conceded that at the time when his certificate was issued the Congressional vote had not been canvassed by any board whatever.

Mr. Sheridan's right to a seat, then, if it could be established at all, depended on the return of the "Forman board," the only board which had returned him as elected.¹ This raised and required the decision of the question whether the House would receive as evidence the testimony taken by the Senate Committee on Privileges and Elections during the preceding Congress; for there was no other evidence before the committee of the return of any board. Upon the authority of Cushing's Law and Practice of Legislative Assemblies, the committee concluded that it could be received "for what it was worth," although neither of the parties to the present case was directly a party to the case in which it was taken; and the question as to which of them was elected as a Representative in Congress was not directly or indirectly before the Senate committee. The volume of testimony thus admitted contained no precinct or parish returns, nor parol testimony of the vote of either claimant, but the committee were satisfied that it contained correct copies of the returns of the boards known as the Lynch and Forman boards. The committee also received as evidence the President's message to the last Congress on Louisiana affairs, and the report and accompanying exhibits of the chief supervisors of election in the State.

Conceding for the purposes of this question that the returns were properly canvassed under a law approved after the election, and that the Forman board was the lawfully constituted board,—the committee were of the opinion that

The correctness of these returns is challenged by evidence, which shows *probable cause*, abundantly sufficient (certainly more so than common fame, upon which the House might act) to put the House upon inquiry before these returns are accepted as conclusive.

The reasons for doubting the returns were: (1) The Forman board first received an immense mass of returns from the whole State on the evening of December 11, and completed their canvass the same evening; (2) there was evidence that at least two of the signatures of the board were forged; (3) one of the members of the board testified that he believed there were from 25,000 to 30,000 fraudulent names on the registration books; (4) there was evidence that the majority of the legal voters in Louisiana were Republicans, and that the "fusion" with Governor Warmoth was the outcome of a corrupt conspiracy to overcome this majority by fraudulent means; (5) the conduct of the State registrar, as shown by his confidential instructions and his own affidavit, was

¹The State of Louisiana had been in what practically amounted to a condition of armed revolution. During this period of confusion there had been at various times *five* returning boards, each claiming to act under a different authority. The various certificates of election awarded by them to opposing candidates were the occasion of a large number of contests, both in the State of Louisiana and in the two Houses of Congress. The subject is too complicated a one to be entered into here, and the reader is referred to the various reports of the Senate and House, in which it is fully discussed.

such as to cover the returns with very grave suspicion; (6) the return of the Congressional vote made by the Forman board was separate from that of other officers, the inquiry of the Senate committee was directed wholly to the other returns, there was no proof or presumption that the Congressional return was verified by comparison with the parish returns; these parish returns had been opened and kept in such a way as greatly to impair their trustworthiness, and whatever they would be worth none of them were in evidence; (7) the polls in large Republican parishes had purposely been opened in remote and inaccessible places, and the exhibits filed by United States supervisors indicated that the fairness of the election had been interfered with in other ways; (8) the truth or falsity of the affidavit of the State registrar, testifying to his own infamy, ought to be investigated; (9) the Forman return omitted six parishes, and a probable case was made out against the correctness of its return as to twelve others, sufficient to overcome the majority of Mr. Sheridan unless the returns could be sustained by evidence.

For all these reasons, the committee recommended that the parties be permitted to file amended notice and answer, and take testimony under the law for taking testimony in ordinary cases.

The minority report contended that the evidence was sufficient to establish the right of Mr. Sheridan to the seat. The certificates of Mr. Pinchback were held to be worthless, for the same reasons assigned by the majority, and the certificate of Mr. Sheridan, though signed by the undoubted governor of Louisiana, was of no effect because it was conceded that it was not based on a count of the votes.

Neither party, then, having established a *prima facie* right, the question remained whether the evidence was sufficient to establish the right of either on the merits. Mr. Pinchback had no evidence of his right except the notoriously insufficient return of the Lynch board. It was proved in the testimony taken by the senate committee that the returns in the legal custody of the governor were delivered by him to the "De Feriet board," legally appointed by him, partly canvassed by that board, a legislature organized upon its returns, a new board—the "Foreman board"—elected by the senate as provided by law, and the returns received by that board unaltered from the De Feriet board, and correctly canvassed. The original returns were before the senate committee, the compiled returns were shown to be in accordance with them, and there was no evidence impeaching the original returns except a statement that the signatures of four of them were forged, which fact, if a fact, would not change the result. Six parish returns had been rejected by the board, but the evidence abundantly justified their rejection, and even if their votes were counted according to the guesswork returns of the Lynch board, it would deprive Sheridan of only part of his large majority. If the returns said to be forged were rejected it would increase Sheridan's majority, and if they were counted as given by the Lynch board it would not overcome his majority.

To validate an election there must be votes legally deposited by legal voters and legally counted, and the result legally declared.

There was no claim that there had been no election in this case, but the votes had not been counted by the Lynch board, and hence it was not material to decide whether that board was legally constituted. The votes had been counted by the Forman board, and it was in proof

that they had been correctly counted. The result of the election as returned by them had not been successfully impeached, and it should therefore be allowed to stand. (No explicit ruling was made as to the legality or illegality of the appointment of the Forman board.) The minority recommended resolutions declaring that Pinchback was not and Sheridan was elected.

The case was considered in the House several days, and the resolution presented by the minority declaring Pinchback not elected was defeated by a vote of 94 to 121, and the resolution declaring Sheridan elected was defeated by a vote of 72 to 145. The resolutions presented by the majority were then passed without division.

[Smith, 196-233.]

(2) *Case on merits. Conflicting returns and charges of fraud. Majority report for contestant, minority report that seat should be declared vacant. Contestant given the seat.*

Majority report by Mr. Harrison, minority report by Mr. Smith. Under the leave given at the first session Mr. Sheridan had taken considerable additional testimony, within the time allowed. Mr. Pinchback took no testimony until the expiration of his time, but took some afterwards, with the consent of Mr. Sheridan. The testimony of Sheridan was directed to proving the correctness of the returns as shown in the canvass of the Forman board; that of Pinchback to proving frauds to offset the majority returned for contestant. No attempt was made to sustain the return of the Lynch board. The original returns were not produced, but contestant showed that he had made a diligent effort to procure them, and failing in that he proved that the canvass of the Forman board was a correct compilation of them. Contestee admitted this, but objected to the returns on the ground that six parishes were omitted and that fraud was committed in others. But correcting the returns of the Forman board by adding to them the vote of these six parishes, as shown by the elections of 1870 or 1874, or the average of both, or the returns of the Lynch board, contestant would still have a majority of from 7,000 to 8,000. The testimony to show fraud consisted of reaffirmations by witnesses of affidavits not received when previously presented (except to raise a suspicion of fraud), because *ex parte*. They were now received by the majority of the committee for what they were worth, but being the testimony of criminals to their own crimes and not sufficiently corroborated, they were held to be inconclusive, especially in regard to the Congressional election, which had been supervised under the new Federal election law in such a way as to make it incredible that frauds of the kind and magnitude charged could have been committed.

The majority therefore recommended resolutions declaring Sheridan elected and entitled to the seat.

A minority, consisting of Messrs. Smith, Hazelton, Hyde, Todd, and Thomas, reported against both claimants. Mr. Pinchback had practically given up the case, and the question was on the seating of Mr. Sheridan. He could not be seated on the returns of the Lynch board, declared by the State courts to be the legal board, because it had not returned him as elected. Nor could he be seated on the returns of the Forman board, for the reasons given in the previous report of the committee. Could he be seated on the parish returns? These were not produced, but contestant showed that he had used due

diligence to procure them, and had shown that they were correctly tabulated in the Forman returns. But six parishes were omitted from these returns, and there were twelve others in regard to which the report adopted at the last session had given due notice that they required to be sustained by evidence before they could be received. Mr. Sheridan had taken no testimony to sustain them, but proposed to compromise by substituting the vote of 1874 in these parishes for that returned. This would leave him a majority of only a little over 1,000, allowing the parish of Orleans to stand. But the testimony of fraud in the registration, and stuffing of ballot boxes in that parish was sufficiently corroborated to convict an accomplice of crime in a criminal court, and certainly sufficient to justify refusing a seat to the beneficiary of the fraud. The minority recommended a resolution declaring that Sheridan was not shown to be entitled to the seat.

The case was not taken up until the last day of the Congress, when the resolutions presented by the majority were adopted without debate or division, and Mr. Sheridan was sworn in.

[Smith, 322-340.]

(8) BELL *vs.* SNYDER.

Votes illegally rejected; returns omitted; irregularities. Sitting member retained the seat.

Report by Mr. Harrison.

According to the returns as certified by the governor, Mr. Snyder received a majority of 104 votes. Bell contested, charging that in four counties the names of legal voters were fraudulently stricken from the registration lists, the voters offered to vote for him, and were refused; and that in one county the return counted by the governor was made by an unauthorized person, and was false and fraudulent. Contestee denied the charges, and charged that he had been deprived of votes in one county by the refusal of the county clerk to certify them, on the ground that the precinct returns did not show for what office the votes were cast for him. If these votes were not to be counted for him, he asked that votes similarly returned for contestant in five other counties be rejected. He also charged intimidation in one county, and the illegal registration of unqualified voters in seven others.

Under the laws of Arkansas the registrar in each county was to make out a registry list from his own knowledge and testimony produced before him and issue certificates. A person holding a certificate was entitled to vote until his certificate was revoked by the board of review, consisting of the registrar and two other persons. The board of review had the right to strike off names from the list from their own knowledge or testimony presented. Their decision was final except on appeal to the supreme court. Immediately after closing the registration the board of review were to make out fair copies of the list for each precinct and deposit the original lists with the county clerk.

The committee held that the board of review might strike off names up to the moment of adjournment, but all persons who held certificates and whose names were on the lists when the board adjourned were legal voters. There was proof that a number of such voters offered to vote and were refused, because their names were not on the copies

of the list furnished the precinct judges. The proof that they offered to vote for contestant consisted of affidavits made at the time, with the ballots attached, and the testimony of the United States supervisor, identifying the affidavits and stating that the voters who made them offered to vote, were refused, and made the affidavits and attached the ballots in his presence immediately afterwards. The committee received the testimony as evidence of the fact of rejection, of the identity of the affidavits and the circumstances of making them, and the affidavits themselves as statements made at the time and part of the *res gestæ*. The affidavits showed that the voters were qualified voters and had registration certificates, but that their names had been wrongfully stricken from the lists and their votes consequently refused. This would not have been sufficient except for other testimony showing that up to the time of the adjournment of the board of review their names were still on the list. This being shown their votes were counted for contestant.

In Hempstead County the return counted was made by an unauthorized party, who, as the proof showed, never had had possession of or canvassed the precinct returns. The return made by the county clerk, based on a full canvass of the votes, showed a much smaller majority for the contestee. The committee would have deducted the difference from the vote of contestee, except that the testimony was taken over the protest of contestee, after the expiration of contestant's forty days, and was hence inadmissible. Attention, however, was called to the fact that the decision of this question either way could not be decisive of the case.

In one precinct in Boggy County the ballots cast for contestee plainly showed that they were cast for him for Congress, but the precinct returns did not show for what office they were cast, and the county clerk had refused, for that reason, to certify them to the secretary of state. The committee counted the votes. In Drew County the returns from ten of the fourteen precincts were so irregular and imperfect that the clerk of the county testified that no one could make out a correct return from them. Most of them did not even indicate where or when the election was held, or for what office the votes cast for contestant and contestee were given. Some of them were not sealed, some not signed, and most of them did not show that the judges had taken the oath. The committee regarded the irregularities as very great, but it not being necessary for the decision of the case, did not deduct the votes.

Making the deductions and additions called for by the evidence, Mr. Snyder was shown to have a majority of at least 492 votes. The committee were unanimous in their decision, and the resolutions presented were adopted by the House without debate or division.

[Smith, 247-259.]

(9.) GEORGE Q. CANNON.

Proceedings for expulsion. Charges of polygamy and of taking an oath inconsistent with allegiance to the United States. The majority recommended exclusion, the minority that no action be taken. The House did not consider the case.

Majority report by Mr. Smith; minority report by Mr. Harrison.

Under the resolution passed at the last session, the committee proceeded to consider the charges against Mr. Cannon. Mr. Cannon

consented to the use of the testimony taken in the case of Maxwell *vs.* Cannon, and from this and some additional testimony the majority of the committee found the charge established that Mr. Cannon was cohabiting with four wives, the last of whom he had married since the passage of the act of 1862, making polygamy in the Territories a felony. The testimony in regard to the oath taken in the Endowment House was conflicting. The majority recommended a resolution excluding Mr. Cannon from his seat.

The minority opposed any action. The testimony establishing Mr. Cannon's polygamy was hearsay and inadmissible. Still the minority concluded that the fact could probably be established by legal evidence. If Mr. Cannon was to be expelled for it he should be expelled by a two-thirds vote, and he should be expelled for no cause that would not be sufficient to expel a member. The House had no doubt the power to expel him by a majority vote, but the safer rule was to follow the analogy of the case of a member. It was a universally known fact that the majority of the people of Utah were Mormons, and would be likely to elect a Mormon Delegate. Congress, with full knowledge of this fact, had given them the power to elect a Delegate. It would be a dangerous precedent to establish the custom of inquiring into the moral character of members with a view to expulsion, and there could be no justification for it in this case unless it was to strike a blow at Mormonism. That blow could be much better struck by legislation. Moreover, Mr. Cannon had never been convicted in a court of the crime of polygamy. He was now under indictment and would soon be tried. It would be much better to leave the issue to the courts.

When the case was brought up, the House, by a vote of 20 ayes, does not counted, refused to consider it at that time. It was not afterwards called up.

[Smith, 259-275.]

(10) GAUSE *vs.* HODGES.

Returns omitted; unauthorized polls; setting aside of registration by the governor. The majority reported in favor of sitting member; the minority in favor of contestant. The House took no action.

Majority report by Mr. Pike; minority report by Mr. Crossland.

There were twenty-four counties in the district; the sitting member in his brief attacked the returns of two of them; the contestant denied the correctness of the returns or the legality of the election in ten of them. The committee rejected the vote of one of the counties attacked by the sitting member, as the clerk of the county had never made an abstract of the votes as required by law. The returns had been stolen from his office, and he had based his abstract on the affidavits of the judges of election in only a part of the precincts. No returns were in evidence. Of the counties put in controversy by the contestant, the question in three of them was the legality of polls opened (as the majority of the committee held) without authority of law, in addition to the regular and legal polls. Their votes had not been included in the returns on which the certificate was based, and were not counted by the committee. In several others it was charged that the abstract of votes certified by the county clerk did not include all the votes of the county. The committee held that the abstract legally forwarded and acted on by the proper authorities was *prima facie* evidence of the vote, and as the contestant had not offered the precinct returns,

or other sufficient evidence, to show the vote of any polls that may not have been included, the vote as counted was allowed to stand. In two or three other counties the registration had been set aside by the governor and a new one ordered, under the power given the governor by the State law. The new registration had been only partly completed, and the county clerks had refused to certify the votes of precincts not yet registered. The committee held that the power of the governor to set aside an old registration was inseparable from the power to order a new one, and should not be so construed as to disfranchise the people of a county. The contestant in one county assailed the legality of the proceedings establishing election precincts on the ground that no quorum of the court had been present. This objection to these precincts was not included in the notice of contest, and hence was not open to contestant. If it were it ought not to prevail, as the order of the court had been generally acted upon as valid. The precincts were to "be regarded as established under color of law, and as having a *de facto* existence." Counting the votes according to the findings of the committee, the sitting member was shown to have a majority of 1,143 votes, and the committee recommended resolutions declaring him entitled to the seat.

The minority disagreed to most of the findings of the committee. The county abstracts objected to were mostly partial abstracts made by the county clerks under fraudulent instructions from the attorney-general, instructing them to reject the returns from all precincts where there were irregularities, or where the votes of unregistered persons were received. The clerks plainly had no right to reject these returns, the law making it a penal offense for them to do so. Abstracts of all the returns were in each case in evidence, and proved to be correct. They were sufficient evidence of the votes. The "outside polls" established were established in accordance with the law, and were, strictly speaking, the only legal polls in the precincts in question. The elections at them were shown to be legal, and only legal votes were received. The minority, however, were willing that the votes of both polls in each precinct should be counted. The minority agreed with the majority in counting votes of counties and precincts not yet registered under the second registrations ordered by the governor, and counted a few additional precincts by accepting evidence not deemed sufficient by the majority. The findings of the minority showed a majority of 799 for Gause, and they recommended resolutions accordingly.

The reports were submitted to the House February 24, 1875, but never acted upon (the House being most of the time until the end of the session engaged in the prolonged struggle over the "Force bill," and the resolutions in regard to the condition of the governments of the States of Arkansas and Louisiana).

[Smith, 291-322.]

(11) LAWRENCE *vs.* SYPHER.

Voting places abolished for partisan purposes; fraudulent votes cast; returns omitted. Majority report for contestant; minority report that the seat should be declared vacant. Contestant sworn in.

Majority report by Mr. Robinson; minority report by Mr. Hazelton. Mr. Lawrence had a certificate of election based on the returns of the "Forman board," and Mr. Sypher one based on the returns of the

"Lynch board." Mr. Sypher was given the seat on his certificate, without referring the matter to the Committee on Elections, and Mr. Lawrence contested. The testimony being taken under a special resolution of the House, after contestee had been sworn in, the case did not come before the committee until the second session, and was not reported on until February 27, 1875, four days before the expiration of the Congress.

The committee did not attempt to decide whether the Lynch or the Forman board was legally constituted, but found that the latter board had actual possession of the returns and had correctly tabulated them, except a few which were omitted. Supplying these omitted parishes, the vote on the face of the returns stood: Sypher, 11,088; Lawrence, 13,085, a majority for contestant of 1,947 votes. This majority the contestee sought to overcome by two charges: (1) That in Plaquemines Parish the polls in the upper part of the parish were abolished shortly before the election, leaving the largest part of the Republican voters of the parish from 35 to 47 miles from the nearest polls; and (2) that in the city of New Orleans a larger number of fraudulent votes were counted for contestant than his returned majority.

The majority of the committee characterized "the abolition of the voting places as an outrage, for which there should be some relief." But Mr. Lawrence was not a party to the wrong, and furnished a steamboat to carry voters of all parties down the river. The evidence seemed to indicate that not over 350 votes had been lost to Mr. Sypher. The Republican vote in 1874, when the election in this parish was quiet, was only 377 more than in 1872, and the Democratic vote was also increased. And in no case could votes lost to Mr. Sypher by reason of the failure to establish voting places be added to his vote unless the provisions of the enforcement act were strictly followed, which was not claimed to have been done in this case.

The testimony relied on to establish fraud in New Orleans was very conflicting and unsatisfactory. It consisted of the testimony of criminals swearing to their own crimes, part of whom at least had consented to expose their crimes for a money consideration. They testified to a conspiracy to procure fraudulent registration and receive fraudulent votes, but they had no means of estimating accurately the number of votes affected. The committee concluded that the number must have been less than 1,000, because (1) the Lynch board in its canvass, based largely on estimates of political strength and strongly biased in favor of contestee, had only counted for him 108 votes more than the Forman board in the seven wards included in this district; (2) the presence of United States supervisors must have prevented much fraud in the Congressional election; and (3) the testimony was general and did not specify particular acts of fraud, and the estimates of the witnesses were "entirely too problematical to overthrow positive returns."

If Sypher should be allowed 377 additional votes in Plaquemines Parish and 1,000 should be deducted from Lawrence in New Orleans there would still be a majority of 570 votes for Mr. Lawrence; or, taking the returns of the Lynch board, which elected Sypher by a majority of only 74, and deducting from them the affidavits counted as votes, which were simply manufactured for the occasion, a large majority would still appear for Mr. Lawrence. The committee recommended that he be given the seat.

A minority, composed of Messrs. Hazelton, Smith, Hyde, Todd, and Thomas, reported that the title of both claimants was so tainted with fraud that it was impossible to say that a legal election had been held. In Plaquemines Parish less than one-half of the registered vote had been cast on account of the abolition of voting places, and it was in proof that the votes lost were nearly all Republican. The testimony of the conspirators in New Orleans, part of which affected the whole State, was not impeached and must be believed to be substantially true. At least it was the testimony of men regarded by the leaders of the party of contestant as fit to be intrusted with the management of the election, and it was not in their mouths to say that the testimony of these men under oath and not impeached could not be believed. It showed that the so-called election was not an election at all, but a conspiracy to defeat an election, and exposed methods which, if practiced in all the Congressional districts of the United States, would be destructive of republican government.

The title of contestee was also tainted by the grossest irregularities, less widespread and systematic, perhaps, than those on the other side, and sought to be excused on the grounds that they were resorted to to counteract the fraudulent machinations of those in power, but still abundantly sufficient to destroy his title to the seat. The minority recommended that the seat be declared vacant.

The case was not called up until the last day of the Congress, when the resolutions of the minority were defeated by a vote of 87 to 143 and those of the majority adopted by a vote of 135 to 86, and Mr. Lawrence was sworn in.

[Smith, 340-355.]

FORTY-FOURTH CONGRESS, 1875-1877.

Committee on Elections.

Mr. HARRIS, Virginia,	Mr. WELLS, Mississippi,
THOMPSON, Massachusetts,	BAKER, Indiana,
BLACKBURN, Kentucky,	BROWN, Kansas,
HOUSE, Tennessee,	TOWNSEND, New York,
DE BOLT, Missouri,	BEEBE, New York,
POPPLETON, Ohio,	WILSON, West Virginia.

(Mr. BEEBE resigned as a member of the committee, and Mr. WILSON was appointed in his place December, 1876.)

Cases.

- (1) Frederick G. Bromberg *vs.* Jere Haralson, *Alabama.*
- (2) Jesse J. Finley *vs.* Josiah T. Walls, *Florida.*
- (3) John V. Le Moyne *vs.* Charles B. Farwell, *Illinois.*
- (4) E. St. Julien Cox *vs.* Horace B. Strait, *Minnesota.*
- (5) William B. Spencer *vs.* Frank Morey, *Louisiana.*
- (6) Samuel Lee *vs.* Joseph H. Rainey, *South Carolina.*
- (7) S. S. Fenn *vs.* T. W. Bennett, *Idaho Territory.*
- (8) Josiah G. Abbott *vs.* Rufus S. Frost, *Massachusetts.*
- (9) James H. Platt *vs.* John Goode, jr., *Virginia.*
- (10) C. W. Buttz *vs.* E. W. M. Mackey, *South Carolina.*

(1) BROMBERG *vs.* HARALSON.

Charges of intimidation, fraudulent voting, and bribery. Sitting member retained the seat.

Report by Mr. Harris.

The contestant sought to overcome the majority returned for the sitting member by the charges that large numbers of fraudulent votes had been cast for the sitting member, and that voters had been made to vote for him by bribery, intimidation, and undue influence.

In Mobile County both intimidation and fraudulent voting were charged. The evidence of the former charge was so plainly insufficient that the committee did not deem it necessary to analyze it. The evidence of the latter charge was the testimony of the president and some of the members of a colored club of some 250 members, to the effect that the said club was organized for the purpose of fraudulent voting, and that the plans thus made and organized were carried out. The president of the club was at the time of giving his testimony the paid agent of the contestant, and his testimony, already weak as being that of a conspirator testifying to his own wrong, was further weakened by this fact. He testified to the plans for fraudulent voting and repeating, and that he saw squads of colored men on election day apparently carrying them out, but he had purposely refrained from seeing whether they actually did carry them out. Both he and the other witnesses testifying to the fraud refused to submit to a thorough cross-examination. Other members of the club testified that there were no

such arrangements made or instructions given. A slightly smaller proportion of the colored vote than of the white vote was cast. The majority of the voters were white, and it was inconceivable that 250 negroes would have been permitted to carry out such frauds. If illegal votes were cast, the proof did not show how many there were, and the only remedy would be to throw out the whole vote, which would be decisive of the case against the contestant.

In Monroe County some casks of Government bacon had been received and distributed among the sufferers from the floods. It was charged that this was used for purposes of bribery. In one town it was distributed without asking any questions, and plainly did not affect the vote. In another town a rumor was prevalent among the negroes that it was necessary to vote the Republican ticket in order to be entitled to bacon. The Republican leaders made no attempt to deny this rumor, and the vote was probably increased by it. But the specific proof only showed 10 or 12 voters influenced. From the increase in the vote over that of 1872 it might perhaps be inferred that some 300 voters were influenced, but these would not be sufficient to overcome the majority of contestee if deducted. There was a small squad of soldiers in this county, but they made no attempt to influence the vote of anyone. The deputy United States marshal testified that the colored voters had unlimited confidence in him, and that he could control the votes of at least 900 of them. This, if true, would not justify the rejection of their votes, and it was probably only idle boasting. General charges of illegal voting and undue influence were made in regard to Wilcox County, but they were "too vague and uncertain to be good." No testimony had been taken by the contestant in this county during his time for taking testimony in chief, and the notices to take testimony during the last ten days specified that it was to be in rebuttal. It was plainly testimony in chief, and was objected to at the time on that ground. The committee rejected all of contestant's testimony in this county.

In Dallas County it was charged that thousands of votes had been cast for contestee by minors and nonresidents, and that 2,000 persons had been prevented from voting for contestant by intimidation and deception. It was proved that 20 persons voted for contestee who appeared to bystanders to be less than 21 years of age; each of them made affidavit that he was of age. There was also evidence that 9 colored men voted who may not have been *bona fide* residents. There was general testimony that large numbers of colored men had moved from the county within the preceding two years, and from this fact and the number of votes cast it was argued that nonresidents must have voted. The testimony was held to be insufficient. It was also proved that the canvass was a heated one and inflammatory language used, but no such condition of violence existed as would interfere with the freedom of the election.

No detailed statement of the illegal votes proved is given, but the evidence is found to be entirely insufficient to overcome the returned majority of 2,700. The committee were unanimous in their decision in favor of the sitting member, and the House adopted the resolution presented without division.

[Smith, 355-367.]

(2) FINLEY vs. WALLS.

Frauds, illegal votes, irregularities. Majority report for contestant; minority report for sitting member. Contestant given the seat.

Majority report by Mr. Thompson; minority report by Mr. Townsend.

The sitting member had a majority of 371 votes on the face of all the returns, and received the certificate. The contestant charged that certain illegal returns ought to have been rejected by the State canvassers, which would have given him the certificate. This point was sustained by the majority of the committee, but is so vaguely stated that it is impossible to tell just what the point was, or on what grounds it was based. It was held to be immaterial to the case on the merits. Most of the remaining charges were substantially alike. Under the laws of Florida a voter was required to be registered at least six days before the election, and the registering officers had the right to strike from the list the names of persons whom they knew of their own knowledge or ascertained by testimony to be no longer entitled to vote. Any person whose name was thus erased would be entitled to vote upon taking oath before the election officers that his name had been improperly stricken from the registry and taking the oath prescribed by law for challenged persons. A person might vote at any precinct in the county where he resided, and it appeared to be the custom for the colored voters to vote so far as possible at one precinct, at which few white voters would vote. All the precincts in controversy were precincts of this sort, and the vote in each case was several hundred for contestee, and from 10 to 30 for contestant. In each one of these precincts it was shown that votes were cast by persons whose names were not found on the copy of the registry list in the hands of the judges of election. An oath was administered to each one of these persons, but contestant charged that it was not the oath required by law, and the majority of the committee sustained the charge. The testimony was indefinite. In one case a supervisor of election testified that he had looked up the form of oath required by the law, and that the form he found was used; it was the oath required of challenged voters, with the addition that each voter swore that he had been registered; he was quite confident the oath did not also state that the voter's name had been improperly stricken from the lists. In other cases election officers attempted to repeat the form of oath from memory, but could not give it all. As they gave it it generally included a statement that the voter was a qualified voter and had been registered, but not a statement that his name had been improperly struck from the registry list. In one or two cases they expressed the opinion that it did not include such a statement; in other cases the question was not asked. The form of oath given in section 16 of the election laws of 1868 (the oath to be given to challenged voters without the addition required of voters whose names were not on the registry list) being read to the witnesses, most of them stated that they recognized it as the form of oath which they had used.

The county clerks testified that they had compared the lists of voters with the original registry lists on file in their offices, and had found that large numbers of the voters whose votes were thus admitted on their oaths, because their names were not (or at least were not found

by the election officers) on the copies of the lists at the polls, were actually registered, and their names were on the original lists. Where this evidence showed the number thus found, the committee allowed these votes to stand, but deducted the remainder, not found on the lists at the polls, and not shown to be on the original list, from the votes of the candidates *pro rata* (the loss falling, of course, chiefly on contestee, who had received nearly all the votes at the precincts in question). Mr. Blackburn, however, announced his opinion that all the votes should be deducted, whether found on the original lists or not.

In each of these precincts other irregularities were charged; in some of them that part of the officers were not sworn, or ineligible; in others, that the polls were not opened at the proper hours; in others, that the polls were adjourned for dinner, and the box not properly secured; in others, that there were discrepancies between the ballots, poll books, and returns; in others, that the returns were irregularly made; in one that the ballots were numbered contrary to law, and in another that an excess of ballots was not "purged" according to law. Some of these charges were held to be not proved, and the rest were held to be insufficient to destroy the validity of the returns or election. But Messrs. Blackburn, Poppleton, De Bolt, and Wells announced their opinion that the irregularities in four of the precincts were sufficient to require the rejection of the whole vote, which would largely increase the majority found by the committee for contestant.

Unless some of the precincts above discussed were thrown out entirely, the findings of the committee in regard to them would not overcome all of the majority of contestee. The remaining precinct in controversy, and the one on which the decision of the case must turn, was Colored Academy, in Columbia County. In this precinct fraud was charged, and the committee threw it out altogether. The vote cast was 588 for Walls and 11 for Finley. Rejecting this vote, and deducting the votes found to be illegal in the precincts previously discussed, the returned majority of 371 for Walls would be overcome, and a majority of 343 shown for Finley.

The fraud was charged to have been planned and committed by one Dr. Johnson, with the object of securing his election to the State senate. Dr. Johnson had been killed soon after the election, and hence could not be called as a witness. Part of the evidence of the fraud consisted of statements which the witnesses testified Dr. Johnson had made to them; the rest was circumstantial. Only part of the officers of election were those regularly appointed. Dr. Johnson had invited other persons to act in the place of some who he said would not be able to attend. One of these persons spent the night before the election in his house, and another took breakfast with him. The testimony as to the time the polls were opened was conflicting, but they were probably opened soon after 7 o'clock, instead of 8, the legal hour. Dr. Johnson manifested great eagerness to have the polls opened as early as possible on account of the large vote. All the witnesses testified that he was "figuring how many votes must be cast a minute," and fearful that there would not be time to get all the vote in. (There were 600 votes cast at this poll.) One witness also answered in the affirmative to a question asking him if it was not his impression that Dr. Johnson wanted the polls opened early in order to get votes in without being challenged.

The number of voters whose names were not found on the registry list at the polls, and who were permitted to vote on taking an oath, was estimated as at least 75. One witness swore that they all took the oath prescribed in section 16 of the election laws (the oath required of challenged voters) and no other. The officer who administered the oath testified that most of them took the oath in section 16 only, but a few also took the oath that they had been registered, and that their names had been improperly struck from the list. There were 16 names found on the poll list as voting at the market-house precinct which were also found on the poll list of colored academy. One witness testified to a remark of Dr. Johnson which, it was his impression, referred to voters voting at both of these precincts. Dr. Johnson was also said to have stated that he had brought in 52 voters who were registered in Columbia County, but who were now in other counties, at an expense of over \$300.

One of the clerks of the election testified that Dr. Johnson had given him a list of about 50 names to copy the night before the election. He was not told what the purpose of the names was, but his impression was that he was expected to work them in as votes for Dr. Johnson; he had not done so, and had destroyed the list. Another witness testified that near the close of the day Dr. Johnson had asked some one if he could not fix up a trick to capture the returns from a neighboring Democratic precinct. No attempt was made to do so. The witness believed the election to be unfair, from the fact that Dr. Johnson would call out names and numbers, a person would come up, take a ticket, call out the same name and number and vote, and also from the fact that he believed that some men voted under fictitious names; no one told him so. One of the inspectors of election had been heard since the election, while under the influence of liquor, to say that the votes at his precinct did not tally within 30 or 40, but "there was always a wheel within a wheel."

From all these circumstances the majority of the committee held that fraud had been committed, with the connivance of the election officers, and that the returns must be rejected and no votes counted except upon proof of the number of legal votes cast. There was proof of the number of votes *actually* cast for each candidate, but as the charge was illegal voting this was not sufficient, and all the votes were rejected.

The minority found that these circumstances were not sufficient to prove fraud. The contestee was put at a disadvantage in regard to this precinct by the facts that the county clerk's office had been burned soon after the election, so that the original registration and poll lists could not be produced; that Dr. Johnson had been murdered and could not be produced, and that the contestee was not personally present at taking depositions in this county. He had asserted that if given time he could produce evidence contradicting all the evidence produced, but the committee had refused him opportunity. The circumstances thought to show fraud could all be more easily explained in other ways, except one or two facts sworn to by unreliable witnesses and plainly false. Nearly all the testimony was hearsay; it was only such as the attorney for contestant chose to present, and was in that sense *ex parte*, and it was entirely insufficient to show fraud.

The other precincts were also discussed by the minority and the testimony held to be insufficient to establish the fact that the voters

did not take the full oath required by law in the face of the presumption that they had done so. And in any case most of them were shown to be actually registered on the original lists, and the few others would not be sufficient to change the result unless the colored academy vote were rejected, and if that were rejected the decision of the other points was immaterial.

The case was debated for two days, and the resolutions presented by the minority were rejected by a vote of 84 to 135. The resolutions presented by the committee were then passed without division, and Mr. Finley was sworn in.

[Smith, 367-406.]

(3) *LE MOYNE vs. FARWELL.*

Fraud, irregularities, votes of paupers in the poorhouse. Majority report for contestant; minority report for contestee. Contestant given the seat.

Majority report by Mr. Harris; minority report by Mr. Brown.

The two points on which this case turned were the disposition to be made of the vote of a certain precinct where fraud was committed, and the right of paupers, sent to the poorhouse from other parts of the county, to vote in the poorhouse precinct.

Mr. Farwell received a majority of 186 votes in the district. In the first precinct of the Seventeenth Ward of Chicago, where fraud was proved, he received a majority of 171 votes. In this precinct a fraudulent registration list was prepared, and by its use a large number of illegal votes were cast. Men were registered from vacant lots and from houses where they were proved not to live. Some voted on the names of dead men, and some voted several times. The ballot box was kept for two days after the election in the house of a candidate on the same ticket with contestee before the official returns were made. The ballots were then sealed up and deposited with the county clerk. When they were opened during the taking of testimony in the case it was found that there were 183 names on the poll book for which ballots with corresponding numbers could not be found, and 198 duplicate or triplicate numbers. There were only 673 names on the poll book, but the ballots were numbered up to 677.

These facts, and the existence of fraud, were conceded by both sides, but the majority and minority differed as to the disposition to be made of the votes. The majority held that the poll was to be purged of illegal votes. There were 252 persons shown to have voted illegally who appeared from the numbered ballots in the box to have voted for contestee. The committee deducted these votes from contestee. The minority held that the ballots in a box plainly shown to have been tampered with, as in this case, were not evidence of how the persons whose numbers corresponded to the numbers found on the ballots voted; that the returns of fraudulent election officers were not evidence of the vote, and that no course was left except to reject the returns and count such votes as were proved *aliunde*. Both sides had thus proved a few votes, which were counted by the minority, except some proved by contestant during his ten days for rebuttal.

If the ruling of the majority in regard to this precinct were followed, it would be decisive of the case, whatever disposition might be made of the other points. The ruling of the minority, deducting from con-

testee his majority of 171 at this precinct, would not quite overcome his returned majority, but illegal votes proved in other precincts would overcome the slight remainder, except for a counterclaim in regard to votes illegally cast for contestant by paupers in the county poorhouse.

These persons were inmates of the county poorhouse. They had been taken to the polls by an officer of the institution, who claimed then, and also when called as a witness in the case, that they were not paupers, but employees. Several of them were shown to be regular employees, and their votes were allowed by both sides. The remainder appeared to be employees only in the sense that they did work about the farm, for which they were allowed, in lieu of wages, *extra* clothing, food, privileges, etc. The minority found them to be paupers, and the majority, while presenting arguments to show that they were not proved to be paupers, did not press the point strongly. But the majority held that if they were paupers they might acquire a voting residence at the poorhouse, while the minority held that their legal residences were the places from which they were sent to the poorhouse. State and Congressional decisions were quoted by both sides, showing a conflict of authorities. Each side concluded that the weight of authority was in favor of the ruling favored by it. The supreme court of Illinois had a short time before passed on the point, in a case involving the liability of a township for the support of a pauper. It had decided that the residence of a pauper was the place from which he had come to the poorhouse. The majority held that questions of residence must necessarily be strictly construed when involving questions of property and public burdens, and that it would have been a very unjust decision to hold that the township in which a county poorhouse is situated could be held liable for the support of all the paupers therein contained; but the decision of the State court in construing a police law of the State ought not to be binding on Congress in deciding on a question of the right of suffrage.

The minority held that while the decision in question was made in a case arising under the law for the support of paupers, it covered in its terms the whole question of the residence of paupers, and, under the rule adopted by all Federal tribunals, was binding on Congress. The minority deducted the votes of the paupers from contestant, for whom they were cast. Following the ruling of the minority both these issues would show contestee elected by a majority of from 3 to 28 (depending on the decision of other minor points not here discussed). To follow the ruling of the majority on either issue would give the seat to contestant.

The case was debated several days in the House, and the resolutions presented by the minority were rejected by a vote of 89 to 129. The resolutions presented by the majority were then adopted without division, and Mr. Le Moyne was sworn in.

[Smith, 406-428.]

(4) COX *vs.* STRAIT.

Election districts illegally established. Adjournment for dinner. Irregularities. Bribery. Sitting member retained the seat.

Report by Mr. Harris.

The allegations in this case were: (1) That all the votes cast in what had formerly been the county of Monongalia, but which had been

consolidated with the county of Kandiyohi by the legislature, were illegally given and should be rejected; (2) that certain voting precincts in the county of Lyon had been illegally established; (3) that the votes of certain precincts ought to be rejected for irregularities, consisting chiefly in adjourning for dinner and leaving the box unprotected; and (4) bribery on the part of contestee.

The evidence was found to be wholly insufficient to sustain the charge of bribery. The mere fact of adjournment for dinner, without fraud, was held to be insufficient to vitiate an election, especially under the provisions of the law of Minnesota that returns substantially complying with the law should not be rejected. The irregularity, and some of the other irregularities complained of, were characterized as grave ones; but as there was no proof, or even allegation, that fraud was committed, and some negative proof that it was not committed, the returns were allowed to stand. The allegation that certain precincts in Lyon County were illegally established was sustained. The law provided that the board of county commissioners should meet at certain times in the year, and in extra sessions at other times when deemed necessary by a majority of the board. At their stated meetings in January and September they were empowered, under certain circumstances, to establish election districts. The election districts complained of in this county were established at an extra session, and were hence illegal. All the votes cast at them were rejected.

The charge that the consolidation of the counties of Monongalia and Kandiyohi was illegal, and that the territory formerly included in Monongalia County was consequently not included in the Second Congressional district, was not sustained. Under the constitution of Minnesota the legislature had the right to establish new counties containing at least 400 miles and to enlarge the dimensions of counties already established at the time of the adoption of the constitution, but not to reduce them below 400 miles. The contestant claimed that the consolidation of these two counties under the name of one of them, being virtually an abolition of the other county, was a reduction of that county below the limit of 400 miles. But the committee held that the evil against which the provision of the constitution was directed was not the abolition of counties, but the construction of counties smaller than 400 miles. The action of the legislature in this case had precisely the opposite effect, and there being nothing in the constitution to prohibit it, the consolidation of the counties by the legislature was clearly constitutional. But even if it were not, the claim of contestant could not be sustained. The legislature in dividing the territory of the State into Congressional districts had prescribed that certain named counties should constitute the First district; certain others, including Kandiyohi, the Second district; and the remainder of the State the Third district. The legislature in designating the county of Kandiyohi as part of the Second district plainly must have intended the county as formed by itself, and could not be construed to have placed the territory formerly constituting the county of Monongalia in the Third district.

Deducting from the vote of contestee the majority he received in the illegally established districts in Lyon County, he was found still to have a majority of 110 votes. The committee were unanimous in sustaining the right of contestee to the seat, and the House adopted the resolutions presented without debate or division.

[Smith, 428-437.]

(5) SPENCER vs. MOREY.

Irregularities. Majority report for contestant; minority report for contestee. Contestant given the seat.

Majority report by Mr. House; minority report by Mr. Wells.

The election and returns of the Fifth ward of Concordia Parish and of all five wards of Carroll Parish were brought in issue in this case. In the district outside of the contested wards contestant had a majority of 1,396 votes, which would be much more than overcome if the returns of the six contested wards were to be counted.

The return of the Fifth ward of Concordia Parish was attacked on the grounds that the box was carried on the night of the election 16 miles to the county seat before counting the vote; that two days were consumed in the count, and that the tally sheets were kept by unsworn outsiders. The law of Louisiana in force at previous elections had required the box to be taken to the county seat to be counted, but the new law required the count to be made at the polls, immediately at the close of the election, in the presence of such electors as chose to be present, and the returns to be made within twenty-four hours. The evidence was the testimony of one of the judges of election, corroborated in all respects but one by each of the other officers of election. He testified that at the close of the polls the other judges were of the opinion that the box should be taken to the county seat to be counted. He was of the contrary opinion, but, having no book of instructions, was governed by the wishes of the other judges. In this he was contradicted by one of the other judges and partly by another. The remainder of his testimony was corroborated. The box was locked, he taking the key and another judge the box. Part of the way he rode in the buggy with the judge who had the box. He was a friend of contestant, the judge who had the box of contestee. The count was partly completed that night, and finished during the next day and night. Whenever the judges separated for any cause, the box was locked, and the box and key kept by judges of opposing parties. The tally list was kept by such persons as could be found at the courthouse, under the supervision of the judges. The witness did not believe it was very regularly kept, but thought it was as correctly kept as it could have been under the circumstances.

The committee found that the irregularities and violations of law were of an extraordinary nature, and the testimony somewhat suspicious, but, waiving the question whether the provisions of the law in regard to the place, time, and public manner of counting the vote, which were violated, were directory or mandatory, the requirement that the officers should make a correct count was certainly mandatory. It was impossible for the judges to know whether the count was correct or not if the tally sheet, on which the returns were based, was kept by unsworn outsiders. It was impossible to believe from the testimony that the supervision of the tally keeper by the judges was of such a nature that they could know whether the tally was correctly kept or not. Unless it was correctly kept, the returns were incorrect.

The commissioners disregarded an imperative provision of the law, without the observance of which there can be no safety or certainty in elections. The integrity of the returns and their *prima facie* character are therefore destroyed. There being no proof outside of the returns of the vote of this ward or poll, it must be excluded from the count.

In Carroll Parish it appeared that the ballots and other papers required to be deposited with the clerk of the county were not to be found in the office. A deputy clerk testified that they had never been filed, but a judge of election of one of the wards testified that he had filed his, and others testified generally that they had done their full duty. The committee considered the proof sufficient to establish the vote of the Fourth and Fifth wards, but rejected that of the First, Second, and Third wards.

In the First Ward the proof of the vote was one of the original returns, produced by a witness who had been a commissioner of election in the Third Ward, but had no official connection with this ward. He testified that it had been given him by the county clerk. Its identity and correctness were sworn to by the commissioners whose names were signed to it. The committee hesitated to receive as evidence of the vote a return found in the unexplained possession of an unauthorized outsider, and unaccompanied by its legal companions, the ballots, tally sheets, etc., whose disappearance was unexplained. But there were other infirmative considerations which were conclusive of the invalidity of this return. There was evidence that the commissioner who received the ballots had changed one or two of them before putting them into the box, and he had been seen handing out greenbacks to voters with their registration tickets.

In the Second Ward there was evidence that part of the signatures to the return counted by the State board were forged. There were no ballots or tally sheets from this ward, as from the others. The poll list was in evidence, showing 713 votes cast. The officers of election testified from memory that the vote was 48, 49, or 50 for Spencer, 3 or 4 blank on Congressman, and the rest for Morey. One witness testified that he had found 65 votes for Spencer on the tally sheet, and he thought more were cast. The tally sheet had been partly kept by unsworn bystanders. The committee found that the return was impeached and not evidence of the vote, and that the memories of witnesses, no two of whom exactly agreed, as to the vote cast at an election six months before, could not furnish evidence certain enough to establish the vote, especially when they were based on the count of a tally sheet partly kept by unsworn outsiders.

From the Third Ward the returns and other papers had also disappeared. The evidence of the vote was the testimony of one witness that he thought about 550 votes were cast, Spencer received 7, there were 2 blanks for Congress, and Morey received the rest; and evidence that one of the judges of election had made affidavit immediately after the election that 510 votes were cast, Spencer received 7, 2 were blank, and Morey received the remainder. Most of the witnesses testified that the election was quiet and universally conceded to be fair, but one witness testified to disturbances between two factions of the Republican party, both of which supported contestee for Congress. The committee held the evidence to be insufficient to establish the vote.

The minority disagreed as to all these points. The action of the commissioners of the Fifth Ward of Concordia Parish in taking the box to the county seat to be counted was due to a misconception of the law, and every precaution was taken to prevent even the possibility or suspicion of fraud. The House had frequently decided that the introduction of unsworn persons to assist in carrying on the election or making the returns did not vitiate the return in the absence of proof of fraud.

In Carroll Parish no proof was furnished by either side to account for the mysterious disappearance of the ballots and tally sheets from the clerk's office. But their disappearance ought not to deprive contestee of the vote he actually received, if that vote could be ascertained in any way. In the First Ward the proof was conclusive. The original return was produced by an unauthorized person, but he testified that he had received it from the county clerk, and the commissioners who made it out and signed it testified to its identity, and that it had not been tampered with, which would cure any irregularities in the manner of its presentation. In the Second Ward the proof of the number of votes cast was the original poll list. The judges of election agreed that Spencer had received 48, 49, or 50 votes, there were 3 blanks, and Morey had received the rest. A partisan of contestant's testified that he had found 65 votes for him on the tally sheet; it was conceded the rest were for Morey. Contestant certainly could not claim more votes than the highest number testified to for him, or deny to contestee the least number testified to. The case of the Third Ward was similar. In all these wards it was conceded that an election was held, that it was fairly and regularly held, and the votes regularly and correctly counted. That election ought not to be set aside on account of the unexplained disappearance of all the papers which should have been in the county clerk's office, if the vote cast could be ascertained in any way. The evidence was such as to satisfy the minds of the minority as to the number of votes cast for each candidate, but if it were conceded that it was too indefinite or not legally sufficient, the equities of the case forbade the seating of contestant. Whether the vote in these wards could be definitely proved or not, the evidence was uncontradicted that contestee had received nearly all the votes cast in them. It followed that contestant was the minority candidate, and if the wards in question must be thrown out, a new election ought to be ordered rather than seat the minority candidate.

The case was fully debated, and a substitute resolution offered by Mr. McCrary, giving the parties further time to prove the actual vote in the first three wards of Carroll Parish, was rejected by a vote of 76 to 101. The resolutions presented by the minority were also rejected by a vote of 74 to 99, and those presented by the majority adopted without division. Mr. Spencer was sworn in a few days later.

[Smith, 437-589.]

(6) LEE vs. RAINEY.

-Name improperly spelled on ballots. Contestee retained the seat.

Report by Mr. Harris.

In the county of Georgetown 669 ballots bearing the name "Jas. H. Rainey" were cast. It was proved that they were printed for Joseph H. Rainey and distributed in his interest; that the voters were informed by the person who had printed the ballots that they were for Joseph H. Rainey, and that there was no person by the name of James H. Rainey, or any similar name, except contestee, a candidate for Congress. The committee held the law to be that where the intention of the voter was clearly shown it should be followed, if it could be done without contradicting the ballot. In this the intention was unmistakable, and the committee unanimously refused to reject the ballots. The resolutions presented confirming the sitting member in his seat were adopted without division.

[Smith, 589-592.]

(7) FENN vs. BENNETT.

Returns rejected for irregularities by Territorial canvassing boards counted and contestant given the seat.

Report by Mr. House.

Returns had been rejected by the Territorial canvassing board because votes were returned for Hon. S. S. Fenn; because the Congressional return was not made on a separate sheet, and because the county returns had been canvassed by three county officers under an old law instead of by the county commissioners, as required by the law then in force, and for other irregularities. The committee counted all the returns, there being no charge that they did not correctly represent the vote, and recommended the seating of contestant, who had received a majority of all the votes. The resolutions presented were passed without debate or division, and Mr. Fenn was sworn in.

[Smith, 591, 592.]

(8) ABBOTT vs. FROST.

Fraud, irregularities, illegal votes, and bribery. Majority report for contestant; minority report for contestee. Contestant given the seat.

Majority report by Mr. Poppleton; minority report by Mr. Baker.

Contestant charged that the ballots, check list, and return of the Fourth Ward of Chelsea were not returned forthwith by a constable, but were returned the next morning by a policeman; that certain votes cast for him without giving his name in full had not been counted for him, and made general charges of fraud, bribery, and illegal voting.

The law required the officers of election to count the votes, and after making out their returns to seal up the ballots and forward them forthwith by a constable or ward officer to the city clerk's office. The count in the other wards of Chelsea was completed by 9 o'clock in the evening and the election papers regularly forwarded, but in the Fourth Ward the ballots were not returned until after 1 o'clock. The ballots were sealed up and given to a police officer, who carried them to the city clerk's office, and finding it closed, took them into the marshal's office and left them with the captain of the night watch. The next morning at 7 o'clock he received the envelope from the night watchman, found that the seals had not been tampered with, and delivered it to the city clerk. The ballots were afterwards recounted by the board of aldermen, with the ballots of other precincts, and found to agree with the returns regularly forwarded on the night of the election to the city marshal's office.

The committee held that the law had been violated in not returning the ballots forthwith to the city clerk's office, in forwarding them by an officer not authorized by law, and in leaving them for several hours in the custody of an unauthorized person.

We are clearly of the opinion that the provisions of the statute, which have been so totally and unblushingly disregarded in this case, are not merely formal and directory, but vital and essential, in order to render the election fair and free from fraud or the suspicion of fraud, for we hold it to be the duty of election officers to so conduct the election and everything thereto appertaining as to as carefully guard against suspicion of or opportunity for fraud as fraud itself. Nothing short of this will satisfy either the spirit or letter of a statute made and enacted to protect and maintain the purity of elections, as was the unquestioned purpose of the law under consideration.

The ballots having been "out of the legal and proper custody, it must be proven that, while illegally held, they were not tampered with." But the night watchman, in whose custody they were for seven hours, was not called as a witness. And the committee found "serious reasons for suspecting that actual fraud was committed in favor of the returned member in this ward." A witness testified that he had made the rounds of the precincts on the night of the election and had stopped at this precinct after 10 o'clock. The count appeared to be completed, and he was told that the returns had been sent to the city marshal's office. He was told the vote, and going to the city marshal's office, was also told the vote; the two statements agreed. His memory of the statements made him on the night of the election was that the vote was about 400—perhaps more—for Frost and about 150 for Abbott. The vote as returned, and as found by the board of aldermen in counting the ballots, was 575 to 105. A witness also testified that he had overheard one McMichael, a partisan of contestee, say that he had given instructions to have the returns of this ward kept back. This was denied by McMichael, but the committee held that the testimony, in connection with other testimony, was "not without significance, and taken with the other facts and circumstances in the case, presents such evidences of actual fraud as to call loudly for affirmative evidence of the entire absence of such fraud." "There being no proof *aliunde* of the vote at Ward 4, Chelsea, your committee is of opinion that the entire vote must be excluded from the count."

The minority disagreed as to this poll. The law which was violated was clearly directory, and all that was proved was that the ballots were not returned as promptly as they might have been, were carried by a police officer instead of a constable, and were left sealed with a night watchman because the clerk's office was closed. The fact that the seals were intact showed that the ballots had not been tampered with, and in any case the returns, which were regular and not in any way attacked, were proof of the vote. The fact that the ballots, on being recounted, agreed with the returns, was additional proof that they had not been tampered with. The evidence relied on to establish a suspicion of fraud ought not to be considered, because contestant in his notice had not charged fraud, but had merely asked that the vote be thrown out on account of the irregularity in returning the ballots; but if it were to be considered it was utterly insufficient. The testimony of a witness as to the statement of the result made him on the night of the election was confessedly based on a very vague remembrance and the rest was all hearsay, and of a sort especially illustrative of the danger of receiving hearsay testimony. Most of it was fully contradicted. Mr. Thompson, who agreed to the conclusions of the majority report, agreed with the minority in regard to this precinct.

The general charges of fraud and illegal voting resolved themselves in the testimony into charges that in the Second and Fifth wards of Boston large numbers of votes were counted for contestee which were not cast, or were cast by fraudulent voters or repeaters. The committee unanimously agreed to deduct 135 votes from contestee in these two wards, the majority briefly stating that the charges of fraud were sustained, and the minority arguing that there was no proof of fraud and that the agreement to deduct these votes was merely a compromise made necessary by the strangely incomplete condition of the

testimony. Two illegal votes were also agreed upon in the town of Winthrop.

The only remaining issue was that of bribery. The specification in the notice of contest was—

That many votes were cast and counted at said election for you in said Fourth Congressional district by persons who were induced to cast said votes by paying, giving, and bestowing upon such voters gifts and rewards and by promising to pay, give, and bestow to and upon such voters gifts and rewards.

This charge resolved itself in the evidence into the charge that a large increase in the force of the Boston Navy-Yard just before the election was for the purpose of corrupting voters by giving them employment in return for their votes. It was proved that an effort had been made to increase the force for some time before the election, which was resisted by the commandant in charge on the ground that his allowance of money was not sufficient to pay the wages of an increased force. Shortly before the election he was instructed by the Chief of the Bureau of Construction to increase his force, with the assurance that a sufficient allowance of money would be made. The force was largely increased, the appointments being mostly made on the recommendations of various prominent Republicans, including contestee. One of the letters of recommendation mentioned that the man would be used at the polls. The person who made this recommendation testified that he made it because he understood the applicant was an influential Republican; he had lost his position and would go out of the district before election day unless he could find work. One of the men who had been discharged after the election testified that the force was so large that there was not work for large numbers of the men, and they spent their time loafing, playing checkers, holding meetings, etc. This was denied by the officers in charge of the departments where it was charged. The commandant of the yard testified that all the men were fully employed, but that he thought all the work necessary to be done could have been done by a smaller force. He had resisted the increase on account of the shortness of the funds allowed him, but had evidently been overruled by those having more influence than himself. He was of the impression that the only necessity for the increase was a political one. After the election, owing to the shortness of funds, it had been necessary to reduce the force below the point of efficiency.

There was evidence that it was a matter of common report, and discussed in the newspapers, that these men were employed for political reasons, and for the purpose of inducing them to vote for contestee. A naval officer had been seen on election day with tickets in his hands in a place where it was convenient to distribute them to the men on their way to the polls.

From all the testimony in this case, the committee are forced irresistibly to the conclusion that employment was given to those men as part consideration, and that they entered into and accepted such employment with the full understanding that they were to vote for the contestee, and, by the application of the rules of law heretofore laid down, the votes of all such must be disregarded.

The "rules hitherto laid down" were that if the giving of employment was for the purpose of influencing the vote of the elector, and he accepted it with a direct or indirect understanding to that effect, he was to be presumed to have voted in accordance with the implied agreement, and unless the contrary was shown by evidence the pre-

sumption became conclusive. The vote of an elector thus bribed was held to be illegal.

It was shown that there had been an increase of at least 300 men in the navy-yard before the election, and the committee presumed that that number had voted illegally for contestee, there being no proof to the contrary, and subtracted 300 from his total vote.

The minority held that the general charge of bribery was not specific enough to raise an issue or justify the committee in considering the testimony. The contestant sought to have the votes of these alleged bribed electors thrown out as illegal, and under the general rule (McCrary, § 344) in regard to specifications of illegal votes he should at least have specified the number of votes and when, where, and for whom they were cast. He had not specified the number or place further than to charge "many votes," and that they were cast "in the said Congressional district." Although the contestee had not objected to the sufficiency of the notice, and hence might be taken to have waived the point, he had no right to waive away the rights of the people to have the case decided in a legal manner, or the right of the committee to have some notice of the issues in the case other than what they might infer from an examination of the testimony.

But even if the evidence were to be considered, it was clearly insufficient. The statute of Massachusetts did not prescribe among the penalties for bribery either that the voter should be disfranchised or the briber disqualified from holding office. The minority thought the true rule to be that where a voter was shown to have been bribed by a candidate or any one for him, to have voted, and to have voted for the candidate by whom he was bribed, his vote should be deducted. In this case there was no pretense of proof that the alleged bribed voters had voted for Mr. Frost, or had voted at all, and they certainly could not be presumed to have done so without proof. And there was no sufficient proof that any voters had been bribed. The increase in the force was abundantly justified by the needs of the public service, and the reduction afterwards was from lack of money, not from lack of work to be done. All the trustworthy testimony was that the men were fully employed, the little testimony to the contrary was discredited. The only possible indication of bribery was, then, that these men were recommended for employment by Republicans. But men were employed who could not vote as well as those who could; no questions were asked and no conditions, express or implied, laid down when the employment was given, and no officer of the Government or any other person was shown to have made any attempt to influence the vote of any employee. True, under the maxim "to the victors belong the spoils" (to the application of which the party of the contestant ought to be the last to object), it was probable that most of the applicants were Republicans, and were recommended and employed in preference to others because they were Republicans. This was true of any department of the Government. But pernicious as the principle must be conceded to be, it had certainly never before been contended that if a man asked the influence of a member or candidate for Congress of his own party to aid him in obtaining Government employment he was thereby disfranchised. There was no other proof than this that any one had been bribed, and no proof at all that the persons in question had voted for Mr. Frost, or had voted at all.

The case was fully debated and the resolutions presented by the

minority in favor of contestee were rejected by a vote of 79 to 103. The resolutions presented by the committee were then passed without division and Mr. Frost was sworn in a few days later. [Smith, 594-649.]

(9) *PLATT vs. GOODE.*

Returns irregular and unsealed; illegal votes; ballots in wrong boxes; bribery. Majority report for contestant; minority report for contestee. Contestee retained the seat.

Majority report by Mr. Brown; minority report by Mr. Blackburn.

Contestant had a majority on the face of all the returns, but the State canvassers threw out the vote of Prince George County on the ground that the returns were not attested by the county clerk, and awarded the certificate to contestee. Contestant claimed the seat on the grounds that the votes of this county should be counted; that 206 votes illegally rejected by the commissioners in Nansemond County should be counted, and that the vote of York County should be thrown out on account of fraud and violence. Contestee claimed that, even if the return of Prince George County could be accepted, the votes of two precincts of the county ought to be rejected, because the ballots and poll books were not returned to the county clerk's office sealed, as required by law; that certain precincts ought to be rejected on account of illegal votes; and that the precincts in which the employees of the Norfolk Navy-Yard chiefly voted ought to be thrown out for bribery. A majority, composed of Messrs. Brown, Baker, Townsend, Wells, Thompson, and House, reported in favor of contestant; a minority, composed of Messrs. Blackburn, De Bolt, Poppleton, Beebe, and Harris, reported in favor of contestee. Messrs. Thompson and House did not agree to all the findings of the majority report, and Mr. Harris reserved the right to nonconcur in some details of the minority report.

The principal issues on which the committee differed were the charge of bribery in the navy-yard vote and the propriety of excluding the votes of Bland and Rives precincts, in Prince George County, because the returns were not sealed. On the latter issue, as will appear, the result of the case must turn. Taking up the other issues first, the majority held that the rejection of the return of Prince George County by the State canvassers was arbitrary and illegal. The law required the return to be certified by the board of county commissioners, attested by the clerk under his seal, and deposited with the clerk. A certified copy was to be forwarded to the seat of government. In this case the return was not attested by the clerk, but was certified by the county commissioners and the copy certified by the clerk. The majority were of the opinion that it was a substantial compliance with the law if the clerk certified to the return as the act of the board, even if he did not also attach to it his formal attestation. Or, if the return was informal, it was the duty of the secretary of the Commonwealth, under the law, to send a special messenger for a formal return. This he refused to do. The minority were of the opinion that the return was properly rejected as informal, but, the House having the power to go behind the returns, the vote of Bland and Rives precincts (to be hereafter discussed) must at least be rejected, which would have the same effect on the result as the rejection of the whole county.

The committee unanimously agreed to count the 206 votes rejected

in Nansemond County, but the minority held that they were properly rejected by the State canvassers, and could only be counted under the broader power of the House. The law of Virginia required the election officers "to open a poll" to take the sense of the voters upon constitutional amendments. In some parts of this county a separate box was not used and the ballots rejected were Congressional ballots having also printed on them votes on the constitutional amendments; a few of them had the vote on the amendments on a separate paper, folded inside of the Congressional ballot. In Norfolk, where two boxes were used, 12 votes against the amendments were found in the Congressional box and 12 votes for Mr. Platt in the constitutional-amendment box. The majority favored counting these votes; the minority approved their rejection.

The committee were also unanimous in refusing to allow contestant's claim that the vote of York County should be thrown out. The illegal votes charged by contestee were the votes of persons registered for the first time on election day, the last day provided by law for registration being ten days earlier. The majority deducted these votes, to the number of 55, from the candidates proportionally. Contestee claimed that the precincts where these votes were cast should be thrown out. The minority stated the number of the votes as 90, and gave arguments in favor of throwing out the precincts and of deducting all the votes from Mr. Platt, but did not decide between these courses and waived the whole question in ascertaining the result of the case.

Upon the question of the Norfolk Navy-Yard vote, Messrs. Thompson and House agreed with the minority, so that the finding of the majority report on this point was approved by only a minority of the committee. According to the majority report, it was shown that assessments were made for campaign purposes on the employees of the navy-yard. The committee regarded this practice as demoralizing and believed that it ought to be made a criminal offense, but did not believe that it ought to affect the result of the election, unless it was shown that the money thus raised was used corruptly, which was not claimed in this case. It was further shown that a large number of men were employed in the navy-yard during the fall months of 1874, but not so large a number as during the preceding year, when there was no election. Some Democrats were employed and many voted for Mr. Goode without losing their places. Most of the men employed were Republicans, as was to be expected. The committee believed that bribery might be committed by the employment of men in a navy-yard, but the mere fact of employment did not constitute bribery. It must be shown that the employment was for the purpose of making the men vote contrary to what they would otherwise do and that they did so vote. There was no attempt at such proof, and the presumption was that the men employed were Republicans already and hence the employment did not change their votes or the result.

According to the minority report it was shown that an increase of from 900 to 1,400 was made in the navy-yard force previous to the election; that the new employees were generally introduced by the executive committee of the Republican party, and "that it was generally understood that they would be expected to vote the Republican ticket." The minority held that—

The giving and the acceptance of such employment upon the terms and conditions stated constitute bribery in law. The *onus* of proving that such persons did not carry out, in good faith, the agreement made rests upon the contestant.

It was also shown that assessments were levied on the employees, that tickets for contestant were given them, and that they were closely watched to see how they voted; in short, that the Government patronage was prostituted to secure the election of contestant. Votes secured by such methods ought not to be counted; the record furnished no method of eliminating them, and the only course was to throw out the entire vote of the three precincts in which most of these votes were shown to have been cast.

If the votes of Bland and Rives precincts were to be counted, but the findings of the minority followed on all other points, contestant would still have a majority of 59 votes, which would not be overcome by deducting the illegal votes, even at the largest estimate of their number, proportionally from the candidates. For this reason Messrs. Thompson and House, agreeing with the majority as to these precincts, agreed to the conclusion of the majority report. The majority for Mr. Goode found in the minority report, adopted by the House, was based on the rejection of these two precincts. The law required the judges to seal up the returns, ballots, and one of the poll books, and forward them by one of their number to the county clerk. The testimony showed that the ballots and poll books of these two precincts were returned unsealed. The majority held that the law requiring them to be sealed was directory, and in the absence of proof or suspicion of fraud the votes should not be rejected. (McCrary, § 166, and elsewhere.) In this case there was neither proof nor suspicion of fraud, and the fact that the elections had been held by and the returns and ballots been in the custody of Democratic officers alone, raised a presumption that if fraud had been committed it would not have been in favor of contestant.

The minority held that the law was mandatory, and that it was not necessary that there should be positive proof that the ballots had been tampered with.

It is sufficient to show that opportunity for such tampering has been afforded. The burden of proving that this has not been done devolves upon the party insisting upon the count.

Mr. Platt received a majority of 408 votes in these precincts, and rejecting them a majority of 349 votes for Mr. Goode is shown.

The case was debated several days, and the resolutions presented by the majority were rejected by a vote of 106 to 98. The resolutions presented by the *minority* were then adopted by a vote of 107 to 95, and Mr. Goode was accordingly confirmed in his seat.

[Smith, 650-683.]

(10) BUTTZ *vs.* MACKEY.

Fraud, repeating, bribery, and intimidation. Committee unanimously reported that neither candidate was elected. Seat declared vacant.

Report by Mr. Thompson.

Contestant had a majority of 2,537 votes in the district. In the city of Charleston, in which one-third of the votes in the district were cast, his majority was 5,548. The only issues in the case considered by the committee were the charges against the validity of the election in the whole city of Charleston, on account of fraud, repeating, bribery, and intimidation committed by friends of contestee and in his

interest. All the testimony was taken by contestant, contestee having made no effort to procure any. Contestee objected to all the testimony taken by contestant after the forty days allowed him by the law of 1873. The parties seemed to have proceeded in ignorance of this law, and the testimony was taken without objection as under the law formerly in force, until some time after the expiration of the forty days, when contestee for the first time objected. The committee received all the testimony taken previous to contestee's first objection and excluded the rest.

The testimony showed in every precinct in the city of Charleston such fraud, repeating, bribery, and intimidation committed by friends of contestee, apparently with the aid and collusion of the election officers, that the committee unanimously agreed that the vote of the whole city must be thrown out. The remainder of the district gave a large majority for contestant, but the committee concluded that, having thrown out the vote of one-third of the district, it was impossible to tell who really received the majority of all the legal votes cast, and that it would be more just to order a new election.

Attention was called to the looseness of the South Carolina law, which required no registration and permitted voters to vote in any precinct in the county. With a proper registration and election law many of the frauds shown in this case could not have been committed.

The resolutions presented were passed without division, and the seat was accordingly declared vacant.

[Smith, 683-689.]

H. Doc. 510—21

FORTY-FIFTH CONGRESS (D.), 1877-1879.

Committee on Elections.

Mr. HARRIS, Virginia,	Mr. ELLIS, Louisiana,
SPRINGER, Illinois,	WAIT, Connecticut,
CANDLER, Georgia,	THORNBURGH, Tennessee,
TURNER, Pennsylvania,	PRICE, Iowa,
COBB, Alabama,	HISCOCK, New York,
Mr. WILLIAMS, Indiana.	

Cases.

- (1) Peter D. Wigginton *vs.* Romualdo Pacheco, *California.*
- (2) Thomas M. Patterson *vs.* James B. Belford, *Colorado.*
- (3) Jesse J. Finley *vs.* Horatio Bisbee, jr., *Florida.*
- (4) Joseph H. Acklen *vs.* Chester B. Darrall, *Louisiana.*
- (5) Benjamin Dean *vs.* Walbridge A. Field *Massachusetts.*
- (6) John S. Richardson *vs.* Joseph H. Rainey, *South Carolina.*
- (7) R. Graham Frost *vs.* Lyne S. Metcalfe, *Missouri.*

(1) WIGGINTON *vs.* PACHECO.

Illegal alteration of returns; illegal votes. Majority report for contestant, minority report for contestee. Contestant seated.

Majority report by Mr. Harris; minority report by Mr. Wait.

Partially dissenting report by Mr. Springer, Mr. Candler, and Mr. Ellis.

According to the returns as certified to the secretary of state, contestee had a majority of one vote. Contestant claimed that according to the returns as ascertained by the county canvassers he had received a majority of one vote, but that the return from one county and the records of the board of supervisors had been illegally altered by the clerk of the board by subtracting two votes from contestant's vote.

This question had been involved in proceedings between the parties before the various courts of California, and most of the evidence presented consisted of transcripts from the proceedings of these courts. Part of it consisted of *ex parte* affidavits, and could not be considered. But one of the affidavits, that of the clerk who made the change, had been included by contestee in a sworn petition for a writ of mandamus on the secretary of state, and it was claimed that contestee was thereby bound by this affidavit. The committee did not decide this question. According to this affidavit, the total of the votes for contestant in this county, as taken down by the clerk of the board of supervisors in his notes of the meeting of the board, was 988. After the adjournment of the board the attention of the clerk was called to the fact that according to the notes taken by two of the members of the board, the vote was 986. A comparison of the clerk's notes with the notes of these members showed that he had set down the vote of one precinct as 29 and they as 27. An examination of the tally sheet and return of this precinct showed that the true vote was 27, and the clerk

accordingly altered his records so as to show a total vote of 986 for contestant. The certificate of the vote was made out by the clerk and signed by him and the president of the board, showing the vote as 986, and forwarded to the secretary of state.

The committee held that the certificate thus made out and signed by the president and clerk of the board, and the official record kept by the clerk, were the official evidence of the vote, and must stand until shown not to represent the true vote cast. The evidence presented by contestant, even if admissible, did not show this, and the return must therefore stand as made.

Mr. Springer, in a dissenting report, held that under the law of California the vote as found by the board must stand until proved to be incorrect on a contest. The affidavit forwarded by the clerk of the board to the secretary of state amounted to a second certificate of the vote; it was legal evidence, on the principle given above as not decided by the committee, and, there being two certificates, that should stand which represented the vote as found by the board.

In addition to the above question, contestant asked that two polls be thrown out for irregularities, and that certain ballots be rejected as marked, and both parties charged illegal votes.

At the two polls complained of the law had been violated by exhibiting open tickets and otherwise doing prohibited acts within 100 feet of the polls. The committee held that while the violators of the law might be punished, the poll ought not to be rejected. The ballots asked to be rejected as marked were ballots on which the judges had written the word "challenged" and the name of the voter. The statute provided that ballots having on the outside "any impression, device, color, or thing" should be rejected, and the committee held that under the letter of this statute these ballots must be rejected. But the spirit of the law was evidently otherwise; "the law was made to protect the voter, not to disfranchise him," and the committee counted the votes. If the voters had placed the marks on the ballots they should have been rejected. One of the individual illegal votes charged by contestee also involved the question of marked ballots. One of the voters had written his own name at the bottom of the ballot. One section of the statute provided that—

When a ballot found in any ballot box bears upon it any impression, device, color, or thing, or is folded in a manner intended to designate or impart knowledge of the person who voted such ballot, it must, with all its contents, be rejected.

The committee held that under this statute an invalidating mark on the face of the ballot must be one intended to impart knowledge of the person who voted the ballot, and that the voter's name at the bottom of the ballot was not such a mark. The minority held that any mark was included in the terms of the statutes, and also that the voter's name in his own handwriting was calculated to impart knowledge of his identity.

The committee found that 12 votes were illegally cast for contestee by nonresidents or unnaturalized or unregistered persons. The minority found the proof sufficient as to only 8 of these. The committee also found 6 votes illegally cast for contestant by similarly disqualified persons. The minority found 11. Some of the legal questions involved in these votes are referred to elsewhere, but they need not be outlined here. According to the findings of the majority, contestant had a majority of 4 votes; according to those of the minority, contestee had

a majority of 6. Mr. Springer, Mr. Candler, and Mr. Ellis concurred in the result of the majority report, but differed as to some details.

After some debate the House adopted the resolutions presented by the majority by a vote of 136 to 125, and Mr. Wigginton was sworn in. [1 Ellis., 5-51.]

(2) PATTERSON *vs.* BELFORD.

Legal time of election. Majority report for contestant; minority report for contestee; report by Mr. Cox for a new election. Contestant seated.

Majority report by Mr. Harris; minority report by Mr. Wait; further dissenting report by Mr. Cox.

At the time of the admission of Colorado into the Union it was entitled to representation for the unexpired term of the Forty-fourth Congress. At the general election held October 3, 1876, Mr. Belford was elected to this unexpired term. At the same election votes were cast for Representative in the Forty-fifth Congress, and Mr. Belford received a majority of the votes and was given a certificate of election. Another election was held for Representative in Congress on November 7, 1876, at which Mr. Patterson received nearly all the votes cast. A very full vote was cast at the October election and a very light one in November. The parties claiming the seat under different elections, neither party was sworn in, and the matter was referred to the Committee on Elections for determination. Most of the facts in the case were conceded. A proclamation was issued from the office of the secretary of state on August 31, giving notice of a general election on October 3, including an election for Representative for the unexpired term of the Forty-fourth Congress. On September 14 another proclamation was made giving notice of an election on November 7 for Representative in the Forty-fifth Congress. On October 3 the general election was held. On October 16 the secretary of state withdrew his notice of the November election. The November election was held, but the friends of Mr. Belford did not take part in it, and only 3,580 votes were cast. The majority of the committee held that the election in November was the legal election. The law of the United States provided (Revised Statutes, sec. 25) that all elections for Representatives in Congress should be held on that day, and this law must apply to the present case unless it could be shown to be excepted by some other provision of the law. The act of March 3, 1875, excepting those States whose constitutions would have to be amended to enable them to comply with the law was conceded not to apply to Colorado; but it was claimed that the enabling act under which Colorado became a State did except it. The sixth section of the enabling act was as follows:

That until the next general census said State shall be entitled to one Representative in the House of Representatives of the United States, which Representative, together with the governor and State and other officers provided for in said constitution, shall be elected on a day subsequent to the adoption of the constitution, and to be fixed by said constitutional convention; and until such State officers are elected and qualified under the provisions of the constitution the Territorial officers shall continue to discharge the duties of their respective offices.

The committee held that the election thus provided to be fixed by the constitutional convention was the first election to be held, and not all elections "prior to the next general census." The provision that the Territorial officers should hold until "such State officers are elected"

showed that the State officers referred to were the ones first elected; and the "one Representative" referred to could not constitutionally be a Representative who should continue until the next census. Hence the constitutional convention had power to provide for but one election. It had only attempted to do this. The provision was:

One Representative in the Congress of the United States shall be elected from the State at large at the first election under the constitution, and thereafter at such times and places and in such manner as may be prescribed by law.

The legislature had not "prescribed by law" any time for holding subsequent elections, but the Territorial election laws were continued in operation by the constitution. These laws provided the places, manner, and machinery of elections, which could be and were used at the November election, and the Federal statutes, applying to Colorado as to other States, provided the time. Mr. Patterson being elected at the election held at the legal time was entitled to the seat.

The committee held that the time of election was the only question involved in the case. The laws fixing the time of elections were mandatory, and could not be abrogated even by the consent of all the voters. But the fact that the October election was without notice, and that the notice of the November election was withdrawn, would not vitiate either election. Neither would the election in November be vitiated by the fact that the votes were not canvassed by the State officers, nor by the fact that a light vote was cast. The supporters of Mr. Belford voluntarily remained away from the November election and must abide by the result.

The minority held that Congress in the enabling act had excepted Colorado from the provisions of the Federal statute fixing the time of elections, and had empowered the constitutional convention to fix the time, and that this power had been exercised by the convention. The enabling act, in referring to State officers and Representatives in Congress, clearly referred to all who should be elected prior to the next census. The election for Representative was required to be on the same day as that for State officers, and hence if it could not be legally held in October it could not be held at all. The election for the unexpired term of the Forty-fourth Congress was to fill a vacancy, and under the constitution should have been held on a writ from the executive. The first regular election for Congress was that for the Forty-fifth Congress, and that must have been the one provided for by the convention. The validity of the October election was further sustained by the fact that the people, by casting a full vote at it, had construed it to be the legal one.

Mr. Cox filed a report contending that no valid election had been held. He held that the enabling act had excepted Colorado from the provisions of the Federal law; that the convention had legally fixed October 3 as the date for holding an election to fill the unexpired term of the Forty-fourth Congress, and had legally provided that subsequent elections should be held at the times fixed by law. The legislature had fixed no time, and hence there was no legal time at which an election for the Forty-fifth Congress could be held.

Neither could it be claimed that either of the elections was really an election *de facto*. A full vote had been cast at the October election, but it was without notice, and neither party regarded it at the time as legal, but rather as a test of strength. The vote at the November election was too small to make it an expression of the popular will.

After considerable debate the House adopted the resolutions presented by the majority by a vote of 116 to 110, and Mr. Patterson was sworn in.

[1 Ells., 52-73.]

(3) FINLEY *vs.* BISBEE.

Fraud, illegal votes, and irregularities. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Cobb; minority report by Mr. Price.

According to the aggregate of all the precinct returns contestant had a majority of 5 votes; but the State canvassers twice canvassed the vote, the second time under mandate of the supreme court, and each time excluded certain returns and gave the majority to contestee, who received the certificate and held the seat. In the issues joined in the contest, precincts and votes were attacked in nearly all of the 17 counties of the district, but the result of the case turned on a single precinct and on two classes of votes in other precincts.

Both parties charged that the count or return of the vote of Archer precinct No. 2, Alachua County, was false and fraudulent, each alleging that the fraud was committed against himself. Contestant charged that the fraud consisted in forging false returns and in adding about 219 votes to contestee's vote; contestee charged that it consisted in stuffing the ballot box with tickets for contestant. Fraud of some sort being conceded, it was agreed that the return should be rejected, and the difference between the parties, and between the majority and minority of the committee, was in regard to what votes, if any, should be counted upon evidence outside the return. A large amount of testimony of a very conflicting character was taken in regard to this return. The election itself appears to have been regularly and quietly conducted. In the evening the votes were counted and a large discrepancy was found between the number of ballots in the box and of names on the poll list. Most of the witnesses testified that at the close of the polls one of the judges announced the vote for governor. Several witnesses testified that the vote thus announced was 136 for the Democratic and 180 for the Republican candidate, and that the vote for other officers varied but slightly. The only testimony on this basis in regard to the Congressional vote showed 141 for contestant and 180 for contestee, and contestant claimed that if any votes at all were to be counted they should be counted as shown by this testimony. But the testimony of part of the officers of election was to the effect that the vote was: Bisbee, 398; Finley, 137, and that it was thus announced. Most of the witnesses testifying to this were impeached. The box was left over night, imperfectly sealed, in the custody of a Republican judge, whose character was assailed. He refused to allow it to be more safely sealed or to allow precautions to be taken to guard it. At noon it had been in the custody of one Democratic and one Republican outsider. The custodian of the box and a friend took an extra train to the county seat at 3 o'clock in the morning, but did not deliver the box and returns until noon. The returns had been signed in blank on the evening of the election, and it did not satisfactorily appear when or by whom they were filled out. They showed for contestee, 399; for contestant, 141. Contestant claimed that this was a much larger vote than was actually cast. It was larger than the num-

ber of ballots in the box. The poll list had been kept, with other papers, in an iron safe in the county clerk's office, but had in some way disappeared. There was testimony that it had contained only 318 names. A witness who had stood at the polls all day and claimed to have taken down the name of every voter presented a copy of his list, showing 305 persons voted. But there was evidence showing that a number of persons voted who were not on the list, thus showing its incompleteness. Contestee called 308 witnesses who swore they voted the Republican ticket, on which his name was proved to have been printed.

On this state of the evidence the committee found that it was impossible to ascertain the true number of votes cast or to count any votes for either candidate. Except the testimony of the individual voters the testimony was too conflicting for certainty, and much of it was impeached. Most of the individual voters called could not read and might easily have been deceived in regard to the ticket they voted. Such ignorant persons might also have been easily induced to testify falsely. Moreover, the other testimony, if not sufficient to show the number of votes, did show that a considerable number of votes was received by contestant, and it would be very unfair to count the votes received by one candidate when there was no way to count those received by the other. This was especially true in this case, as the election and returns had been in the control of partisans of contestee, and whatever fraud had been committed was presumably in his interest. But to count the vote for him, according to the testimony of the individual voters, and count no vote for contestant would give to contestee, already the beneficiary of the fraud, a majority even larger than that given him by the fraudulent returns.

The minority agreed that the returns should be rejected, and that the general testimony in regard to the vote was too conflicting to be trustworthy, but held that the votes proved by the testimony of the individual voters to have been cast for contestee should be counted for him. Only 54 of these witnesses could read, but all testified that they got their tickets from well-known Republicans and voted them unchanged. The persons from whom they got their tickets were called, and all testified that they gave out none but straight Republican tickets containing the name of contestee. It was shown that there were organized Republican clubs with a membership more than large enough to account for the vote thus shown for contestee. That the fraud had been committed in the interest of contestant was indicated by the fact that at previous elections the Democratic vote had been very small, while at this election there were 141 Democratic ballots found in the box, though very few Democrats were known to have voted. The increase in the Republican vote was about 50 per cent over that of two years before, and was accounted for by the opening up of new lands and new avenues of employment for laboring people. The increase in the Democratic vote was about 900 per cent, and was not explained. If contestant had desired to have his vote counted, he should have proved it in the same manner as contestee. But no hardship was done him by not counting the votes not proved, as contestee had proved as cast for himself nearly the whole number of votes claimed by contestant to have been cast for both candidates, and the few remaining votes could not affect the result.

Large numbers of illegal votes were charged by contestee, most of

which were included in two classes—nonregistered and foreign-born voters. Under the constitution and laws of Florida foreign-born persons might vote under the same conditions as native citizens on presenting to the election officers certified copies of their naturalization papers or declarations of intention. The election officers were forbidden to receive their votes without such presentation. A large number of votes of foreign-born persons had been received without the presentation of the requisite certificates, and contestee asked that they be excluded. The evidence showed that all but 7 of them were duly naturalized and could have produced the required certificates if they had been asked for. The committee held that the qualification required by the constitution was the fact of naturalization, and that the presentation of certificates was merely a directory requirement as to mode of proof. The votes having been received were presumed to be legal, and the failure to furnish the required proof could at most only shift the burden on the party claiming their votes to show that they were in fact qualified. This had been done as to all but 7, and with these exceptions the votes were counted.

Under the constitution no person could vote who had not been registered, but if a voter had been registered and his name had been struck from the registry he could vote on taking the oath required of challenged voters, and also an oath that his name had been wrongfully struck from the list. Contestee presented certified copies of the poll lists and registry lists, showing a large number of voters marked on the poll lists as voting who were not on the registry lists. But the committee held that the votes having been received the presumption was that the voters had been struck from the list and had taken the required oaths. The certified copies of the registry lists were accompanied with certified lists of the names that had been struck off, and the names of many of the voters attacked were also not on these lists; but the committee held that the county clerks could only certify to the official list, which was a matter of record, and not to the names struck off. This should have been proved by testimony and not by certificate. Certain testimony based on comparisons of lists made by witnesses was open to the same objection. It not being shown by competent testimony that these voters were not qualified, their votes must stand.

The minority held that both these classes of votes should be rejected. The constitution was mandatory in its terms, and prohibited the reception of the votes of foreign-born persons except under certain conditions. Many cases were cited to show that, these conditions not having been complied with at the time, it was not sufficient to show that they could have been complied with. The constitution was also mandatory in prohibiting the reception of the votes of nonregistered persons. The manner in which the lists were kept made the names struck off, and the fact of their being struck off, as much a part of the record as the names retained, and the clerks' certificates were evidence of both. By this evidence the voters were shown not to have been registered, and their votes should be rejected. If these two classes of votes were rejected contestee would be elected, regardless of the decision in regard to Archer precinct No. 2. Most of the foreign-born voters attacked were shown by their own testimony to have voted for contestant. There was no evidence showing which candidate had received the votes of most of the unregistered voters, and the minority deducted them from the candidates *pro rata*. The majority did not deduct them, but

stated that if they had been shown to be illegal it would be a fair course for a legislative body, having power to order a new election, to do so, rather than to adopt the rule followed by the courts of deducting them *pro rata* from the candidates.

According to the findings of the majority contestant was elected by a majority of 252; according to those of the minority contestee was elected by a majority of 354.

After considerable debate the House adopted the resolutions presented by the majority, by a vote of 131 to 122, and Mr. Finley was sworn in.

[1. Ells., 74-124.]

(4) ACKLEN *vs.* DARRALL.

Unauthorized removal of poll. Recount of ballots. Majority report for contestant; minority reports for contestee. Contestant seated.

Majority report by Mr. Harris; minority reports by Mr. Price and Mr. Thornburg.

The returns of this district were twice canvassed by different returning boards. The first canvass, made under the "Kellogg government," gave contestee a majority of 2,093; the second, under the "Nicholls government," gave him a majority of 1,094 votes. He held certificates of election from both governors. Contestant charged that the first canvass, made by the "Wells-Anderson" returning board, was illegal and fraudulent, and that the canvass made by the second board should be corrected by excluding the returns of one precinct in La Fourche Parish on account of fraud, by throwing out the entire returns of St. Martin's Parish as forged, and by counting the vote of Iberia Parish as shown by a recount. He presented a certificate signed by the lieutenant-governor of the State, certifying to his election if the entire returns of St. Martin's and Iberia parishes were excluded. Both the majority and minority of the committee disregarded the canvass made by the "Wells-Anderson board;" the majority on account of "its notoriously fraudulent character," and the minority because its canvass did not, as the other canvass did, include all the precinct returns. The charge that the returns of St. Martin's Parish were forged was not established by evidence, and in addition, there was an agreement between the parties as to the vote of the parish. The issues were accordingly narrowed to the question of the fraudulent removal of the voting place of poll 17, La Fourche Parish, and the recount in Iberia Parish. It was shown that the voting place in poll 17 had been conveniently located on the public road, but that the day before the election, without general notice, it had been removed to the "negro quarters," for the purpose, as was alleged, of depriving contestant of votes. Eighty-six votes, all for contestee, were cast. The majority, and those signing the second minority report, rejected the poll. In the first minority report it was counted according to some finding of the Louisiana courts, not very clearly stated.

The decisive issue in the case was the recount in Iberia Parish. There were eleven polls in this parish, all of which were recounted. In six of them a change of only 7 votes was made by the recount; in the other five there was a change of over 1,000 votes in favor of contestant, sufficient to give him a majority in the district. The majority sustained the validity of this recount; the minority denied it. The

majority held that the law always looks with suspicion on recounts, and that they can not be received to change the results of an election unless it "be shown absolutely that the ballot boxes had been safely kept; that the ballots were undoubtedly the identical ballots cast at the election; and when these facts are established beyond all reasonable doubt, then full force and effect are given to the developments of the recount." Such facts were established in this case with the possible exception of two boxes. The boxes had all been sealed up by the election officers and deposited in the office of the clerk of the court. The clerk testified that they had not been and could not have been tampered with, and in every case but two the seals were intact and identified by the precinct election officers. One seal was broken, but the clerk testified that it had probably been broken by his carelessness in moving the boxes. Another box had been sealed only with paper and mucilage, without the signatures of the election officers, and hence could not be identified. The committee out of abundant caution allowed the original count of these two boxes to stand.

It was objected by contestee that this recount took place in March, four months after the election and two months later than the ballots were required by the law to be preserved. The law required them to be kept until after the next term of court, and the clerk of the court certified that court had been held in January. But at that time the government of the State was still unsettled. There were two claimants for the office of judge. The one who was alleged to have held court was afterwards adjudged to be not elected, and the court was at most merely formal, no business being transacted. Considering the unsettled condition of the State government during most of the time and the date on which contestee's answer was served the recount could not have been held much earlier.

The very large change made by the recount was accounted for by the fact that contestant's name was printed on a large number of the Republican tickets, and the officers of election, not being aware of this fact, did not scrutinize the ballots carefully, and in most cases counted for contestee all ballots appearing to be straight Republican tickets. The Republican tickets were printed on paper with a heavily glazed and nearly black back, so as to be easily distinguishable. The chairman of the Republican committee in this parish was hostile to the election of contestee, and had large numbers of tickets printed identical with the regular Republican tickets, except that on some of them the name of contestant was printed instead of that of contestee, and on others there was no name for Congress. In sending out tickets to the various polls he mixed these three sorts, and the committee found that according to the evidence many of the two sorts not containing the name of contestee must have been voted. The judges of election in a number of precincts testified that they counted for contestee all ballots which were apparently straight Republican tickets. In one precinct the count had been completed within one hour, which would have been impossible if all the names on the tickets had been scrutinized. Contestee was counted as receiving substantially his full party strength in most of the precincts, though it was impossible for him to have received it with such tickets in circulation. The recount showed in the five boxes where the change was made large numbers of such ballots, and the change consisted in counting them for contestant or blank for Congress when they were so printed.

Accepting the recount in all but two of the precincts (where, as above stated, the seals were imperfect) and rejecting the 86 votes cast for contestee in poll 17, La Fourche Parish, contestant was shown to have a majority of 108 votes, and the committee accordingly recommended resolutions declaring him elected.

There were two minority reports, both in favor of contestee. The first, presented by Mr. Price, denied the validity of the recount in the six precincts where the chief change was made, and counted the votes according to the original count in the five uncontested polls, and the two polls conceded by the majority of the committee. This would give contestee a majority of 165 in the uncontested part of the district. If the other four polls were counted according to the original count this majority would be increased. They ought either to be so counted or not to be counted at all.

The second minority report, presented by Mr. Thornburgh, and signed also by Mr. Wait and Mr. Hiscock, also denied the validity of the recount, but held that doubt was cast upon the original count in the six polls where the "bogus" Republican tickets were sent. Rejecting these six polls contestee would be elected by 184 majority. Even if the evidence were taken as sufficient to show that the recount represented the votes actually cast, it ought not to be permitted to give the seat to contestee, as the additional votes received by him were the result of a fraud upon the voters, to which the House ought not to give effect. But the evidence of the identity of the ballots recounted was not sufficient.

In the six precincts where a change of only 7 votes was made on the recount it was conclusively shown that the seals on the boxes had not been tampered with, but it was not conclusively shown as to any of the five precincts where the change of over 1,000 votes was made. In one the seal had been broken, and in another it could not be identified. The majority conceded that these two boxes might have been tampered with, and counted them according to the original count. If this concession was made as to these boxes it must also be made as to the others. The seals over the ballot holes in the others were intact and identified, but there was no seal over the keyholes. The keys were in the possession of the clerk, the boxes were exposed in a public part of the office, and might have been tampered with at any time. The officers of election in some of the precincts testified to extreme care in counting the ballots, and in one precinct, at least, returned contestee much less than his party vote, thus showing that they must have discovered the Republican tickets on which his name did not appear. The election boards were composed of members of both parties, and it was inconceivable that they could have overlooked mistakes amounting, in some cases, to more than half the votes. Part of the boxes had not been returned promptly to the clerk's office, which ones it did not appear. One of the experts who conducted the recount testified that in at least one of the boxes the Republican tickets on which contestee's name did not appear did not have the appearance of having been handled and folded by the voter, and that the difference was so noticeable that he could tell by the back of the ticket, before they were examined, whether contestee's name would be found on them or not. The recount had been had four months after the election and two months after the ballots were required to be preserved.

Such a recount had never been received to change the result of an election, and ought not to be received in this case.

After some debate the House rejected the resolution presented by the minority by a vote of 115 to 139. The resolutions presented by the majority were then adopted without division, and Mr. Acklen was sworn in.

[1 Ells., 124-189.]

(5) DEAN vs. FIELD.

Recount by board of aldermen. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Springer; minority report by Mr. Candler.

According to the aggregate of the returns made by the precinct officers of election, and by the United States supervisors, contestant had a majority of either 5 or 30 votes, according as 25 votes cast for contestee "for Congress, Fourth district," were or were not counted for him. According to a recount made by a committee of the board of aldermen of Boston contestee had a majority of 5 votes, and this latter count being the one certified to the governor, contestee had the certificate of election.

The parties were both candidates for Congress in the Third district of Massachusetts, which was wholly comprised within the city of Boston. In the Eighteenth Ward of Boston, one of the wards in the Third district, 25 ballots were cast bearing the words:

For Representative to Congress, Fourth district, Walbridge A. Field, of Boston.

These votes were separately returned by the precinct officers and United States supervisors of the Eighteenth Ward. The committee of the board of aldermen which made the recount submitted the question in regard to them to the full board, which decided that they should be counted for contestee. If they were not counted for contestee it would be decisive of the case in favor of contestant. The committee unanimously held that the words "Fourth district" were not a part of the legal designation of the office, and that as the intention of the voters was plain, and they would have had no right to vote for Mr. Field or any one else for Representative from any other than the Third district, the votes should be counted for contestee.

The majority of the committee held that the original count made by the precinct officers and verified by the count made by the United States supervisors should stand in preference to the recount. The statute of Massachusetts provided that—

If within three days next following the day of any election ten or more qualified voters of any ward shall file with the city clerk a statement in writing that they have reasons to believe that the returns of the ward officers are erroneous, specifying wherein they deem them in error said city clerk shall forthwith transmit such statement to the board of aldermen or to the committee thereof appointed to examine the returns of said election. The board of aldermen, or their committee, shall thereupon, and within five days, Sunday excepted, next following the day of election, open the envelope and examine the ballots thrown in said ward, and determine the questions raised; they shall then again seal the envelope, either with the seal of the city or a seal provided for the purpose, and shall endorse upon said envelope a certificate that the same has been opened and again sealed by them in conformity to law; and the envelope, sealed as aforesaid, shall be returned to the city clerk. Said city clerk, upon the certificate of the board of aldermen or their committee, shall alter and amend such ward returns as have been proved to be erroneous and such amended returns shall stand as the true returns of the ward.

The committee held that this law could not have been intended to apply to the elections of Representatives in Congress. It could apply to no other district than this one, as this was the only one entirely included within a city. And to apply to any district it must come in conflict with the Federal statute providing United States supervisors. These supervisors were required to be present wherever the votes were counted, until such count was wholly completed and all returns made, and to personally scrutinize the ballots and count. It would not be "competent for any State to provide another board of canvassers who may take possession of the ballot boxes, exclude the Federal officers, and secretly count the votes and declare a different result." This recount was privately conducted by three aldermen, and was not, and would not have been permitted to be scrutinized by the United States supervisors.

But even if the law were held to be valid its provisions were not carried out. The statute in question conferred upon the board of aldermen a special jurisdiction, and unless its provisions were strictly carried out the proceedings were void. The law did not contemplate a general policy of substituting an aldermanic count for the ward count, or that recounts should be granted merely on account of the closeness of the vote. The petitions must "specify wherein they deem them in error," and unless the petitions did so specify no jurisdiction was conferred. The petitions in this case merely specified that the returns were in error in counting more votes for contestant and less for contestee than were cast. There was no suspicion of fraud, and the persons signing the petitions had no reason to believe that error had been committed, but only a general hope that a recount might prove beneficial to their candidate. The aldermen were empowered to "determine the questions raised," by an inspection of the ballots, and were given no general power to make a recount. In this case there were no "questions raised." Further, the jurisdiction was conferred on the board of aldermen or a committee of three. The committee having taken jurisdiction, the jurisdiction of the board abated. But the certificate sent to the governor was based on a decision of the board and not of the committee.

The ward count was made in public by eight State officers and two supervisors in each ward. The aldermanic count was made in private by three aldermen for the whole district. Moreover the law had not been complied with by the city clerk; he had not entered the original count, and amended it on certificate of the committee, but had in the first instance entered the aldermanic count, as found by a vote of the board. For all these reasons the committee held that the law had not been complied with.

But as to two wards, there was evidence outside the various counts showing the correctness of the first count. The count made by the precinct officers might be balanced against that made by the committee of aldermen, and the testimony of each sustaining the correctness of their own counts might not disturb the balance, but the testimony of the United States supervisors, who, whether they were anything more or not, were at least official witnesses of the count, made the preponderance of testimony in favor of the first count. They, as well as the election officers, testified to precautions taken in the count of these two wards which made the probability of error much less than in the count made by the aldermen. If the original count was followed in these wards contestant would be elected.

In one ward there was evidence that some of the ballots were left in an open box during the day, after having been taken out and counted, and that outsiders were in the room. These ballots may have been tampered with. It was also shown that "stickers" were used by both candidates, and that some of those used by candidates for other offices had fallen from the tickets. This might also have happened in the case of votes for Congress, and in that case the original count and the recount might both have been correct, but the original count would have represented the votes as cast by the voters.

The minority held that the Federal statute providing for United States supervisors was not enacted by Congress pursuant to its power to "make or alter" regulations as to the manner of holding Congressional elections. The supervisors were no part of the machinery of the election, but merely witnesses appointed by the courts to watch the proceedings of an election conducted by State officers. They were only required to attend on the day and at the place of election, and hence a provision for a subsequent recount was not an interference with the performance of their duties. Moreover, there was no evidence that they could not have attended the recount had they desired.

The returns of the supervisors did not show, except in one ward, that they themselves counted the votes. Therefore their returns gave no additional weight to the ward counts. To say that the ward count was balanced against the count of the aldermen, and that either might be shown to be correct by a slight preponderance of outside evidence, was like saying that the decision of a higher court reversing the decision of a lower court was merely balanced against the latter decision.

The recount was made under a valid statute of the State, and the statute was strictly followed. The specification in the petitions that the ward counts were erroneous in that more votes were counted for one and less for another candidate than were cast were as specific as was possible. No evidence having been introduced by either party going to the merits of the case, or behind the returns, the case turned on the validity of the two counts, and the statute of Massachusetts requiring that the recount should prevail, it should be permitted to do so in the absence of any evidence other than the original count to impeach it.

After considerable debate the resolutions presented by the minority were rejected by a tie vote of 120 to 120 (the Speaker voting to make the vote a tie). The resolutions of the majority were then adopted by a vote of 124 to 123 (the Speaker giving the casting vote in the affirmative), and Mr. Dean was sworn in.

[1 Ells., 190-223.]

(6) RICHARDSON vs. RAINEY.

Intimidation and military interference. Majority report to void the election; minority report for contestee. House refused to consider; no further action.

Majority report by Mr. Ellis; minority report by Mr. Hiscock.

According to the returns, contestee received a majority of 1,528 votes, and so far as appeared or was alleged, these returns correctly represented the votes cast in the district. But contestant claimed to have been deprived of a large number of votes by intimidation, and also

that a number of polls should be thrown out for irregularities. The committee refused to throw out any polls or votes for the irregularities charged, but found that there was such intimidation practiced throughout the district as to prevent a free and fair election, and that on this account the seat should be declared vacant.

The intimidation consisted in (1) the presence of Federal troops at the polls, sent there by the Government, "without cause other than to influence the result of the election in the interest of contestee and the Republican party;" (2) the presence at the polls and at public meetings of armed colored militia, and threats made by them; and (3) threats of social and religious ostracism made by colored bodies against colored men who should vote for contestant.

In discussing the question of military interference the committee discussed at some length the recent history of the State of South Carolina, and the events which preceded the election. The government of the State, according to the committee, had become so corrupt in the hands of the unscrupulous white leaders of the colored voters that the decent people of all classes had come to recognize the absolute necessity of reform of some sort. The Democratic party had nominated its purest man for governor, and the canvass made under his leadership had been conciliatory throughout. As a result many thousands of colored voters who had heretofore voted the Republican ticket had begun to ally themselves with the other party, and the movement was increasing in strength. In this situation the leaders of the Republican party resorted to a policy of intimidation, to compel the colored voters to vote their ticket. In spite of the fact that the commander of the Federal troops in the State had announced that there was no disorder or resistance to authority, and no need of additional troops, and that the judges of the various districts had announced that there was no state of violence or threatened intimidations in their districts, the governor had issued a proclamation commanding certain imaginary "rifle clubs" and other disorderly bodies to disband, and calling out all the militia of the State to preserve the peace. And the President of the United States had issued a proclamation reciting a state of insurrection and resistance to authority, and, through the Secretary of War, had sent to the State all the available Federal troops. These troops had been scattered through the State in small bodies, and been stationed at or near the various polling places. To be sure they committed no overt acts, and made no threats or attempts at coercion, but the effect was just the same, for the negroes were told that they were there to watch over them and see to it that they voted the Republican ticket; and in their ignorance they believed it, and many of them who doubtless would otherwise have voted the Democratic ticket were thus induced to vote the Republican ticket.

The committee quoted from a large number of English authorities, and suggested that the rule there laid down was the correct one; that the presence of troops at or near the polls of itself vitiated an election, regardless of whether any active intimidation was resorted to by them or not. On the question of social and religious ostracism, and intimidation by the colored militia, the committee said:

The record in this case discloses a condition of moral, social, and religious intolerance and intimidation exercised by the adherents and political friends of the sitting member in the First Congressional district of South Carolina that renders the idea of freedom of thought and opinion, the idea of free political action, on the part of the

colored race, an utter mockery and delusion. Preachers preached against the Democratic party. Threats of 'turning out of the church' those who acted and voted with that party, threats of divorce from wife and separation from children, threats of social ostracism, were indulged throughout the entire district. Colored women assaulted and heaped epithets upon those men of their own race who dared to act with the Democratic party. Colored men were told that there was for them no social, moral, or religious existence or affiliation with their own race if they acted or voted otherwise than in obedience to the behests of the Republican leaders. It is even shown in the record that the sitting member declared that all colored men who acted with the Democratic party 'should be treated as enemies.' And this feeling and those appeals were not confined to any particular or isolated community or portion of the district, but existed and were exercised throughout the entire district. Your committee feel constrained to declare that undue, illegal, and improper influences were brought to bear upon the vast mass of colored voters throughout the First Congressional district of South Carolina, and while the proof of the extent of the influence and of its control can not be arrived at with any degree of accuracy from the evidence, yet sufficient is shown to leave no doubt but that these undue influences were widely felt, and prevented, in the district in contest, a free, fair, and full election.

But if any doubt were left in the minds of your committee of the perfect propriety of declaring the election in the First South Carolina district null and void for the grounds heretofore examined, the doubt is solved because of the wholesale intimidation practiced by armed colored clubs and organizations during the campaign and at the polls on election day. The evidence is clear that throughout the district, and in nearly every precinct of the district, these organizations existed. They were armed with the State arms for the most part, but many had private arms. They went to their political meetings with arms in their hands, and at many of the polling places they appeared on election day in organized force. So intolerant were they against individuals of their own race who differed with them politically that they uttered against them the most terrible threats, and in some cases resorted to actual violence. They denied the right of free speech; they tore tickets from the hands of voters and substituted others; they interfered with the domestic peace of colored Democrats by persuading their wives to leave them, and left no device that could intimidate unemployed to coerce men of their own color into voting the Republican ticket.

The answer that the other side resorted to similar tactics was not sufficient, for it was not sustained by the evidence, and if it were it would only constitute an additional reason for declaring the election void.

The minority considered the discussion of the recent history of South Carolina found in the committee report out of place.

The record submitted in this case fails to furnish the facts alleged, and, in our judgment, the wailings over the real or fancied past wrongs of the State are as much out of place in the report as a discussion of the causes of the war or any of its results would be.

Upon the subject of social ostracism, the minority called attention to the fact that there was no law of this or any other country "making it a crime for those of adverse views to refuse to associate together." Campaigns in this country are productive of great excitement. Angry discussions between members of the same church or order, or even of the same family, are not uncommon. Such things take place everywhere, and the minority thought that nothing more was proved in regard to the district in contest.

"Rifle clubs" and "saber clubs" had been extensively organized by the Democrats preparatory to this campaign and attended the meetings of both parties, often seeking to break up Republican meetings. Pledges were signed not to hire or patronize colored men who would not vote the Democratic ticket. If there was quiet in the State, it was the quiet of subjection. On the other hand, the evidence showed that "twenty colored men had personal altercations and were threatened with social ostracism if they voted the Democratic ticket; nevertheless, they were not intimidated thereby. One cow pen was burned; one man had a quarrel with his wife, struck her, and was abandoned by

her; she had left him twice before; and one man was struck in the face by a woman armed with an umbrella." There was nothing in the record to show that the colored voters were being prevented by social ostracism or fear from voting the Democratic ticket. Comparing the vote with the census, it was evident that contestant must have received at least one-fifth of the colored vote, which would have been impossible if the charges of intimidation were true.

The sending of troops to the State was a legitimate police measure. If there was intimidation by the Republicans, as charged by the majority, or by the Democrats, as charged by the minority, in either case the governor was authorized in issuing his proclamation and in calling on the President for troops, and the President was justified in sending them to preserve the peace. It was not alleged that they had been used in any other way. The proposition of the majority was that "a police force, detailed by the Federal authorities, that simply enables the citizen to enjoy his rights, is illegal, and renders that enjoyment illegal and void." The English principle has no application to the conditions of a free country, and is not the law here.

In the judgment of the undersigned, the action of the Federal Government was justified, and incumbent upon it, in stationing the troops as it did in South Carolina; that nothing in the conduct of the troops, neither did the fact of their being stationed there, influence the electors to vote otherwise than as their judgments and consciences dictated; but, to the contrary, the action of the Federal Government and the presence of the troops enabled the freedmen to participate in the election and vote for the candidates they preferred.

The minority report was only signed by Mr. Hiscock.

The reports were made to the House on May 18, 1878, and, in accordance with the usual order, were ordered printed and recommended to the Committee on Elections. On June 17 the case was called up, but the House, by a vote of 103 to 126, refused to consider it, and it was not afterwards called up. This left contestee in his seat, and to that extent the views of the minority were sustained.

[1 Ells., 224-288.]

(7) FROST vs. METCALFE.

Illegal votes, irregularities, and bribery. Report for sitting member. No final action by the House.

Report by Mr. Harris.

Contestee had only received a majority of 19 votes on the face of the returns, and contestant sought to overcome this majority by charges of illegal votes, bribery, and irregularities. Six of the illegal voters were boat workmen who claimed a residence where they voted. The committee held that the evidence was not sufficient to overcome the presumption of legality arising from the reception of their votes. Twelve votes had been rejected by the election officers on the ground that they were not registered. Two of them were shown to have been on the original list, but not on the list in the hands of the judges, and the committee counted their votes. The evidence was not sufficient to show that the judges acted wrongly in rejecting the other 10. It was shown that the registry list, as printed and sent to the election officers, was very imperfect, many names having been omitted through the carelessness of the printer. Contestant claimed that this had lost him more votes than contestee; but as, except in the case of

these 12, there was no attempt to prove that the voters had even offered to vote, the committee certainly could not consider the question of counting any additional votes.

Contestant claimed an error of 9 votes against him in footing up the returns of a precinct. The only evidence was the memorandum paper, in which a figure 1 was found in the second column from the right with no 0 in the first column. It had been added in as 10, but there was nothing in the comparison of the total votes for Congressman and for other officers to indicate that the number was not properly 10, and no oral testimony was introduced. The committee held that if the error was committed it ought to have been shown by better evidence. A similar ruling was made as to an entry of 25 for contestee alleged to have been made twice and included in the sum.

United States marshals to the number of 728 were appointed in the district. It was alleged that these appointments were given as bribes for votes for contestee. The committee "deprecated the appointment of United States marshals under any pretext," but recognized that the law permitted it. In this case the only attempt to prove that the appointments were in the nature of bribery was the testimony of 8 of the appointees to the effect that they received their appointments under an understanding that they would vote for contestee. But 5 of them did vote for contestant; two voted for contestee, but would have done so in any case, and the other did not vote at all.

The report when made was ordered to be "passed over for the present," and was not afterwards called up. Contestee was thus left in his seat, as recommended by the committee.

[1 Ells., 289-293.]

FORTY-SIXTH CONGRESS, 1879-1881.

Committee on Elections.

Mr. SPRINGER, Illinois,	Mr. KEIFER, Ohio,
MANNING, Mississippi,	CAMP, New York,
SPEER, Georgia,	CALKINS, Indiana,
COLERICK, Indiana,	FIELD, Massachusetts,
ARMFIELD, North Carolina,	OVERTON, Jr., Pennsylvania,
BELTZHOVER, Pennsylvania,	WEAVER, Iowa,
SAWYER, Missouri,	CLARK, New Jersey,
Mr. PHISTER, Kentucky.	

Cases.

- (1) John M. Bradley *vs.* William F. Slemons, *Arkansas.*
- (2) Horatio Bisbee *vs.* Noble A. Hull, *Florida.*
- (3) James McCabe *vs.* Godlove S. Orth, *Indiana.*
- (4) J. C. Holmes and John L. Wilson, *Iowa.*
- (5) W. B. Merchant and Robert O. Herbert *vs.* Joseph H. Acklen, *Louisiana.*
- (6) E. Moody Boynton *vs.* George B. Loring, *Massachusetts.*
- (7) Sebastian Duffy *vs.* Joseph Mason, *New York.*
- (8) James E. O'Hara *vs.* William H. Kitchin, *North Carolina.*
- (9) Jesse J. Yeates *vs.* Joseph J. Martin, *North Carolina.*
- (10) Andrew G. Curtin *vs.* Seth H. Yocum, *Pennsylvania.*
- (11) Ignatius Donelly *vs.* William D. Washburn, *Minnesota.*

(1) BRADLEY *vs.* SLEMONS.

Conspiracy, fraud, deception, irregularities. Report of committee for contestee. Report of Mr. Weaver to declare seat vacant. Contestee retained the seat.

Report by Mr. Sawyer; dissenting report by Mr. Weaver.

Contestant took testimony in only three of the twenty counties of the district, and in two of these the testimony was taken more than forty days after the service of the answer to the notice of contest. Contestant claimed that the forty days allowed by law commenced to run from the first day on which he took testimony, but the committee held that the act of Congress approved March 2, 1875, conclusively showed that section 107 of the Revised Statutes must be so construed as to require the time to run from the day of the service of the answer of contestee. In this case no reason was shown why the forty days would not be sufficient; indeed, only eighteen days were actually occupied by contestant in taking testimony. The testimony taken after the time was all cross-examined by contestee, and the objection only entered after all the testimony was taken, and contestee in his oral argument before the committee had expressed entire willingness to

have the testimony considered. But the committee held that "the people of the district have interests and rights which can not be thus taken from them," and excluded all the testimony except that taken in Jefferson County, which was taken within the time.

Contestant alleged that a fraudulent conspiracy had been entered into to carry the election of Jefferson County by illegal methods. The testimony showed that conferences were held between leaders of the different parties for the purpose of selecting a "compromise ticket" for county offices. Such a ticket was nominated containing candidates from different parties for the different offices and was elected at the State and county election held in October. These conferences had nothing to do with the Congressional election in November, and there was no proof that it had been in any way affected by them.

Contestant also charged that the ballot boxes in Pine Bluff and other precincts had been stuffed in the interest of contestee. The principal testimony relied on only showed that Democratic tickets were being printed on election day. The part of the testimony tending to show that they were printed after the close of the polls was contradicted, and the fact that they were printed on election day was satisfactorily explained by the witnesses.

Complaint was made that no votes were counted from two townships. In one of these the judges of election were threatened with arrest by a United States marshal if they did not close the polls before sunset. When the polls were closed, they were surrounded by an armed body of negroes. The judges were frightened and left the box in the possession of the negroes. It was carried to the county clerk's office, securely locked, and was still there in the same condition when the testimony was taken. If contestant had desired to have the votes counted, he should have put the ballots in evidence. In another precinct the box had been stolen by an armed body of men. It did not appear to which party these men belonged, and as the strength of the two parties in the precinct was about equal, it could not be inferred which party was injured. In some other precincts no election was held, the judges of election not being present, and the voters, probably through ignorance, neglecting to take advantage of the provision of the law allowing them to organize and hold the election. No reason was given for not holding the election, and the committee refused to count any votes.

In Chicot County, a few days before the election, fraudulent posters were circulated announcing the candidacy of a well-known Republican. These posters were delivered to a political friend of contestee at the same hotel where contestee was stopping, and contestee was seen in conversation with the person who distributed these circulars a few moments before the latter took the train with them for Chicot County. The committee strongly condemned the trick, and held that if the evidence had been sufficient to show the connection of contestee with it, and that it had had an effect on the voters sufficient to change the result of the election, the election ought to be held void and a new one ordered. But the testimony was not sufficient to show the connection of contestee; the candidate fraudulently announced only received 90 votes. It was impossible to tell how many voters were confused and prevented from voting, but the number was probably much less than the majority returned. Moreover, most of the testimony in regard to this county was among that taken out of time.

If, however, all the claims of contestant were allowed, and he were given the largest possible number of additional votes that could be inferred in any view of the law and evidence, the number would still be more than 850 short of overcoming the returned majority of 2,827.

Mr. Weaver filed a brief dissenting report, submitting to the House the question whether contestee had not waived his objections to the testimony taken out of time; and, also, whether the frauds shown in the testimony were not sufficient to render uncertain the result of the election and to call for a new one. All the other members of the committee agreed to both the conclusions of law and the result of the committee report.

The report of the committee was adopted without division, and contestee retained the seat.

[1 Ells., 296-314.]

(2) *BISBEE vs. HULL.*

Returns not canvassed. Report for contestant. Contestant seated.

Report by Mr. Keifer.

There were 17 counties in the district. The State canvassing board canvassed the returns from 15 counties, and contestee having a majority of 12 votes in these counties, a certificate of election was issued to him. One of the counties omitted by the State canvassing board had been omitted on the ground that no return for one precinct had been included by the county canvassers. After the issue of the certificate to contestee, the State canvassing board, under mandate of the supreme court of the State, reconvened and canvassed the vote of this county, and certified it to the governor. On the vote of the 16 counties now canvassed contestant had a majority of 201. The vote of the remaining county would not change the result. Contestant applied to the governor for a certificate of election, and his application was referred to the attorney-general, who strongly favored granting it, but the application was refused by the governor.

Contestee claimed that the State supreme court had no jurisdiction to issue a mandamus on the State canvassers, and that the canvass of Madison County was hence without authority of law. The committee did not consider this question, but held that whatever might be the case of the State officers the duty of the committee was to count all the returns unless it was shown that they did not correctly represent the vote. This was not charged in this case, and the committee counted the returns from the two omitted counties, including the omitted precinct. It was admitted also that one ballot box had been stuffed, making a change of 186 votes against contestant. This showed a majority of 350 votes for contestant.

Contestee claimed that 18 votes should be deducted from contestant as cast by nonresident or unregistered persons. The committee found the charges sustained in 11 cases, and deducted the votes, leaving the majority of contestant 339. Contestee also asked that three precincts be rejected because they had not been canvassed by the county canvassing board at its first count, and because the supreme court, under whose mandate they were subsequently canvassed, had no authority to issue such mandamus. But copies of the original precinct returns were put in evidence by contestee; there was no pretense that they did not cor-

rectly represent the vote cast, and the committee refused to reject the returns. The committee were unanimous in their decision.

The House agreed without division to the resolutions presented, and Mr. Bisbee was sworn in.

[1 Ells., 315-319.]

(3) McCABE vs. ORTH.

No testimony taken. Contest dismissed.

Report by Mr. Calkins.

Contestant served notice of contest within the legal time, to which answer was duly served by contestee. No testimony was taken by contestant, partly on account of illness in his family, and partly because another contest between candidates for a county office was expected to develop, and it was alleged did develop, the evidence relied on to sustain contestant's claim. Contestant presented a memorial to the committee reciting these facts and also alleging the discovery of new evidence tending to show bribery committed in behalf of contestee. Contestee presented counter affidavits. The committee decided to recommend a resolution to the House permitting the service of a new notice and answer and the taking of new testimony, but from some inadvertence the resolution was never reported. Near the close of second session the committee, in view of the shortness of the time remaining, rescinded its former action and recommended that the contest be dismissed. The report of the committee was unanimous and the resolutions presented were adopted without division.

[1 Ells., 320-321.]

(4) HOLMES and WILSON.

Legal time of election in Iowa. Report against petitioners adopted by the House.

Report by Mr. Field; dissenting report by Mr. Colerick.

Elections for Representatives in Congress were held in Iowa in October, 1878, on the same day as the State election, and in the Eighth and Ninth districts Messrs. Lapp and Carpenter received majorities of the votes, the total vote in each case amounting to over 30,000 votes, and were given certificates of election. The election for Representatives in Congress was held on this day under proclamation issued by the governor, after consultation with the attorney-general and eminent legal counsel.

On November 5, 1878, elections were held in a few precincts in the Eighth and Ninth districts, and in the Eighth district 171 votes were cast, nearly all for Mr. Holmes, and in the Ninth district 357 votes, nearly all for Mr. Wilson. No proclamation was issued for this election, it did not appear that it was held by the legally appointed officers, nor that the voters had general notice of it, and the returns from the precincts where elections were held were not canvassed by any State or county officers.

Holmes and Wilson presented petitions setting up that they had been elected at elections held on the day fixed by the statutes of the United States, and praying to be admitted as members. The petitions did not state that any other persons had been elected at any other

election, nor ask that the election of any other persons be inquired into. The petitions, with the accompanying papers, were referred to the Committee on Elections. The accompanying papers consisted chiefly of *ex parte* affidavits, showing the facts substantially as above stated.

The committee held that the power of the House to inquire into the election of any of its members did not apply to the committee, but that its jurisdiction was limited by the terms of the reference. The papers referred did not raise any question of the election of the Iowa delegation, and the reference of them did not confer on the committee any jurisdiction to inquire into the legality of that election.

The petitioners in this case not being contestants in the ordinary sense, the terms of the statute for taking testimony in contested election cases did not apply, and the fact that the papers presented were not put in evidence under the provisions of this statute was no reason for dismissing the case. They were, however, merely *ex parte* affidavits and could at most be taken as an offer of proof. If the facts alleged in them, taken as true, would be sufficient to sustain the right of petitioners, some method of obtaining evidence ought to be adopted; but if the facts alleged were not sufficient, if proved, to sustain the claim of petitioners it would be needless to attempt to procure evidence of their truth or falsity.

On the facts presented the committee found that neither Holmes nor Wilson would be entitled to a seat, whether the 5th of November was the legal day for holding the election or not. For, if that was the legal day, no election was then held under the authority and machinery of election provided by the State, and the few votes cast at the alleged election could not constitute an expression of the will of the people.

The validity of the October election was not in issue before the committee, but, as a minority of the committee proposed to discuss the question, the majority gave their opinion. The whole question was whether the State of Iowa was included within the exception mentioned in section 6, chapter 130, of the acts of the United States of 1875, excepting from the operations of section 25 of the Revised Statutes those States whose constitutions "must be amended in order to effect a change in the day of election of State officers in said State."

It devolved upon the governor of Iowa to determine whether the State came within this exception, and he having determined that it did, the committee, while not recognizing his decision as binding upon the House, were not disposed to depart from the general rule that the construction of a State statute or constitution by the proper State authorities would be followed by the Federal authorities.

A detailed analysis of the provisions of the Iowa constitution was given. Under it annual elections were to be held, those in the Presidential years being held on the same day as the Presidential election in November. Part of the State officers were elected every year, and the governor and members of the general assembly who were elected in the odd-numbered years for terms of two years were required by the constitution to be elected in October. The attorney-general was to be elected at such time as the legislature should fix. The time for the election of other officers was either not mentioned, or they were required to be elected at the "general election." The committee (in an argument too elaborate to be outlined here) held that the purpose of

the constitution of 1857, the construction placed on similar provisions in the earlier constitution, contemporary interpretation, and a detailed examination of the constitution itself, all showed that the election for State officers in the even-numbered year, not a Presidential year, was required by the constitution to be held in October. The provision of the constitution expressly requiring the election for Representatives in Congress to be held in that month was not considered by the committee, as the time of holding this election was held to be in the entire control of the legislature, subject to the laws of Congress but not to the constitution of the State.

Five members of the committee agreed to this report. Five others agreed in the conclusion, but not in all the reasoning. Mr. Colerick filed a minority report reaching a different conclusion. There is nothing to show the opinion of the other four members of the committee (Messrs. Springer, Speer, Phister, and Clark).

The minority report of Mr. Colerick argued that the election of October 8 was not held on the legal day and was hence void. The election held on November 5 was held on the legal day, but being held in only a few precincts, without proclamation or general notice, did not constitute such an election as to entitle anyone to a seat under it. He accordingly recommended that the seats of the Representatives from the Eighth and Ninth districts of Iowa be declared vacant.

He held that the rule that State constructions of State laws would be followed by Federal authorities only applied to judicial interpretations by the highest courts of a State and not to constructions by the governor and attorney-general.

Under the constitution of Iowa the date of the State elections in three years of each period of four years was fixed. In the years of the Presidential election it was in November. In the odd-numbered years it was in October. But in the even-numbered years, not Presidential, there was no provision in the constitution, and the date of the "general election" in that year was thus left within the control of the legislature. The State of Iowa was therefore not one of the excepted States.

The resolutions presented by the majority were adopted without division.

[1 Ells., 322-344.]

(5) *MERCHANT AND HERBERT vs. ACKLEN.*

Failure to file briefs. Cause dismissed.

Report by Mr. Springer.

The testimony in this case was printed January 15, 1880, and sent to the parties with notice to file briefs within twenty days from January 25, 1880. No briefs were filed, and on May 21 and December 22, 1880, the contestants were again notified to file briefs. No reply was made to these notices, and on March 1, 1881, the committee reported these facts with a resolution declaring contestee elected, and giving contestants leave to withdraw their papers. The resolutions were passed by the House without division.

[1 Ells., 345.]

(6) *BOYNTON vs. LORING.*

Illegal votes; imperfect ballots; insufficiency of notice of contest. Report of committee for contestee; dissenting report by Mr. Weaver for contestant. No final action by the House.

Report by Mr. Calkins; dissenting report by Mr. Weaver.

The notice of contest in this case was extremely vague and general, and consisted chiefly of statements of illegal practices "said to have been" practiced at the election. The committee held that "had the exceptions alleged against the notice of contest for insufficiency been pressed before the committee the exceptions no doubt would have been sustained." The opinion of the committee on the same question in *Duffy vs. Mason* was quoted. But in order to be certain that no injustice was done the committee examined into the merits of the case as disclosed by the evidence. Certain questions involving the construction of the registration law of Massachusetts and the law in regard to challenged voters were not decided, as not being necessary to the determination of the case. One vote cast for the contestee by a man who would have voted for contestant but hoped to gain immunity from prosecution by voting for contestee was deducted from contestee but not added to contestant.

Under the constitution of Massachusetts persons unable to read and write the English language were not permitted to vote. In the town of Amesbury the registering officers had required persons who had been previously registered to read and write in their presence, as well as persons applying for registration for the first time, and refused reregistration to those whose disqualification was shown by this test. It was claimed that the registering officers did not have the power under the law thus to refuse registration, but the committee, without passing upon this question, held that it being conceded that the persons in question were not in fact qualified voters their votes could not be counted whether the registering officers had been technically negligent or not.

In the town of Haverhill 42 printed ballots with the name of contestee erased were found on a recount, but the committee did not consider the evidence sufficient to show that they were originally so cast. Certain defective votes were deducted from each party, but no account of the evidence on which they were deducted was given.

In one town there were 138 ballots counted for contestee having printed on them "For Representative, Sixth district, George B. Loring, of Salem." It was claimed that these ballots did not "clearly indicate in writing" or printing, as required by the laws of Massachusetts, the office voted for. But there was no other "Sixth district" in which the voters of this town had the right to vote except the Sixth Congressional district, nor was there any Representative office to be filled for any Sixth district in which the town was situated except the office of Representative in Congress, and the committee therefore held that the office was clearly indicated.

The deductions required by the evidence not being sufficient to overcome the majority of contestee, the committee reported resolutions declaring him elected. The result was concurred in by all the members of the committee except Mr. Weaver.

Mr. Weaver held that the votes of the voters who were refused reregistration in the town of Amesbury, on the ground that they could

not read and write, should be counted for contestant, and also the 42 votes in Haverhill found erased on a recount should be counted as then found. He also held that the 138 ballots with the words "For Representative, Sixth district," were required by the laws of Massachusetts to be rejected, but he did not make any account of them in reaching the result.

He also argued quite elaborately that the educational qualification law of Massachusetts, disfranchising over 100,000 citizens, should, under the fourteenth amendment, reduce the representation of the State. If it had not been for the disfranchisement affected by this law contestant would certainly have been elected, and the House ought to apply the most available remedy by seating him.

The House, by a vote of 136 to 93, decided to consider the case, but after voting on many motions to adjourn, etc., finally proceeded to other business without acting on this case. This left contestee in the seat, as recommended by the committee.

[1 Elts., 346-360.]

(7) DUFFY *vs.* MASON.

Insufficiency of notice; bribery; illegal votes. Report for contestee, who retained the seat.

Reported by Mr. Colerick.

The notice of contest in this case contained five specifications. The first, fourth, and fifth merely alleged in general terms that contestant was elected and that contestee was not. The second and third were as follows:

Second. That your election was effected and procured by force, fraud, intimidation, promises of favor, corruption, the buying of votes and voters, and other corrupt and illegal means used by you and in your behalf; and that your certificate of election as such Member of Congress was and is based upon and the result of such force, fraud, intimidation, promises of favor, the buying of votes, and other corrupt and illegal means used by you and in your behalf.

Third. That your election was procured by illegal votes and illegal voting in your behalf, and by your procurement or the procurement of those interested in your election.

The committee held that this notice of contest was clearly insufficient, and that if the objections made to it by contestee in his answer had not been afterwards waived, the committee would have been justified "in dismissing this case or excluding the evidence offered in support of the alleged grounds of contest." But the parties having entered into an agreement to admit all of the testimony taken by contestant as part of the case, in consideration of an extension of the time for taking testimony by contestee, the objection was held to be waived, and the committee were "compelled to examine the evidence and determine the merits of this contest."

The grounds of contest, as stated in the brief of contestant, were five: (1) A system of bribery practiced by Thompson Kingsford and the Oswego starch factory in compelling their employees, by fear of discharge, to vote the Republican ticket; (2) the expenditure of money by contestee and the committees of his party to procure the attendance of voters at the polls, and for other purposes not permitted by the statute of New York; (3) the employment of day-laborers about the time of the election for the purpose of influencing their votes; (4) direct buying of votes, and (5) illegal voting.

It was shown that rumors had been prevalent in the city of Oswego for many years that the managers of the Oswego starch factory improperly influenced their employees to vote the Republican ticket. But the committee held that it was necessary to ascertain the truth of these rumors, and not their mere existence. Most of the evidence of contestant merely went to establish the existence of the rumors. Three persons were found who had been discharged, during a period of eighteen years, and who believed that their discharge was due to political reasons. None of these had been discharged within two years of the election in contest, and there was evidence to show that each of them had been discharged for drunkenness. A large number of employees of the factory testified that no such system of intimidation or influence existed, and that they had always voted freely for either party.

Under the statute of New York any candidate or other person was forbidden to furnish or pay for any "entertainment for any meeting of electors," with the intent of influencing the election; to furnish money for the purpose of "procuring the attendance of voters;" or—

To contribute money for any other purpose intended to promote an election of any particular person or ticket, except for defraying the expenses of printing and the circulation of votes, handbills, and other papers previous to any such election, or for conveying sick, poor, or infirm electors to the polls.

It was shown by the evidence that contestee paid to the various county committees assessments amounting to \$400, and contestant similarly paid \$375. Part of the \$400 contributed by contestee was shown to have been expended in ways which contestant claimed were prohibited by the statute, namely, "in procuring the attendance of voters at the polls" who were neither "sick, poor, or infirm," and in paying the expenses of public meetings and speakers. The committee held that even if such expenses were prohibited by the statute there was nothing to show that contestee had authorized such an expenditure of the money contributed by him, and he could not be held responsible for the illegal acts of his agents. Besides, even if such expenses were illegal, a legal voter who attended a meeting in a hall paid for by a party committee, or who rode to the polls in a carriage provided by a party committee, though he was able to walk or pay for his own ride, certainly ought not to be deprived of his vote. And there was nothing to show how many such voters there were.

The third charge was based on the fact of the erection of a large building by Thompson Kingsford during the months preceding the election. Large numbers of laborers were employed on this building for some months previous to the election and for a month or more afterwards, until work was stopped on account of cold weather. A number of witnesses testified that they believed or had heard that these men were employed for the purpose of inducing them to vote the Republican ticket. All the testimony was hearsay, and did not even as hearsay attempt to show specific acts of influence exercised upon particular voters. On the other hand, the testimony showed that the building was erected because of urgent necessity and not for political reasons, and many employees who voted for *contestant* testified that no influences were brought to bear to affect their votes.

The charge of direct bribery was confined to two votes and to rumors of the expenditure of \$1,500 by contestee. So far as the rumors were specific they were directly denied by the only persons

who could have knowledge of their truth or falsity. One witness testified that he had been paid 50 cents for his vote by a student in the law office of contestee. He was intoxicated while testifying, was impeached, and contradicted on material points by other witnesses. Another person was said to have stated since the election that he had been paid \$1 for his vote by this same student. This, even if true, would not affect the result, as there was nothing to connect contestee with the transaction.

The charges of illegal votes were confined to 14 students of Madison University. There was no evidence of the illegality of their votes except the fact that they were students in the university. The number of students voting was much less than in former years, and it was shown that legal advice was taken by the students and great pains taken that no one should vote who was not legally entitled to vote. Six of these students were affirmatively shown to be married men and old residents of the town of Hamilton, and there was no evidence that the others were not legal residents. They had all been acquitted by a United States commissioner of the charge of illegal voting. The committee refused to reject their votes.

The committee were unanimous in their decision, and the House agreed without division.

[1 Ells. 361-377.]

(8) O'HARA vs. KITCHIN.

Rejection of precinct returns by county canvassing board. Testimony not taken in time. Report of committee for contestee. No action by the House.

Report by Mr. Field.

The date on which the notice of contest in this case was served, or whether it was served at all, was in dispute. Contestee in his answer objected that he ought not to be called upon to answer the notice, because "no lawful or sufficient notice of said contest has been served upon him * * * within the time prescribed by law." The answer of contestee was served April 29, 1879. As the canvass of the votes in part of this district had been involved in complicated legal proceedings, it was impossible to determine with certainty when the result of the election was determined, and, hence, when the thirty days for serving notice of contest expired. The first testimony taken by contestant was one hundred and ninety-four days after the service of the answer of contestee. Contestant alleged an oral agreement for the extension of time, but this agreement was denied by contestee, who supported his denial by a number of affidavits. The committee condemned the practice of extending time by agreement, and held that in any case the agreement must be in writing. There being no written agreement in this case, the committee declined to determine from the affidavits whether or not there was an oral agreement, and excluded all the testimony as inadmissible.

But if the testimony were admitted it would not establish contestant's case. Part of it was open to the additional objection of being taken without notice. There was only one witness from whose testimony any definite conclusions affecting the election might be drawn, and the most that could be inferred from his testimony was that in the county of Edgecombe precinct returns giving an aggregate majority for contestant of 925 votes were rejected by the county canvassers,

chiefly on the ground that the judges of election were not regularly sworn. The committee did not agree as to whether such votes should be counted or not (see case of *Yeates vs. Martin*), but as in this case the number of votes affected was less than the majority returned for the sitting member, the committee unanimously agreed in reporting resolutions declaring contestee entitled to his seat. There was no action by the House on this case.

[1 Ells., 378-383.]

(9) YEATES *vs.* MARTIN.

Rejection of returns. Polls not opened in time. Election officers not qualified. Ballots with distinguishing mark. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Speer; minority report by Mr. Field.

According to the returns as canvassed by the county and State boards of canvassers, contestee had a plurality of 51 votes. Each party alleged that this canvass did not include all the votes that should have been counted for himself, and did include votes which should not have been counted for his opponent.

The vote of Providence Township, which gave a majority of 39 votes for contestant, had been rejected by the county canvassers on the ground that the returns had been delivered by the registrar instead of by one of the judges. The committee unanimously counted the vote of this precinct. Contestant insisted that if the vote of this precinct was counted, the vote of Salem Township, where he received a majority of 135 votes, and which he alleged had been rejected for the same reason, should be counted. The testimony merely showed that the return had been rejected "on account of informality." The committee held that the evidence was not sufficient to show that the return was not properly rejected. The poll was not opened until 12 o'clock, the registrar was not regularly appointed, the officers of election were not sworn, and only about half of the vote of the precinct was polled.

The vote of South Mills precinct, where contestee had 64 majority, was excluded by the committee on the ground that the polls were not opened until three hours after the legal time, only a part of the officers of election officiated, and these were not sworn, and only about one-half of the registered vote was polled. The vote of Hamilton precinct, where contestee also received a majority of 64 votes, was also rejected on the ground that contestee had for a time acted as registrar, contrary to the imperative provisions of the statute. The vote of Vandemere precinct was rejected for reasons similar to those of South Mills.

In Merry Hill precinct 108 votes for contestee were rejected by the election officers on the ground that the words "Republican ticket" at the head constituted a "device." The statute of North Carolina provided that—

The ballots shall be on white paper, and may be printed or written, or partly written and partly printed, and shall be *without device*.

The committee held that these votes must be rejected, but said that they had "come to this conclusion with much reluctance."

The precincts of Goose Nest and Hamilton had been consolidated several years before, and all the names of the voters on the Goose Nest registry list transferred to the Hamilton list. Just before this election the precincts had been again separated. The judges of election at Goose

Nest refused to receive the votes of any voters who did not present a certificate that their names had been erased from the Hamilton list. These certificates had been given to a number of voters the evening before election, but were refused on the day of election. Contestee claimed that all the votes tendered and refused should be counted for him, but the committee held that they could not be counted, and that if they could, the evidence was insufficient to show their number.

Making the deductions and additions above indicated would give contestant a majority of 156 votes, and the committee accordingly reported resolutions declaring him elected.

The minority disagreed as to most of the findings. Under the law of North Carolina, if any of the judges of election were not present at the opening of the polls, it was the duty of the registrar to appoint others of the same party. This law necessarily implied delay if suitable persons could not immediately be found, and the delay in opening the polls in each of the precincts in issue was in fact due to this cause. In no case was the effort to hold an election given up, or the impression created that there would be no election. It was the duty of the voters to wait until the polls could be opened and if there then remained time enough for all the votes to be cast, the freedom of the election was not interfered with. The case of polls closed before the legal time was not analogous. If the votes of all the voters who were shown by definite proof to have left under the impression that there would be no election were counted the result would not be affected. The fact that some of the officers of election were not sworn or otherwise not qualified would not vitiate the election. They were officers *de facto*, whose acts affecting the public were valid. There was no allegation of fraud or injury resulting from their action. Many of the irregularities for which it was sought to reject polls were not mentioned in the notice of contest and ought not to be considered. None of these irregularities were sufficient to vitiate the election, and the returns should be counted, including that of Salem precinct rejected by the county canvassers.

The names of the voters in Goose Neck precinct should have been transferred from the Hamilton registry books without individual application, and there should be counted for contestee the least number shown by the proof to have tendered their votes for him. The minority left to the House the question whether the 108 ballots with the words "Republican ticket" were properly rejected. If they were not included, the majority of contestee, under the findings of the minority, would be 267. If they were included, it would be 375.

The resolutions presented by the majority were adopted by a vote of 115 to 103, and Mr. Yeates was sworn in.

[1 Ells., 384-415.]

(10) CURTIN vs. YOCUM.

Unregistered votes. Majority report to declare seat vacant; first minority report for contestee; second minority report doubtful. Conclusions of first minority report adopted by the House, and contestee retained the seat.

Majority report by Mr. Springer; first minority report by Mr. Calkins; second minority report by Mr. Field.

There were three reports in this case: A majority report, by Mr. Springer, signed by Messrs. Springer, Manning, Clark, Speer, Cole-

rick, Armfield, Beltzhoover, and Sawyer, holding that the result of the election was doubtful under the evidence, and that the seat should be declared vacant; a minority report by Mr. Calkins, signed by Messrs. Calkins, Keifer, and Weaver, holding that contestee was entitled to retain the seat, and a second minority report, signed by Messrs. Field, Overton, and Camp, differing from the other reports in some conclusions and expressing doubt as to others, but coming to the conclusion that if the case was to be decided on the testimony presented, the result reached by the minority had more in its favor than that reached by the majority. The conclusions of the first minority report were adopted by the House, and contestee retained his seat.

The testimony in this case covered over 4,000 pages (being the largest amount of testimony ever taken in a contested-election case in the House of Representatives, unless it be the case of Greevy *vs.* Scull in the Fifty-second Congress, which covered 3,000 pages of much finer type) and involved a large number of issues, but the issue on which the case turned, and the only one discussed in the reports, was the effect on the election of the votes of a large number of unregistered voters which were alleged to have been received by the judges of election without the presentation of the affidavits and vouchers required by the Pennsylvania statute to be presented by unregistered voters. There were some disputed questions of fact in regard to whether it was sufficiently shown that these affidavits were not in fact presented by these unregistered voters, and also in regard to the number of such unregistered voters. The disputed questions of law were as to whether the statute in question was mandatory and the votes illegal, and also as to the effect they should have on the election if they were illegal.

The qualifications of voters, as prescribed by the new constitution of Pennsylvania, were all personal qualifications, namely: Age, United States citizenship, State residence, election district or precinct residence, and payment of taxes; the required qualifications in each of these respects being specifically defined in the constitution. The only provision in regard to registration was:

All laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the State; but no elector shall be deprived of the privilege of voting by reason of his name not being registered.

Acting under this constitution the legislature had enacted a registration law, providing for a registration of the qualified voters to be made out by the assessors from the assessment lists, and corrected by the same officers sixty days before the election. This list was to be furnished to the election officers, "and no man shall be permitted to vote at the election on that day whose name is not on said list, unless he shall make proof of his right to vote as hereinafter required." The proof required was an affidavit by the claimant setting forth the possession of all the qualifications required by the constitution, and an affidavit by another qualified elector of the precinct showing that the claimant has been for two months a resident of the precinct. The contents of these affidavits were specifically and minutely prescribed by the statute. It was further provided that—

If any election officer shall refuse or neglect to require such proof of the right of suffrage as is prescribed by this law * * * from any person offering to vote, whose name is not on the list of assessed voters,

or who might be challenged, he should be guilty of a misdemeanor and liable to a fine and imprisonment.

The election officers were required by one of their number to return all the affidavits of voters, with the poll list, tally sheet, and other papers, to the office of the prothonotary. The ballots in the ballot boxes were to be deposited with the nearest justice of the peace, or other custodian appointed by the court.

The evidence of lack of registration in this case consisted of copies of the registry lists, poll lists, and affidavits of voters on file in the offices of the protonotaries. Contestant insisted that whenever the name of any person was found on the list of persons voting, but was not found on the registry list or among the affidavits on file, such person was proved to have voted without registration and illegally. The parties differed as to how many such names there were, but the committee found that after eliminating all names shown to have been probably registered under a similar name, all in regard to which the possession of the constitutional qualifications was affirmatively shown, and all which were shown to have voted for one party or the other, there still remained some 900 votes of persons not registered and not shown to be qualified, and in regard to which there was no proof for which party they voted. This number was more than ten times as great as the certified majority of the sitting member, and three times as great as the majority claimed by him after the elimination of such illegal voters under the evidence.

The majority of the committee held that the statute requiring an unregistered voter to prove his qualification by a specified affidavit was mandatory, and that the votes cast without the presentation of such affidavits were illegal.

The evident object of the law-making power of Pennsylvania in the passage of the foregoing statute was this: Such had been the looseness theretofore in receiving parol evidence as to the right of persons to vote on the day of election and such was the difficulty of indicting persons for perjury on such parol evidence that it was deemed necessary to provide by law that the proof of an elector's right to vote should no longer rest on parol evidence, but that the voter, in order to establish by competent evidence his right to vote, should file a written or printed affidavit of himself as to his qualifications, and also the written or printed affidavit of another qualified voter of the same election district as to his residence in the precinct for two months immediately preceding the election.

The authorities are uniform to the effect that all statutes are mandatory which can not be disregarded without ignoring the legislative intent. The will of the legislature can not be carried out unless this provision of the statute is complied with, and to disregard it is to disregard one of the safeguards which the law-making power of Pennsylvania deemed necessary for the protection of the ballot.

According to the distinction between mandatory and directory statutes, as laid down in all the authorities, this statute could not be regarded as directory. The question had not been directly passed on by the Pennsylvania courts since the adoption of the new constitution, but the former decisions of the courts, so far as applicable, sustained the decision of the committee. The only apparent exception was in a case where the voters had not neglected to register or furnish the necessary evidence of qualification, but where the officers of the law had neglected to furnish the election officers with a certified copy of the registry list.

The result of all the authorities is that all constitutional provisions in [and] statutes defining what the voter himself must do, both as to qualifying himself as an elector and furnishing the quality and quantity of evidence thereof which the law demands, is mandatory, jurisdictional, and in the nature of conditions precedent, while those which merely relate to the conduct of the election officers may or may not

be directory according as they may or not appear to affect results, and according as they may or may not seem to have been regarded by the lawmaking power as essential and necessary safeguards against the mischief the statute was intended to prevent.

Independent of this question of unregistered voters an attempt had been made by each party to show illegal votes cast for the other, and contestant claimed that an elimination of these votes would elect him by 99 majority. Contestee claimed that this elimination would elect him by 379 majority. But in view of the 900 unregistered votes the committee held that neither of these claims could be sustained. There was no way of eliminating these unregistered votes, and their number was so large that the result of the election could not be ascertained without eliminating them. It would be unjust to deduct them all from either candidate, or from the candidates *pro rata*, and if only those precincts in which they were cast were thrown out there could be no certainty that the result thus shown was the true result of the election. The only just course was to remit the matter to the people by a new election. The objections that the contestant, by not producing the ballots of the voters and by resisting contestee's effort to have them preserved so that he might produce them, had himself prevented it from being shown for whom the illegal voters voted were not well taken, for it appeared that contestant had throughout shown an extraordinary degree of diligence in showing for whom illegal votes were cast. The number of votes in question was so large that it was impossible for either party, in the time for taking testimony, to show for whom all the illegal votes were cast.

The result being thus left in uncertainty, the majority of the committee recommended resolutions declaring the election void and the seat vacant until filled by a new election.

The minority of the committee held that the registration law, in so far as it affected the right of a nonregistered voter to vote, if he was otherwise qualified, was not mandatory. The words of the constitution, "but no elector shall be deprived of the privilege of voting by reason of his name not being registered," forbade such a construction.

We regard section 10 of the election law of Pennsylvania, *supra*, so far as it requires a qualified elector to produce his own affidavit and that of a voter of his election district to his qualifications, directory merely, and in the nature of a law to authorize the board of election on the day of election, while it is being held, to correct the registry lists, theretofore furnished them by the county commissioners, by adding the names of qualified voters thereto who may have been unintentionally omitted. The registry lists and poll lists will then agree. It is the duty of the election officers to comply with this law. It is imperative on them, and if they fail they subject themselves to the penalties provided in section 12 of the registry law, but to allow a nonregistered voter to vote without requiring him to comply with the law, if he is otherwise qualified, is quite a different question. If he refuses to comply on being requested, then it is clearly the duty of the officers to refuse his vote because he refuses to obey a reasonable regulation prescribed by the legislature, and he hurts no one but himself; but if he is allowed to vote without being required to file the affidavits, and is otherwise qualified, his vote is not an illegal one. The officers of election have simply failed to take and preserve the evidence which the law requires of them, but the failure on their part to take and preserve this evidence does not reach the qualification of the voter. Nor do we believe the courts will hold any such doctrine, for it would be equivalent to holding the evidence of a fact superior to the fact itself.

The neglect in this case was not, as claimed by the majority, on the part of the voters, but on the part of the election officers in neglecting to require the affidavits of the voters.

Moreover, the evidence was far from establishing that the voters in question did not in fact present the proper affidavits. The only evidence was the fact that the affidavits were not on file in the prothonotary's office. But the filing of the affidavits by the return judges was only the last of a series of acts required to be performed by the election officers, and the fact that it had not been performed raised no presumption that the preceding acts had not been performed.

And in fact it was shown in regard to a large number of precincts that the affidavits had been required of the voters, but had, under a mistaken view of the law, been sealed up in the ballot boxes instead of being filed in the office of the prothonotary. Under the law of Pennsylvania the ballots were to be preserved in the ballot boxes intact until the next election, when they, with all other papers in the ballot boxes, were to be publicly destroyed by the custodians, unless required to be kept by an order of the court. The "spring election" in this year came on February 18, 1879. This happened also to be the last day for taking testimony by contestant. It being discovered that the affidavits in many precincts were in the ballot boxes, contestee applied to the proper courts for orders restraining the custodians from destroying the contents of the boxes. The contestant resisted this petition, and in accordance with his contention the courts denied the prayer and the contents of the boxes were destroyed. Contestant had thus by his own act destroyed the testimony by which it would be possible to prove whether the voters in question had complied with the law or not, and also to show for whom they had voted, so that if they were held to have voted illegally they might be deducted. He thus stood "in the position of the spoliator of documentary evidence asking to take advantage of his own wrong."

Conceding, for the sake of the argument, that the votes were illegal, the minority held the true rule to be that if it could be shown by the use of due diligence for whom the votes were cast they should be deducted from the parties respectively; if it could not be shown, and the number of votes was small, they should be disregarded; if it was large, the whole poll where they were cast should be thrown out. In this case it could have been shown, and that it was not shown was due to the action of contestant. If the polls where the votes were cast were thrown out it would increase the majority of contestee; also if the unregistered votes were deducted *pro rata*. Contestee could not be deprived of his seat by the application of any rule except that of giving to contestant the advantage of an uncertainty produced by his own acts. The minority accordingly recommended resolutions declaring contestee entitled to retain his seat.

Messrs. Field, Overton, and Camp presented a second minority report, disagreeing with the minority in their construction of the registration law, but agreeing in the conclusion that contestee ought to retain the seat. They held that the provision of the registration law for requiring affidavits of unregistered voters was mandatory, but that the requirement that these affidavits should be filed in the office of the prothonotary was directory. There was no proof that the voters in question had voted illegally except a remote inference from the fact that no affidavits were on file in the office of the prothonotary. This certainly could not be inferred without evidence, and what evidence there was bearing on the subject tended to show that the affidavits were required of the voters, but were sealed up in the ballot boxes.

The contestant could easily have proved not only what votes were illegal, but for whom they were cast, but he had not only not done this, but had resisted the efforts of contestee to preserve the evidence.

The burden of proof, even if the doctrine of declaring an uncertain election void be adopted, is, we think, as stated by the minority, on the contestant to show that more illegal votes than the returned majority of the sitting member were cast, and either that they were cast for the sitting member or that it is impossible to ascertain for whom they were cast, and that this impossibility is an actual impossibility arising from the circumstances of the case, and which could not have been remedied by the use of due diligence, and not an impossibility arising wholly from the absence of evidence that could have been taken. The party having the burden can not by his own neglect create the impossibility.

On the facts as stated in the reports the election ought not to be declared void; no one contended that the contestant ought to be seated, and so if the House was to take final action on the reports as made, the resolutions presented by the minority should be adopted.

The House, by a vote of 113 to 75, adopted the resolutions presented by the *minority*, and contestee retained his seat.

[1 Ells., 416-438.]

(11) DONNELLY *vs.* WASHBURN.

Bribery; numbered ballots; unorganized counties; informality. s. Majority report for contestant; minority report for contestee. No action by the House.

Majority report by Mr. Manning; minority report by Mr. Keifer.

The report in this case headed "majority report" is only signed by five members—Messrs. Manning, Sawyer, Armfield, Beltzhoover, and Colerick. The "minority report" is also signed by five members—Messrs. Keifer, Overton, Calkins, Camp, and Field. There is no report signed by the other five members—Messrs. Springer, Speer, Phister, Weaver, and Clark—but it would appear from statements in the reports that part at least of them favored unseating Washburn on the ground of bribery, according to the doctrine of the majority report, but opposed the seating of Donnelly on the ground that he did not receive a majority of the votes.

According to the returns, the majority of contestee was 3,013. Contestant claimed that part of this majority was due to bribery, and that some of the bribery having been traced to the sitting member or his agents, he should be unseated. He also asked that the votes of certain precincts and counties be thrown out, and that he be given the seat by virtue of the majority received by him in the remainder of the district.

Besides the cases of bribery in bulk, it was claimed that twenty-two individual cases of bribery were proved, and that attempted bribery was shown in thirteen other cases, but the parties either refused the bribe or voted for contestant in spite of it. Three of these cases were alleged to be traceable to the office of contestee, and presumably to have been committed by him or with his knowledge and approval. One of these cases was that of a man who wrote to contestee asking \$50 for his services and support. The letter was not answered by contestee, but was forwarded by some one else to a resident of the same town with the applicant. This person received \$50 from the Republican committee, but gave none of it to the writer of the letter, as he did not trust him.

In another case one Shagren was urged by a friend of the sitting member to go to his office and see his business manager, who would convince him that he ought to vote for Washburn. He did go, but was not convinced. Some time later, being out of work, he was urged to go to Washburn's office and he would be given a job. He went and met Major Hale, a friend of Washburn, who offered him \$2 per day until election to canvass and work for contestee. Major Hale went into the back office, and after a conversation with the brother of contestee returned and paid Shagren \$5. Shagren accepted the \$5, but did not canvass for contestee nor receive the money he was to be paid for doing so. He worked and voted for contestant.

The third case was of a man who had concluded not to take any active part in the election because he had been promised money at previous elections which he had not received. He had been a Democrat, but was favorable to the election of Mr. Washburn. He was urged to see the secretary of the Republican committee and attempted to do so, but could not find him. He was afterwards informed by some one that Mr. Washburn would like to see him in his office. He went to the office, but did not find Mr. Washburn there. The secretary of the Republican committee was there and agreed to pay him for his time and expenses if he would go out and electioneer for contestee. The next day, in the post-office, he was given \$30 and told to hire a team and go to work. Soon afterwards he went again to the office of the sitting member and asked for more money. The secretary of the committee, after going into the next room and talking to the sitting member, came back and handed him \$20.

A fourth instance of bribery, involving about 90 votes, was also said to have been traced to Mr. Washburn. The voters were wood choppers, working in Kittson County, chopping wood by the cord. They were allowed to go to the nearest polling place and vote, and were paid by the contractors in whose employ they were a sum equal to the amount they would probably have earned in the time lost. This sum, amounting to \$160 or \$170, was repaid to the contractors by the paymaster of a railroad of which contestee was the president. It was paid by the individual check of the paymaster and not out of the funds of the company.

These four cases of bribery being brought directly home to contestee, were enough to convict him of bribery in any court. He had not introduced any testimony to rebut the testimony against him, and must thus be held to have admitted his guilt. There were eighteen other individual instances of bribery and thirteen of attempted bribery, similar to these cases except that there was nothing to show the direct personal connection of contestee with them. There were also two other precincts where collective bribery was shown. In the three precincts, including the one already noticed, 161 votes were cast by railroad workmen, presumably not permanent residents of the precincts where they voted. The precincts were in an unsettled country, where there were scarcely any houses, and the railroad employees lived in box cars. The voting places were box cars or railroad stations. The men were all paid for the time they were absent from work, and would not have voted if they had not been paid. Including all these men, and the individual voters bribed or attempted to be bribed, a total of 304 bribed voters was shown. The true number must have been larger, because several persons were shown to have bribed a

large number of voters and this 304 only included a few bribed by each of these persons.

The majority of the committee held that—

It is a clearly established principle of law, both in England and the United States, that bribery committed by the sitting member, or "by any agent of the sitting member, with or without the knowledge or direction of his principal, renders the election void."

But the committee did not rest the case on this principle, but held that the evidence showed that contestant had received a majority of the legal votes. They reached this result by deducting the 22 bribed votes and by throwing out 7 precincts of Minneapolis and the whole "county of Polk and Kittson" and Isanti County. Throwing out these counties and precincts, and counting the counties of Stearns, Morrison, and Douglas, not counted by the State canvassers, would elect contestant by a majority of 230 votes.

The counties of Stearns, Morrison, and Douglas had not been counted by the State canvassers on the ground that these counties had never been officially recognized by the legislature as organized. These counties gave the sitting member a majority of 508 votes. The committee held that they were not legally organized, but as there was no charge of fraud or illegal voting, they recognized them as *de facto* organized, and counted the votes.

As each of the other three issues—the rejection of the seven precincts of Minneapolis, of Isanti County, and of the "counties of Polk and Kittson"—involved more votes than the majority found by the committee for contestant, any one of them may be considered a decisive issue, and it will be necessary to examine them fully.

Seven precincts in Minneapolis were rejected by the committee on the ground that the ballots were numbered by the election officers, as a part of a system of intimidation practiced by contestee. The constitution of Minnesota provided that "all elections shall be by ballot."

At the session of the legislature previous to this election the legislature had passed a law providing that in all cities containing over 12,000 inhabitants the ballots should be numbered by the election officers to correspond with the names on the poll list. The district court of Ramsey County, previous to the election, had decided that this law was unconstitutional, on the ground that an election "by ballot" implied a secret ballot, and that an election by numbered ballots was not an election "by ballot." This decision was affirmed by the supreme court of the State *subsequent* to the election. A short time before the election the officers of election of the various precincts of Minneapolis and St. Paul, the only cities affected by the law, held a meeting, and after taking legal advice, concluded not to number the ballots. The morning of the election, before the polls were opened, the officers in these seven precincts reconsidered their determination, and agreed to number the ballots. The committee held that—

If the numbering of the ballots had been the result of an innocent mistake on the part of the judges of these seven precincts * * * we should not be in favor of casting out the votes of these precincts simply for the reason that the ballots had been numbered.

But the testimony showed that the numbering of the ballots was regarded by the workingmen, who were largely supporters of contestant, as a means by which their employers could intimidate them; that there was a widespread conspiracy on the part of employers to intimi-

date their employees; that "a cloud of bribery surrounds the vote of the whole city," and that the officers of election in these precincts, all of whom were partisans of contestee, had decided at the last moment, knowing these facts, and against their former agreement and the opinions of their legal advisers, to number the ballots. The testimony showed that one man had refused to vote if his ballot was numbered, and another had stayed away from the polls for this reason, and the decrease in the Democratic vote compared with the previous election, without any corresponding increase in the Republican vote, showed that many others had been deterred from voting, and that contestant was injured thereby. Under all these circumstances the votes cast at these precincts must be rejected.

The vote of Isanti County was rejected by the committee on the ground that the county canvassing board was illegally organized. The law required the board to be composed of the county auditor and two justices of the peace. The return of Isanti County was signed by the auditor, one justice of the peace, and the probate judge. The committee held that the probate judge could not be construed to be a *de facto* officer, because he was not acting by color of title as justice of the peace, but as probate judge. The law of Minnesota, to be sure, provided that where powers were given to three or more officers they might be exercised by a majority, and under this provision, if the canvassing board had been legally organized, the auditor and one justice might have acted. But in this case the board was never legally organized, and hence could have neither majority nor minority. If this objection were purely technical, the committee might hesitate to reject the return. But contestant in his notice of contest had charged that the votes in this county "were not cast or counted for you, or returned or canvassed as provided by law." The *bona fides* of the casting of the vote, and the count of the precinct officers, being thus put in issue by the pleadings, the burden was on contestee, by introducing the ballots in evidence, to show the true vote. There being no evidence of the vote except the returns, the vote of the county must be rejected.

There was in the record a certificate of the vote in the "county of Polk and Kittson," giving the vote by precincts. Two of these precincts were marked "Kittson County," and there was testimony that a third was also in Kittson County. There was no "county of Polk and Kittson" in the State of Minnesota, but separate counties. Kittson County was unorganized, and not attached to Polk County for any purpose. The election in the two precincts of Kittson County was illegal because there were no legally established precincts, and because the votes were cast by nonresidents, who were bribed. In two of the precincts of Polk County more votes were cast than there were legal voters in the precincts. There was no evidence to show in which county the other precincts were. The proper course for contestee would have been to show by competent evidence which precincts were in Polk County, and then by introducing the ballots in evidence prove the votes cast in them. This not having been done, and the "fraudulent vote of Kittson County having been inextricably mixed into whatever legal votes were cast in Polk County," the whole vote of both counties must be rejected.

Rejecting these counties and precincts, contestant had a majority of 230 votes in the remainder of the district, and the committee recommended resolutions declaring him elected.

The minority of the committee disagreed to all the propositions of the majority report except as to counting the votes of the unorganized counties, not counted by the State canvassers.

The notice of contest served by contestant consisted of nine paragraphs, stating only in general terms his grounds of contest. Most of the issues considered by the committee were not specified in the notice at all. The testimony, especially that by which it was sought to prove bribery, was almost entirely hearsay of the most untrustworthy character.

As to the charge of bribery, the minority found that there was—

evidence tending to show that in this district the friends of the contestant and contestee both used money to poll the district, and to provide means for getting to the polls voters who were remote from the polling places, and who were often without conveyances of their own in which to travel to the polls on election day. Money was undoubtedly spent to pay canvassers before the election, and in some instances men were employed at the polls to hold tickets for the respective parties. The district is a very large one in point of population and in extent of territory, and in consequence of this greater effort was required to get out the full vote. Some money was also expended to pay speakers to go over the district. The committee is not prepared to say that such use of money is entirely illegitimate. It is very common, if not universal, in all contested elections throughout the United States, for candidates and their friends to use such means to secure votes.

But there was no evidence sufficient to show bribery, and especially to show that it was committed by contestee. The four cases said to have been traced directly to contestee were not made out. The first case was that of a man who wrote to contestee asking for \$50, not for his vote, but for his services as a canvasser. Contestee did not answer the letter; he did not receive the \$50, and did not work for contestee. As he had made a similar proposition to contestant, and did work for him, he may have received money from contestant.

The second case, that of Shagren, was no stronger. Shagren was impeached by three witnesses. Taking his testimony as true, it only showed that a friend of contestee, in his office, but not in his presence, promised Shagren \$2 a day for his services as canvasser, and paid \$5 down, possibly from money given by the brother of contestee. Shagren did not work or vote for contestee, and received no more money. The third case was that of a man who was paid \$50 for his time and expenses of himself and team in canvassing for contestee. The statement of the majority report that part of this money was paid in the presence of contestee was not borne out by the evidence, and if it were, the payment was not for the man's vote, and did not constitute bribery. The case of the 90 woodchoppers was not bribery, nor was it traced to contestee. The woodchoppers were paid by their employer the wages they would have earned if they had not gone to vote. They were told to vote as they pleased, and no questions were asked as to how they would vote. The money was repaid to the employers by the paymaster of a railroad of which contestee was president, but it was not paid out of the funds of the road. Quite possibly it was paid out of the campaign fund of the party. This custom of paying laboring men for the time lost while going to the polls the committee did not approve, but it was very common in all the States, and certainly was not bribery.

The minority discussed in detail all the other cases of bribery charged, but found that the evidence relied on in most of the cases was entirely hearsay. There was no pretense that the connection of contestee with any of them was shown. The most that was shown in

any cases was that men had been paid by party committees to canvass, drive teams, and hold tickets at the polls, for the whole party ticket; some of them were working in the especial interest of candidates for local offices.

The minority held that even if bribery were proved it would not be cause for vacating the seat unless it affected the result, which was not claimed in this case. The English rule arose under the statute law of England declaring a person guilty of bribery *ineligible* to office under the election at which the offense was committed. Such was not the common law, and there was no such statute in this country. If, for bribery or any other cause, a member was unworthy to sit in the House he should be expelled by a two-thirds vote; but such questions did not involve the "election, qualifications, and returns" of members, and were not within the jurisdiction of the Committee on Elections.

Upon the question of numbered ballots, the committee held that the statute for numbering them was constitutional in so far as it applied to Congressional elections, and that if it were not, ballots honestly and freely cast and correctly counted ought not to be rejected because they were numbered. The power of the legislature to prescribe the time, place, and manner of holding Congressional elections was not derived from the State constitution, but from the Constitution of the United States. The statute was not contrary to the Federal Constitution nor to the laws of Congress, and was consequently valid. The numbering of the ballots was required by the constitutions of several States where the election was by ballot, and under the precautions of the Minnesota law it was not a violation of the secrecy of the ballot. The unbroken line of decisions in the House was that even if the ballots were numbered contrary to law the votes ought not to be rejected. It was not shown in this case that the numbering was for the purpose of intimidation. Most of the voters did not even know that the ballots were being numbered. Two somewhat eccentric persons were said to have refused to vote, but it was doubtful for whom they would have voted.

The rejection of the vote of the county of Isanti could not be justified. The contestant himself had put in evidence the returns of the county, and there was not the slightest evidence that they did not correctly represent the vote. The canvassing of the returns was required to be done by the auditor of the county, assisted by two justices of the peace. In this case the certificate of the auditor was attested by two persons, one signing himself "justice of the peace" and the other "probate judge." The functions of the county board were purely ministerial, and the only function shown to have been performed by the justice of the peace and the probate judge was the attestation of the certificate of the auditor. Even if the probate judge could not legally act, the certificate of the other two was sufficient, especially since the returns had been passed upon and canvassed by the State board and there was no charge or evidence that they were not correct.

The minority were willing that the vote of the two precincts in Kittson County should be rejected, as it would not affect the result, and the voters were possibly nonresidents. The precincts in Polk County where nonresidents were said to have voted ought not to be rejected, as the evidence was very doubtful, especially under the Minnesota law requiring only ten days' residence in the precinct. But certainly the whole vote of Polk County ought not to be rejected because

the vote of Kittson County was certified with it. There was a statute of Minnesota under which such certification was legal. And in any case the certificate was by precincts, and there was no difficulty whatever in separating the precincts of the two counties. The vote of Polk County was stated in the certificate of the State canvassers and also in contestant's brief.

In accordance with the vote of two-thirds of the committee, the minority recommended a resolution that contestant was not elected, and in accordance with the views of those signing the minority report, a further resolution that contestee was elected.

There was no action by the House in this case.

[1 Ells., 439-516.]

FORTY-SEVENTH CONGRESS, 1881-1883.

Committee on Elections.

Mr. CALKINS, Indiana,	Mr. JACOBS, Jr., New York,
HAZELTON, Wisconsin,	PAUL, Virginia,
WAIT, Connecticut,	BELTZHOVER, Pennsylvania,
THOMPSON, Iowa,	ATHERTON, Ohio,
RANNEY, Massachusetts,	DAVIS, Missouri,
RITCHIE, Ohio,	JONES, Texas,
PETTIBONE, Tennessee,	MOULTON, Illinois,
	Mr. MILLER, Pennsylvania.

Cases.

- (1) Paul Strobach *vs.* Hilary A. Herbert, *Alabama*.
- (2) Algernon A. Mabson *vs.* William C. Oates, *Alabama*.
- (3) James Q. Smith *vs.* Charles M. Shelley, *Alabama*.
- (4) William M. Lowe *vs.* Joseph Wheeler, *Alabama*.
- (5) George Witherspoon *vs.* Robert H. M. Davidson, *Florida*.
- (6) Horatio Bisbee, jr., *vs.* Jesse J. Finley, *Florida*.
- (7) John C. Cook *vs.* Marsena E. Cutts, *Iowa*.
- (8) Alexander Smith *vs.* E. W. Robertson, *Louisiana*.
- (9) Samuel J. Anderson *vs.* Thomas B. Reed, *Maine*.
- (10) George M. Buchanan *vs.* Van H. Manning, *Mississippi*.
- (11) John R. Lynch *vs.* James R. Chalmers, *Mississippi*.
- (12) Gustavus Sessinghaus *vs.* R. Graham Frost, *Missouri*.
- (13) Robert Smalls *vs.* George D. Tillman, *South Carolina*.
- (14) Samuel Lee *vs.* John S. Richardson, *South Carolina*.
- (15) Edmund W. M. Mackey *vs.* M. P. O'Connor, *South Carolina*.
- (16) Carlos J. Stolbrand *vs.* D. Wyatt Aiken, *South Carolina*.
- (17) George Q. Cannon *vs.* Allen J. Campbell, *Utah Territory*.
- (18) John T. Stovell *vs.* George C. Cabell, *Virginia*.
- (19) S. P. Bayley *vs.* John S. Barbour, *Virginia*.
- (20) John W. Jones *vs.* Charles M. Shelley, *Alabama*.

(1) STROBACH *vs.* HERBERT.

Irregularities. Report for contestee. Contestee retained the seat.

Report by Mr. Ranney.

Contestant presented two briefs, in one of which he claimed to be elected by 938 majority and in the other by 463. The committee found that in each brief there were clearly untenable claims covering more votes than the majority claimed, and they therefore decided the case against contestant without discussing the other issues.

In the first brief the vote of Escanaba County, where contestee had a majority of 634, was asked to be rejected, and also 1,190 votes in another county, where contestee's name was spelled *Hebert* on the ballots. The latter was merely a mistake of the printer; there was no other person of like name a candidate, and the intention of the voters was clear. In Escanaba County no official notice was given of the election, but this was not necessary where the time of the election was fixed by law. No officers of election were regularly appointed, but the law permitted the voters present, under such circumstances, to select the election officers; this was done and the election was held. Disallowing these two claims, contestant was not elected if every other claim was allowed. In the second brief also the vote of Escanaba County was asked to be rejected. Disallowing this claim alone, on the statement of this brief, destroyed the claim of contestant. And there were other equally untenable claims, especially some precincts which were asked to be rejected on no other ground than that contestant was returned as receiving less than the colored vote and contestee more than the white vote, as shown by the census.

Contestant then asked that the whole election be declared void, alleging that the frauds committed at the State election in October were repeated at the November election. But the committee found no proof that this was so to such an extent as to affect the result.

The committee unanimously recommended a resolution permitting contestant to withdraw his contest without prejudice. The House adopted the resolution without division.

[2 Ells., 5-7.]

(2) *MABSON vs. OATES.*

Application for time to take further testimony. Majority report to dismiss case; minority report to extend time. Case dismissed.

Majority report by Mr. Calkins; minority report by Mr. Thompson.

Notice of contest and answer were duly served, but contestant took no testimony until about a month after the service of answer, when he took the testimony of a few witnesses, all on the same day. Some time later contestee took the testimony of a few witnesses in reply. This was all the testimony in the record. Contestant presented an affidavit claiming that he had used due diligence to procure his testimony in time, but could not because all the officers in the district competent to take testimony were his political opponents and would not take his testimony because they had themselves been elected by the same fraudulent methods as contestee. Contestant had succeeded in taking the depositions of about 100 witnesses, but the notary had refused to forward them. He asked that further time be granted him in which to take testimony. The subcommittee to which this application was referred reported adversely, on the ground that contestant had not used due diligence, and that his affidavit was defective in not stating specifically the facts he expected to prove, or the witnesses by whom he expected to prove them. Contestant then filed another affidavit, avoiding some of these objections, but the committee held that this affidavit came too late.

It would be dangerous to establish a precedent allowing a contestant or contestee, after finally submitting their cases, to ascertain from the report of the committee the grounds upon which he had been overruled, and to then supplement his application

by a new affidavit, avoiding the decision, and thus open up the case again. Such a practice your committee think would lead to interminable delays, and would transform the committee into mere advisers of the parties. The committee are of opinion that parties should be bound by a reasonable rule of diligence, and that there should be a time fixed beyond which the doors for the reception of *ex parte* affidavits or evidence should be shut.

As contestant conceded that the evidence taken, including that not yet forwarded, would not establish his case, the committee recommended a resolution permitting contestant to withdraw his papers without prejudice.

A minority of the committee thought that contestant had used due diligence, and that the interests of justice required that the case be investigated. They recommended a resolution providing for the taking of additional testimony.

The House passed the resolution recommended by the majority without division.

[2 Ells., 8-17.]

(3) SMITH *vs.* SHELLEY.

Fraud; ballot-box stuffing; irregularities. Majority report that contestant elected, and on account of his death the seat be declared vacant; minority report for contestee. Seat declared vacant.

Majority report by Mr. Thompson; minority report by Mr. Beltzhoover; second majority report by Mr. Ranney.

The issues in this case, as in the other cases from this district in other Congresses, were chiefly questions of fact in regard to the election at nearly every precinct in the district. Contestant charged that throughout the district the election officers were either all Democrats, or that the Republican officer was too ignorant to detect fraud; that in very many precincts, as the result of a conspiracy, the Democratic election officers refused to open polls, in the hope that the Republicans, if they held an election at all, would make informal returns; that in many cases such informal returns were rejected by the county canvassers; that in many precincts the ballot boxes were stuffed or the returns falsely made, and that a correction of all these wrongs would show that he and not contestee received a large majority of the votes actually cast.

The committee found instances of all these varieties of fraud proved. Where the returns had been rejected for informalities they counted the vote as shown by the proof to have been actually cast; where ballot boxes were stuffed or false returns made they deducted the votes returned and added the votes proved to have been cast. It is not necessary here to go into an analysis of the evidence in regard to the particular precincts. There were two majority reports. According to the findings in regard to particular precincts in the report by Mr. Thompson (which seems to have been the report of a majority of the committee) contestant was shown to have a majority of 2,803 votes. According to Mr. Ranney his majority was 3,073.

Preliminary to a discussion of the evidence in regard to particular precincts all the reports discussed the character of the district and the general features of the case. This district had been made for the express purpose of including in it as large a proportion as possible of the Republican voters of the State. At the time of its organization the counties composing it cast a Republican majority of about 15,000

votes. According to the census of 1880, just taken, there were 18,000 more colored voters than white in the district. The testimony showed that from 95 per cent to 97½ per cent of the colored voters voted the Republican ticket when permitted to do so. At every previous election the district, and each county in it, had given a Republican majority.

The minority found the evidence insufficient to sustain the charges. While it was true that the colored voters largely predominated, there was no evidence except estimates and opinions to show how the voters were divided politically. There had always been a great lack of harmony among the Republicans, and never less than two candidates claiming to be Republicans. It was natural, under such circumstances, that many colored voters would not care to take part in the election.

The best evidence of the vote cast was the ballots themselves, and where, as in Alabama, they were required by the law to be preserved for the express purpose of being used on a contest, no secondary evidence should be admitted until the ballots had been produced or their absence accounted for. But if the secondary evidence offered were admitted, it would not be sufficient in most cases to establish the facts claimed, and when it was, it was often impossible to purge the result, owing to the lack of testimony showing what votes had been included in the canvass.

The House, by a vote of 145 to 1 (144 not voting), adopted the resolution presented by the majority, and contestant having died, the seat was declared vacant.

[2 Ells., 18-61.]

(4) *LOWE vs. WHEELER.*

Fraud; irregularities; marked ballots; unregistered and illegal votes. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Hazelton; second report by Mr. Ranney; minority report by Mr. Beltzhoover.

According to the returns as certified by the secretary of state, contestee had a majority of 43 votes, but it was conceded that if all the votes cast for contestant had been counted he would have received a large majority. Contestant asked that these votes be counted, and also that the returns of certain precincts be rejected for fraud, and only votes proved *aliunde* counted. Contestee claimed that all the ballots which were rejected were properly rejected, and that many more should have been rejected; that very many votes were cast for contestant by unregistered or otherwise disqualified persons; and that fraud had been committed in some precincts in the interest of contestant.

The rejected ballots were ballots containing the names of the presidential electors arranged with the heading "State at large," followed by 2 names, and then the heading "District electors," followed by 8 names, with the words "1st district," "2d district," etc., before the names. The statute of Alabama provided:

The ballot must be a plain piece of white paper, without any figures, marks, rulings, characters, or embellishments thereon, * * * on which must be written or printed, or partly written and partly printed, only the names of the persons for whom the elector intends to vote, and must designate the office for which each person so named is intended by him to be chosen; and any ballot otherwise than described is illegal and must be rejected.

These ballots were thrown out by the election officers on the ground that the figures 1st, 2d, etc., were such "*figures*" as were prohibited by the law, and rendered the ballots illegal. This point was substantially abandoned by contestee, and was overruled by the committee. If any such literal construction of the statute was to be followed it would be impossible to print or write a legal ballot, for "marks" or "characters," in the literal sense, must be used in all writing and printing. Contestee, however, objected to the ballots on the additional grounds that the heading "District electors" designated an office unknown to the laws of Alabama, and that the words "1st district," "2d district," etc., were in violation of the provision that the ballots should contain only the names of the candidates and the offices to which they were to be chosen. These objections were not mentioned in the majority report, but were answered by Mr. Ranney in his "views" separately submitted. The custom in Alabama, as in other States, had always been to select electors from each of the districts, and two from the State at large, and there could be no wrong in designating the districts on the ballot. The words "District electors" might not be a technically correct designation of the officers to be elected, but it expressed the intention of the voters. Whatever the effect of the incorrect designation might be on the votes for Presidential electors, it was certainly not such extra printing on the ballots as was prohibited by the statute, and the whole ballot could not be thrown out.

In addition to these votes there were three precincts where fraud was proved. In each of them all the officers were partisans of contestee. The evidence of ticket distributors and others was introduced, tending to show that very many more votes were cast for contestant than were returned for him, and then the individual voters were called and testified to their votes. There were also other indications of fraud, and the committee therefore rejected the returns, and counted for contestant the votes proved by the testimony of the voters to have been cast for him. This would give contestant a majority of 193 votes, independent of the 611 rejected ballots. Contestee sought to establish a majority for himself by having a large number of votes rejected. He asked that all the ballots similar to the rejected ballots above described, to the number of some 3,000, be rejected. This was overruled on the same grounds as those given for counting the rejected ballots. He also attacked many votes on the ground of nonresidence, minority, conviction of crime, etc., but the committee found the proof insufficient to sustain the charges. On the question of nonregistration the committee held that registration was not a necessary prerequisite for voting in Alabama, and that the testimony by which contestee sought to establish nonregistration was in most cases insufficient to establish the fact. The constitution of Alabama contained this provision:

The general assembly may, when necessary, provide by law for the registration of electors throughout the State, or in any incorporated city or town thereof, *and when it is so provided* no person shall vote at any election unless he shall have registered as required by law.

The majority of the committee held that the words "when it is so provided" meant that when the legislature should provide that a non-registered person should not vote, he should not vote. There was no such provision in the registry law. The minority held that the words referred to "registration," and that the meaning was that when the

legislature should have provided for registration, no person should vote who was not registered.

The committee, under the findings above outlined, found that contestant had a majority of 847 votes and recommended that he be seated.

Mr. Ranney, who agreed to the conclusions of the majority, submitted a separate report. He agreed with the majority on the question of rejected votes and, as above noted, argued the question somewhat more fully than the majority. On the question of registration, while the matter was not free from doubt, he was inclined to agree with the minority that registration was a necessary prerequisite for voting. But there was no satisfactory evidence that any voters voted who were not registered. The evidence consisted of certified copies of the poll lists and what purported to be copies of registry lists on file with the probate judges. Witnesses were examined who had compared the lists, and filed lists of names which they said were found on the poll lists and not on the registry lists. These witnesses testified very recklessly and an examination of the lists showed that very many of the persons they claimed not to have found were registered, but the names were spelled in a slightly different way. The copies of the registry lists in evidence, however, were very imperfect. It was only necessary to be registered once, and nonregistration could only be shown by copies of all the lists made since 1875, including the lists made by the registrar on the day of election at the polls. The copies presented were not certified to include all these lists and in many cases it was evident they did not. Re-registration was not imperative when a voter moved from one precinct to another, so that even if the voters were not registered at the poll where they voted they might be legal voters. Some of the lists had been lost, all of them were on loose sheets of paper, instead of a book as required by law, and many of them were lacking in proper headings. All of the copies in evidence lacked the required certification of the election officers and, as above mentioned, they were very imperfectly certified by the probate judges.

Mr. Ranney therefore agreed in the conclusion that contestant was elected.

The minority held that contestee was elected by a large majority. They disagreed with the majority in their findings in regard to many of the minor issues, and pointed out at very great length the inconsistencies and inaccuracies of the majority report. There were 3,028 ballots cast for contestant which ought to be rejected because of the illegal designation of electors as "district electors," and because of the words "First district," "Second district," etc., which were additional to the names of the persons voted for and the offices to which they were to be chosen. The law of Alabama expressly required the electors to be elected by general ticket, so that there was no such officer as a "district elector," either in strict law or in fact. The law of Alabama was unique in requiring ballots to contain nothing but the names of the candidates and offices, and in requiring all ballots differently printed to be rejected, and the words "First district," etc., were therefore fatal to the ballot in Alabama, though in no other State. There were 1,294 of these ballots which were illegal for the further reason that the name of contestant was printed on them in very large bold type, which could be easily read through the back of the ticket. This was a distinguishing mark within the meaning of the law, and it appeared that

it was in fact used as such for the purpose of intimidating voters and depriving them of a secret ballot. All of these ballots should be rejected and also the ballots of all the unregistered voters. It was proved that at least 1,000 of the unregistered voters voted for contestant. These should first be deducted from his votes, and then the remainder deducted from the candidates *pro rata*, according to the rule laid down by McCrary.

The proof of fraud in regard to the three precincts where fraud was charged to have been committed in the interest of contestee was wholly insufficient, and most of the evidence was inadmissible because not certified by the magistrate and not reduced to writing in his presence. There were two precincts where fraud was plainly shown to have been committed in the interest of contestant, and the minority rejected these precincts. There were also the votes of nonresidents, minors, convicts, etc., to be rejected. Rejecting all these votes contestee had a majority of 2,841 votes, and the minority recommended that he retain the seat.

The House, by a vote of 148 to 3 (140 not voting), adopted the resolutions presented by the majority, and contestant was seated.

[2 Ells., 61-163.]

(5) WITHERSPOON *vs.* DAVIDSON.

Case dismissed for want of prosecution.

Report by Mr. Ranney.

There was no notice of contest, answer, or testimony before the committee in a regular way. Contestant made affidavit that he had employed an attorney to conduct the contest, but that the attorney had betrayed his trust, and refused to deliver to contestant or to the committee the notice of contest or the answer. He further alleged that he had not taken testimony because of a condition of intimidation in the district which rendered it unsafe for witnesses to testify. Contestee denied all these charges and furnished the committee with copies of the notice of contest and answer. The notice was too vague to be good, but there was a "replication" which was more specific.

The committee were of the opinion that the failure of contestant to prosecute his case was due to the causes alleged, but could see no way of investigating the case further unless the House chose to institute an independent investigation.

Contestant was permitted to withdraw his papers without prejudice.

[2 Ells., 163-171.]

(6) BISBEE *vs.* FINLEY.

Fraud; ballot-box stuffing; illegal votes; irregularities. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Ranney; minority report by Mr. Beltzhoover.

According to the returns as certified to the secretary of state, contestee received a majority of 1,152 votes. Contestant sought to overcome this majority by having counted for himself votes which were offered for him by legal voters and illegally rejected; by having deducted from contestee the votes of a number of foreign-born electors

who did not present their naturalization papers when they voted, and by having the votes of a number of precincts rejected for fraud and only the votes proved *abunde* counted, or, where it was possible, correcting the returns.

The committee added to the vote of contestant the votes illegally rejected, and deducted from contestee the votes of foreign-born persons received without the presentation of naturalization papers. On this point the committee said:

It is a fundamental principle as firmly established as any rule of law that votes must be cast as the law directs, and if the law requires the voter to produce certain specified evidence of that right before he can cast his vote, and he fails to produce that evidence, such vote, if cast, is illegal and void. * * * The principle must likewise be maintained that the production of this evidence at the trial will not change the legal status of the voter and thus make these votes in question legal votes. Such a decision would be at variance with the well-established principle of law which forbids the making of an act valid at a subsequent period which at the time of its commission was void because prohibited by law. * * * The principle is self-evident. Voting is a single *act* commanded to be performed within a particular time, on a particular day, and in conformity with law; there can not, therefore, be a valid performance of the requirements of the law at a period subsequent to the day on which alone the law commanded the act to be performed. The question at issue is not whether such evidence as required by law to establish their right to vote could have been furnished, but whether such evidence was furnished. If they did not produce it, the supreme law prohibited their voting, and an act prohibited by law can not be valid.

In Alachua County the returns of three precincts were shown to be fraudulent. In each of these precincts there were irregularities and violations of the law, in one case sufficient of themselves to cast strong suspicion on the returns. In each precinct, also, very many more voters testified that they voted for contestant than were returned for him. The committee rejected the returns and counted the votes proved *abunde*.

In Madison County contestant charged that the ballot boxes were systematically stuffed, thereby creating an excess of ballots in the boxes. This excess was drawn out, under the Florida law, before the votes were counted, and as the Republican and Democratic tickets could easily be distinguished by the touch, substantially all the ballots drawn out were Republican ballots, while the ballots fraudulently placed in the boxes were Democratic ballots. Contestant proved these facts, and also the number of votes drawn out in each poll. He also attempted to call the individual voters as witnesses to prove his own vote, but on the first day he began taking this sort of testimony a riot was started by the friends of contestee, and one voter was killed. The officer before whom the testimony was being taken and the attorneys for contestant were compelled to flee for their lives, and though contestant made several attempts to get the testimony taken, the condition of affairs was such that it was impossible. Under these circumstances the committee did not reject the returns, but corrected them as well as possible. Deducting from contestee the excessive ballots evidently stuffed into the boxes for him, and adding to contestant the ballots of which he was deprived in drawing out the ballots, the majority of contestant in the county was increased from 108 to 436.

Under the laws of Florida no person "not duly registered according to law" had a right to vote. In Brevard County there was no legal registration. In some of the precincts there was nothing purporting to be a registry, and in other precincts there were only certain irregular

lists on loose sheets of paper instead of in a "well-bound book," as required by law. The committee rejected the whole vote of this county.

A return in Hamilton County was rejected because the supporters of contestee furnished the colored voters with drink, and then forced them while intoxicated to vote for contestee; because of rioting at the polls which the United States marshal could not stop, and because of the fraudulent reception of known illegal votes by the election officers. A return in Orange County was rejected because not signed. Charges of fraud were made against certain other precincts, but the committee found the evidence inconclusive. Counting the votes according to the findings above indicated contestant had a majority of 645 votes.

A portion of the testimony of contestant was taken after the expiration of the first forty days, and some that was taken during the ten days allowed for rebuttal was claimed not to be rebuttal testimony. The committee found that contestant had begun taking certain testimony a reasonable time before the expiration of his time, but had been prevented from finishing it by long cross-examinations on the part of contestee, evidently made for the purpose of delay. After the forty days had expired contestant continued to take the testimony until it was finished. Contestee could have cross-examined it, he had ample opportunity to contradict it, and the taking of his own testimony was not interfered with because he did not commence taking testimony until some time after contestant had ceased. The committee considered all this testimony.

The minority reported for contestee. The irregularities at the three polls complained of in Alachua County were not sufficient to vitiate the returns or show fraud, and the testimony of the individual voters was unsatisfactory on account of their ignorance. They did not know for whom they had voted, and if they did they might not be willing to testify that they had not voted their regular party ticket. The weight of the evidence showed that there was a registration in Brevard County, and that the lists were delivered to the election officers in all the polls but one. There was not sufficient evidence to justify counting the 122 votes alleged to have been illegally rejected in Marion County.

It is very plain that, having been rejected, under the law they can not be counted unless each voter has adduced in the contest the same proof in every respect which would have entitled him to vote at the polls on the day of election.

This had not been done. The charges made against Nassau and Bradford counties were different from those included in the notice of contest, and could not be considered. In Orange County there appeared to have been no notices to take testimony served on contestee, and the testimony could not therefore be considered. In Madison County the charge that two precincts had been unlawfully rejected by the canvassers could not be considered, because not made in the notice of contest. The strange proposition of contestant to "correct" the alleged fraudulent returns of this county could not be seriously considered. If the returns were fraudulent, they were not evidence of anything, and must be rejected, which would increase the majority of contestee; if they were not fraudulent, they should be counted as made. The foreign-born voters who did not produce their naturalization certificates at the polls must be presumed to have been, nevertheless, legal voters, and under the rule adopted by the House in the case of Curtin

vs. Yocum these votes could not be rejected without proof of actual disqualification. All the testimony taken by contestant during the contestee's time, or taken in rebuttal in counties where contestee had taken no testimony and where there was consequently nothing to rebut, ought to be rejected; but the minority had examined most of it and found that if considered it would not alter the result.

The minority found that, conceding to contestant everything that in any possible view of the case could be claimed for him, contestee had still a majority of at least 316 votes, and they recommended that he retain the seat.

The House, by a vote of 141 to 9 (141 not voting), adopted the resolutions presented by the majority, and Mr. Bisbee was sworn in.

[2 Ellis, 172-243.]

(7) COOK *vs.* CUTTS.

Illegal votes. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Beltzhoover; first minority report by Mr. Thompson; second minority report by Mr. Ranney.

According to the returns as canvassed contestee had a majority of 101 votes, but there were two precincts rejected by a county canvassing board which should have been counted. This would reduce the majority of contestee to 9 votes.

Each party charged a number of miscellaneous illegal votes, and the reports contain detailed discussions of the evidence in regard to them, but the principal issue, and the one on which the case turned, was the charge that 23 illegal votes were cast for contestee by colored laborers in the Muchikinock coal mines who had not been in the State six months. It appears that these coal mines had been newly opened, and that large numbers of negro laborers had been imported from Virginia to work them. These laborers came in several parties, the first coming in March and the last in October, 1880. The chief controversy was in regard to the date of the arrival of the third party, known as the "May party." Contestant claimed that it arrived May 15, contestee that it arrived May 1. If the date was later than May 1, those who came in it would not have acquired the six months residence necessary to give them the right to vote. From the evidence of the man who went to Virginia after these laborers, corroborated by the dates of letters written by him, and the testimony of railway officials, the committee found it to be conclusively shown that this party arrived May 15. There were several men who were shown by the poll books to have voted, and who must have come with the May party. Major Shumate, the man who brought them from Virginia, testified to this fact, and on the coal mine roster or pay roll the names of these men appeared for the first time in the accounts for the month of May. A number of others, making, with those of the May party, 23 in all, were shown to have come with parties later than the May party. An attempt was made to prove for whom these voters voted by their own testimony, but most of them could not be found (the coal mines having closed) and those who were found refused to testify on this point. But it was shown by circumstantial evidence that they were Republicans. They were brought to the polls in wagons furnished and driven by Republicans; they were shouting for contestee; they were given Repub-

lican tickets by Republicans, and went immediately to the polls and voted. The committee therefore deducted all their votes from contestee, which gave contestant a majority. This majority would be increased by the decision of the other questions in the case, and the committee therefore recommended resolutions declaring contestant entitled to the seat.

A minority of the committee reported for contestee. The evidence of Major Shumate was very unsatisfactory. He was impeached by a large number of witnesses, and his testimony was based on his memory alone. His cross-examination showed that he did not have a remarkable memory, and yet no one could have truthfully testified to remembering so many facts in regard to so many different persons, with whom he had no intimate acquaintance, without a most phenomenal memory. The roster of the coal company was so kept as not to be satisfactory evidence. It contained no dates, and Shumate himself testified that he could use it only "by association." Instances were shown in which the names of persons who came with the earlier parties appeared in the book after those of persons who came with the later parties.

It was probable from all the testimony that a party came on May 15, but a number of persons, said to have come with the May party, testified positively that they came on May 1, fixing the date in each case by some circumstance of known date, and they were corroborated by a number of disinterested witnesses. There were also other circumstances creating a direct conflict of testimony which could only be reconciled by the assumption that there were two May parties, one of which came on May 1. But all the voters objected to as belonging to the May party might be held to have voted illegally and their votes be deducted from contestee (though the evidence that they voted for him was far from satisfactory) without overcoming his majority. The only evidence in regard to the remainder of the twenty-three, who were claimed to have come after May 15, was the uncorroborated testimony of Shumate, and this, for the reasons indicated above, was insufficient.

The minority held that the majority of contestee would be increased by the deduction of the miscellaneous illegal votes not included in the above class, and recommended resolutions declaring contestee elected.

Mr. Ranney agreed with the minority and discussed the same points somewhat more elaborately. His arguments, so far as necessary, are included in the above account.

The House, by a vote of 154 to 81, adopted the resolutions presented by the majority and contestant was sworn in.

[2 Ells., 243-283.]

(8) SMITH *vs.* ROBERTSON.

Case dismissed.

This case was dismissed because of the failure of contestant to take testimony and prosecute his case according to law.

[2 Ells., 284.]

(9) ANDERSON *vs.* REED.

Bribery; illegal votes. Report for contestee; contestee retained the seat.

Report by Mr. Hazelton.

Contestee had a majority of 123 votes. There was evidence that one man was bribed to vote the Republican ticket, and some evidence

tending to show that six others were bribed, but "no suggestion or intimation is made of any complicity, or even knowledge, on the part of the sitting member." Votes were alleged to have been received for contestee which should have been rejected and rejected for contestant which should have been received, but the evidence in regard to these was conflicting. Each of these cases had been passed on by the selectmen of the towns, who had much better opportunity than the committee to know all the facts, and the committee did not feel authorized to reverse their decision upon merely conflicting testimony. There was also some testimony in regard to vague rumors that "men would lose their jobs" if they did not vote as their superiors wished, but the committee found that such reports "hardly constitute such an overthrow of men's wills and determinations as can be taken notice of by the law."

The committee unanimously reported in favor of contestee, and the House agreed without division.

[2 Ells., 284-286.]

(10) BUCHANAN *vs.* MANNING.

Fraud; intimidation; illegal rejection of votes; conspiracy. Majority report for contestee; minority report to vacate seat. Contestee retained the seat.

Majority report by Mr. Calkins; minority report by Mr. Thompson.

According to the returns contestee had a plurality of 5,259 votes. Contestant charged a general conspiracy to carry the election by fraud, and that, as a result of this conspiracy, the Republican party was refused representation on election and canvassing boards, or illiterate Republicans were appointed in pretended compliance with the law; polling places were removed to remote and inaccessible places without notice; qualified voters were refused registration, or, being registered, were refused the right to vote; United States supervisors were excluded from the polls; ballot boxes were stuffed, and voters were intimidated by threats and violence. All these allegations were very vaguely and generally made in the notice of contest, there being no specification of the particular precincts where the frauds occurred, of the number of votes affected, or the persons by whom the frauds were committed, or any allegation that the result of the whole election was changed by these frauds. The committee found that all the allegations were clearly insufficient under the law.

We prefer, however, not to rest our decision of this case upon the sufficiency of the pleadings, for if the testimony taken in the case develops the fact that the sitting member was not elected, it would be our duty to so report, although the contestant might not be entitled to his seat, having failed to comply with the law with respect to the sufficiency of his notice.

The committee gave an abstract of the testimony of the United States supervisors in the various precincts, showing instances of all the classes of wrong complained of. These supervisors, from their positions, must have known and been able to testify to all the frauds committed. Whenever it appeared that the supervisors were excluded from the polls or the count, or that the ballot box was stuffed, or violence and intimidation resorted to to control the election, the committee rejected the polls. Eight boxes were thus rejected, making a net reduction of about 500 votes in the majority of contestee. It was charged that these frauds were parts of a general conspiracy, but the

committee found the evidence too vague and inferential to establish this fact.

Your committee have not hesitated to recommend to the House the throwing out of all the boxes where frauds, intimidation, or ballot-box stuffing have been proven, but it would be unsafe to assume from the testimony in this case that other frauds had been committed by the election officers, not specifically shown or proven in any tangible or definite manner.

It was evident that contestant had been deprived of votes by the arbitrary refusal of registry to qualified voters and by the unauthorized changes of polling places just before the election, but there was no specific evidence on which deductions could be made. The appointment of illiterate persons to represent contestant's party was strongly condemned, and if it were not for the counteracting effect of the United States supervisors law the committee would have been inclined to apply some corrective. The refusal of representation on the various boards to contestant's party might be a fact forming a link in a chain of evidence to show conspiracy, but the evidence in this case did not establish such a conspiracy.

The majority (Messrs. Calkins, Hazelton, Wait, Miller, Beltzhoover, Alberton, Moulton, and Davis) finding that contestee's returned majority was not overcome by the evidence, recommended that "contestant have leave to withdraw his papers without prejudice."

A minority favored declaring the election void. (The minority report was signed by the remaining 7 members of the committee. When the case was voted on in the committee a majority of the members present voted for the resolution to declare the seat vacant, but a majority of the whole committee signed the report for contestee.)

The conclusions of the minority were largely based on the proof of conspiracy. It was shown by the census that there was a majority of some 2,600 colored voters in the district. At this election the colored voters were practically solid for contestant, while the white voters were divided between contestee and the Greenback candidate. The party of contestee was in a *minority* in the district of some 5,000 or 6,000 votes. The fact that under such circumstances contestee was returned as receiving a majority of 5,259 votes "at once throws suspicion on the fairness of the count, and when the whole of the election machinery was in the hands of contestee's friends the burden of showing the fairness of the count should be upon him when a reasonable doubt of fairness has been established by the proof."

On the evidence in this case the minority found the following indications of fraudulent conspiracy:

- (1) The action of the governor and State board; their refusal to allow the opposition party to name any of the election commissioners; (2) the same action on the part of the county commissioners in appointing the precinct inspectors; (3) the appointment of corrupt and illiterate officers; (4) the systematic adjournments of the election without sufficient cause; (5) the premature closing of the registration books and refusal to register Republican voters, the erasing of names of Republican voters already registered, and the forgery of poll books; (6) the failure to *openly* count the vote at the closing of the polls; (7) the changing of polling places; (8) the abandonment of ballot boxes during adjournment, and of their carrying off to private houses during adjournment; the interference with and exclusion of United States supervisors; (9) the fact that these practices were in counties having large Republican majorities are conclusive evidence of a conspiracy to defraud.

The specific proof of fraud or suspicious circumstances in the conduct or appointment of election officers required the rejection of the votes of thirty-four precincts, casting an aggregate vote of 11,715,

and there were strong reasons for the rejection of many other precincts and one whole county. This was sufficient to set aside the election; and—

there being a conspiracy to defraud, there being proof of fraud at a number of precincts, and the illiterate inspectors leaving the door open to unlimited fraud, and there being no proof by contestee of good faith in the election, it must be set aside.

The minority therefore recommended resolutions declaring neither party elected.

The House agreed without division to the resolution presented by the majority, and contestee retained the seat.

[2 Ells., 287-338.]

(11) LYNCH *vs.* CHALMERS.

Fraud, irregularities, distinguishing marks. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Calkins; minority report by Mr. Atherton.

Contestant received a majority of the votes cast, but contestee received a majority according to the returns of the county commissioners. This difference was brought about by the action of the county commissioners in throwing out a large number of precincts for various irregularities and a large number of ballots cast in other precincts on the ground that they were marked in violation of the statute. Contestant asked that all these votes be restored to him, and also attacked a number of precincts for fraud. The committee found fraud in one precinct where its existence does not seem to have been seriously denied, but otherwise the case was decided without reference to the charges of fraud.

There had been some preliminary proceedings in the courts of Mississippi affecting this case. The district attorney of Tunica County applied to the circuit court of that county for a writ of *mandamus* to compel the election commissioners to reassemble and reject 506 ballots which had been counted for contestant, and which were claimed to have contained illegal distinguishing marks. The marks complained of on these ballots, and all the other ballots in question in this case, were printer's dashes (made thus: — o —, or thus: —), separating the names of the candidates for President and Vice-President from those of the candidates for Presidential electors, and these from the name of the candidate for Congress. The supreme court of the State, on appeal from the circuit court, refused to grant the writ of *mandamus*, on the ground that the election commissioners were *functus officio* and could not be compelled to reassemble, but also decided that the election commissioners had authority to reject illegal ballots, and that the ballots in question were illegal. If this should be taken as a decision of the question binding on Congress it would be decisive of the case in favor of contestee, as a majority could not be shown for contestant without counting these ballots. It was strongly contended that a decision of the supreme court of a State, construing a State statute, was binding on Congress, but the committee held that this was too broad an assertion. The committee discussed this question as follows:

"It is true that where a decision or line of decisions has been made by the judiciary of the States, and those decisions have become a 'rule of property,' the Federal judiciary will follow them. Not to do so would continually place titles to property

in jeopardy, and disturb all business transactions. * * * There is still another reason why Congress should not be bound by the decisions of State tribunals with regard to election laws, unless such decisions are founded upon sound principles, and comport with reason and justice, which does not apply to the Federal judiciary, and it is this: Every State election law is by the Constitution made a Federal law where Congress has failed to enact laws on the subject, and is adopted by Congress for the purpose of the election of its own members. To say that Congress shall be absolutely bound by State adjudications on the subject of the election of its own members is subversive of the constitutional provision that each House shall be the judge of the election, qualifications, and returns of its own members, and is likewise inimical to the soundest principles of national unity. We can not safely say that it is simply the duty of this House to register the decrees of State officials relative to the election of its own members. The foundation of this contention is that if the Congress of the United States fails to enact election laws, and makes use of State laws for its purposes, it adopts not only the laws thus enacted but the judicial construction of them by the State courts as well. We do not agree that this is the rule except as it may apply to a 'positive statute of the State, and the construction thereof, adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character.' (Swifts. Tyson, 16 Peters, 1-18.) As to matters not local in their nature, the Supreme Court of the United States has uniformly held that the decisions of the State courts were not binding upon it.

Election laws are, or may become, vital to the existence and stability of the House of Representatives, and to hold it must shut itself up in the narrow limits of investigating solely the question as to whether an election has been conducted according to State laws as interpreted by its own judiciary would be to yield at least a part of that prerogative conferred by the Constitution exclusively on the House itself.

It may be stated generally that the House of Representatives will, as a general rule, follow the interpretation given to a State law regulating a Congressional election by the supreme court of a State, where decisions have been continued and uniform in such a way and for such time as to become the fixed and settled law of a State. The processes of determining the election and all questions relating to the honesty and *bona fides* of ascertaining who received the highest number of legal votes must of necessity forever reside exclusively in the House.

Where decisions have been made for a sufficient length of time by State tribunals construing election laws so that it may be presumed that the people of the State knew what such interpretations were would furnish another good reason why Congress should adopt them in Congressional election cases. But this reason would be of little weight when the election had been held in good faith before such judicial construction had been made, and where there was a conflict of opinion respecting the true interpretation of a statute for the first time on trial. * * *

It need, however, hardly be added that a line of carefully considered cases in the States, in which such courts have undoubted jurisdiction, so far as they would apply in principle, would go a long way toward settling a disputed point of construction in any State election law. In fact, it may be said that it would probably be the duty of Congress to follow the settled doctrine thus established.

Still another reason why the House should feel free to disregard this decision was that on the points at issue before the House it was, strictly speaking, a mere *obiter dictum*. These points were not necessarily involved in the decision of the case, and the court expressly disclaimed jurisdiction of them. The whole case could have been decided upon the ground that the election commissioners were *functus officio*, and the decision was in fact controlled by this point. The other points were decided at the request of the Attorney-General, and because he stated that they were of public importance.

In this case the committee felt compelled to disagree with the court. The marks alleged to be distinguishing marks were mere printers' dashes, such as are known among printers and given in Webster's Dictionary as punctuation marks. The statute of which they were claimed to be in violation was:

All ballots shall be * * * without any device or mark by which one ticket may be known or distinguished from another, except the words at the head of the ticket; * * * and a ticket different from that herein prescribed shall not be received or counted.

Under such a statute it *might* be that printers' dashes or other punctuation marks, or even the type in the body of the ticket or the arrangement of the words at the head, could be used as "marks or devices," but the extreme limit to which the law could be applied in such cases would be to inquire—

In the use of these appliances, which are ordinarily used in printing, were they so arranged as that they became "marks and devices," and were they so used and arranged for that purpose? And, secondly, was the unusual manner of their being used such as might or ought to put a reasonably prudent man on his guard?

No case which the committee could find went even so far as this. In this case the committee found, as a matter of fact, that these dashes were not intended or used for the purpose of distinguishing the ballots; that contestant had been assured that his tickets would be printed in entire compliance with the law, and that these dashes were not noticed until the day of the election, after the tickets were distributed, and then it was strenuously contended that the ballots were legal. Similar ballots had been used by the opposite party in other parts of the State without complaint.

The committee restored to the vote of contestant all the ballots which had been thrown out on this ground. They also added to the votes of both parties the votes cast at a number of rejected polls, where the irregularities were immaterial or cured by evidence. This included two precincts in Bolivar and three in Issaquena County, which will be further noticed in connection with the minority report. Adding all these votes and counting the vote of one precinct where fraud was proved according to the proof instead of according to the returns, contestant was shown to have a majority of 385 votes, and the committee recommended that he be seated. There were other issues in the case which, if decided for contestant, would largely increase his majority, and some of the committee seem to have agreed with contestant on these points, but they were not decided by the committee. All the members of the committee signing the majority report (all the members of the committee but three) agreed on all the points above outlined.

A minority of the committee (Messrs. Atherton, Moulton, and Davis) reported for contestee. The count of votes as made by the majority included at least three untenable decisions, the reversal of any one of which would give the majority to contestee. The majority counted three rejected precincts in Issaquena County on the certificate of the election commissioners as to the number of votes shown by the rejected returns, and the certificate of the chancery clerk of the county to a copy of the original precinct returns in his office. The certificate of the commissioners alone was not claimed to be evidence of the vote, and the certificate of the clerk of the chancery court certainly was not, for no law could be found requiring these returns to be preserved as records in his office or anywhere else. The fact that these two certificates agreed as to the vote could give them no validity or force not possessed by each one separately. In Bolivar County two precincts were rejected by the commissioners because the returns were not certified. This was a sufficient ground for their rejection, and it was not cured by any evidence. The mere fact that the county commissioners certified to the rejection of these precincts and stated in their certificate the number of votes shown for each party by the rejected returns did not cure the defect.

If these precincts were not included, contestant's claimed majority of 385 votes would disappear, and contestee would have a majority of

696 votes. But the minority claimed also that all the marked ballots were properly rejected, and if they were not counted contestee had a large majority without reference to any other question. The decision of the supreme court of Mississippi construing the election law of the State was, under all the decisions of the United States Supreme Court and of the Committee on Elections, binding on the House. The court clearly had jurisdiction of the case in which the decision was rendered, and its opinion on the point in issue in this case was not in any sense *obiter dictum*.

An *obiter dictum* is an expression of opinion by way of argument or illustration, and rendered without due consideration as to its full bearing and effect.

This was nothing of the sort. The questions presented to the court for decision were three: (1) Have the election commissioners authority to reject illegal ballots? (2) Were these ballots illegal? (3) Can the commissioners be reconvened for the purpose of rejecting them? A negative decision of the first question would have rendered unnecessary any decision of the other two. The first and second questions being decided in the affirmative, a decision of the third question was necessary, and it being decided in the negative the decision of the first two questions was no longer material, but if it had been decided in the affirmative a decision of them would have been very material. Under such a state of facts it would be impossible to say that the opinion of the court on any of the three issues presented was in any sense *obiter dictum*.

The minority quoted numerous precedents to show that decisions of State courts on the construction of State statutes had always been held to be binding on Congress, and also numerous authorities to show that the decision of the supreme court of Mississippi was right in principle. The minority recommended resolutions declaring contestee elected. The House, by a vote of 124 to 84, agreed to the resolutions presented by the majority, and contestant was sworn in.

[2 Ells., 338-380.]

(12) SESSINGHAUS vs. FROST.

Illegal striking of names from registry list and rejection of votes. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Miller; minority report by Mr. Moulton.

According to the returns contestee had a plurality of 197 votes. Contestant claimed that he was deprived of more than that number of votes by the illegal action of registration and election officers, and especially of the board of revision of the city of St. Louis. The case involved the question both of the validity and construction of the registration laws and of the manner of their execution. The committee found that the registration law of St. Louis was invalid; that neither it nor any State law made registration an imperative prerequisite or qualification for voting, and that the action of the board of revision was so unfair and fraudulent as to be void even if it had been authorized by law. Under the constitution of Missouri the legislature was to provide for registration in all cities of over 100,000 inhabitants and might provide for it in cities of over 25,000 inhabitants. The legislature was also to provide general laws for the organization and classi-

fication of cities and towns, and means whereby cities and towns existing under special charters might become subject to these general laws. The legislature had passed laws providing for the organization of cities of over 100,000 inhabitants, to be known as cities of the first class, and providing a method by which such cities might bring themselves under these laws. The city of St. Louis had not chosen to take advantage of these provisions and continued its old organization under a special charter. The only registration law passed by the legislature applicable to St. Louis was a statute providing that in cities of 100,000 inhabitants or over, no person should be deprived of the right of voting by reason of having failed to register, but that all such persons offering to vote should be registered on the day of election at the polls by a special registering officer. The registration laws under which elections were held in the city of St. Louis were city ordinances passed by the municipal assembly, and differed somewhat both from the charter of the city and from the general law. The charter of the city, adopted in pursuance of the constitution, provided for registration, but it had never been ratified or in any way acted on by the legislature of the State. Among the provisions of the ordinance was one providing for a board of revision, who were to meet twenty days before each election and sit for not exceeding ten days—

for the purpose of examining the registration and making and noting corrections wherein as may be rendered necessary by their knowledge of errors committed, or by competent testimony heard before the board. * * * They shall strike from the registration, by a majority vote, names of persons who have removed from the election district for which they registered, or who have died, and shall note the fact opposite the name of any person charged with having registered in a wrong name, or who, for any reason, is not entitled to registration under the provisions of this ordinance, which person shall be challenged by the judges of election when presenting himself to vote, and rejected unless he satisfy said judges that he was entitled to register. * * * Their proceedings shall be printed daily in the paper doing the city printing.

The charter of the city did not make registration an essential prerequisite to voting, and if it had it would have been unconstitutional in that it would have provided an additional qualification for voting not prescribed by the Constitution. But the ordinance instead of the charter of the city had been followed in the matter of the board of revision, and the committee held that this ordinance was invalid.

The Constitution of the United States having declared that the legislatures of the several States shall provide for choosing members of Congress, and the constitution of Missouri having authorized the general assembly, and that alone, to enact a registration law, we hold that the above ordinance has no binding force or effect and is invalid.

The quotations from the so-called "revised statutes" of Missouri, made by the minority, apparently ratifying and adopting the provisions of this ordinance, were sections inserted by the committee appointed by the legislature in 1879 to revise the statutes, and they had not yet been ratified or approved by the legislature.

But even if the ordinance were valid it would be necessary to add to the vote of contestant the votes of 155 persons who testified that they were qualified electors and had been duly registered, and that they offered to vote for contestant, but were refused because their names were not on the list as revised. The manner in which the revision of the registry was made was grossly unfair and in violation of the ordinance. Instead of striking off names from their own knowledge or

testimony presented by a majority vote, the board of revision adopted a resolution at the outset of their proceedings providing that—

When a member of the board of revision presents a list of persons found on the list furnished him by the recorder of voters with dead, removed, not found, vacant house, duplicate, not a citizen, or any other word or phrase to indicate that the person is not entitled to vote, his name being on the books of the recorder, the board of revision shall take immediate action on such names and instruct the recorder of voters to erase such names from the registered list of voters in his office.

Under this resolution the member from each ward made or had made a list of persons claimed to be not entitled to registry, and the board, without even reading the names, instructed the erasure of all such names. In this way, in a session of one or two hours a day for eight days, the board struck off over 12,000 names in a registration of about 60,000. Twenty-four of the 28 members of the board were Democrats and many of them had their lists prepared by unsworn outsiders sent out by the Democratic committee. One of these outsiders testified to fraudulent and partisan action in putting down the names only of known Republicans. Names were struck from the list not only on the ground that the persons had died or removed, but also on the grounds that they were not citizens or were for other reasons not entitled to vote, though in these cases the ordinance merely provided that the objections should be written after the names and the voters challenged by the officers of election and required to prove their right. Under all these circumstances, the committee held that the whole action of the board of revision was vitiated by both illegality and fraud. Inasmuch as the judges of election had no discretion as to rejecting the votes of persons whose names had been erased by the board of revision, they were on this point not judges of election. The duties of judges of election had already been performed by the board of revision, and as the 155 persons whose testimony was taken had been in fact rejected by that board, and as they had done everything the law required of them to entitle them to vote, the committee counted their votes for contestant, for whom they offered to vote.

The committee also counted the votes of 35 persons who were registered but whose votes were rejected on various trivial grounds, of 8 persons who registered at the polls under the law but were not permitted to vote, and of 86 persons who offered so to register but were refused. Adding these and a few ballots thrown out for slight irregularities and correcting one small clerical error, contestant was shown to have a majority of 172 votes, and the committee recommended that he be seated.

The committee quoted some of the testimony in regard to the alleged tampering with the testimony by one of the counsel for contestant and found that there was "not the slightest ground for the allegation."

The minority reported for contestee. A motion had been made, and should have been granted, to suppress all the testimony of contestant on the ground that it had been altered and tampered with by one of his attorneys. From the evidence it appeared that the evidence had been put into the hands of this attorney as fast as transcribed, and that while going over it and gathering materials for his brief he had made marginal suggestions in pencil, chiefly in regard to the spelling of proper names. The stenographer testified that he had carefully compared all the testimony with his notes just before forwarding it and had followed his notes rather than the marginal suggestions, except in the matter of the spelling of proper names, on which he could not

trust his notes. In one case he found that the attorney had erased some profane language which it had been expressly agreed should be retained. The committee had wished to investigate this whole question and had called the stenographer before it, but he testified that he had destroyed his notes. The minority could attach no confidence to the integrity of depositions which had been manipulated in this way, and thought the motion to suppress should be granted.

Waiving this point, the minority could not see on what ground the 155 rejected votes could be counted. The charge that the board of revision acted fraudulently was not sustained; on the contrary, it appeared that its members were men of high character and integrity. The proceedings of the board were not in violation of the law under which they acted; their action in accepting the knowledge of any member of the board as the knowledge of the board was only an application of the familiar principle of the use of committees, and there was nothing expressed or implied in the law prohibiting the members of the board from securing assistants to aid in procuring information. The testimony of the one witness relied on to show that these assistants acted fraudulently broke down on cross-examination and was plainly untrustworthy. The voters were given notice of the action of the board by publication in a newspaper, and if injustice was done they had their remedy. As a matter of fact, a large number of the 155 persons whose votes were counted by the majority had failed to use due diligence in complying with the registration law; they had moved and neglected to secure transfers until the day of the election, when it was too late to register any person except those who had failed to be registered in the first place. The only other possible objection to the acts of the board of revision was the claim that the law under which they acted was invalid. This question had been separately and fully argued before the committee, and the minority found that the law was shown to be valid. The provisions of the general laws applicable to cities of the first class, of the charter of the city of St. Louis, and of the city ordinance were substantially alike. Under the charter the city had the undoubted right to pass a registration law if it was not in conflict with the State constitution or laws, which this clearly was not. The action of the board of review in striking the names of these 155 men, among others, from the registry was consequently of full authority, and the remedy provided by the law not having been availed of, it was too late to ask for another. The case as to the other additional voters counted by the committee was still weaker, as nearly all of them appeared from their own evidence to have neglected to comply with some essential provision of the law, and the testimony of some of them was not such as to attract confidence.

The minority therefore recommended that contestee retain the seat.

The House by a vote of 126 to 110 adopted the resolutions presented by the majority, and contestant was sworn in.

[2 Ells., 380-430.]

(13) SMALLS vs. TILLMAN.

Fraud; violence and intimidation; illegal rejection of returns. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Wait; minority report by Mr. Davis.

According to the returns as certified by the county canvassing boards to the secretary of state, contestee had a majority of 5,421

votes. Contestant alleged that the county canvassers unlawfully refused to count the votes of many precincts, and also failed to forward to the secretary of state the precinct election papers as required by law; that the precinct returns did not in all cases truly represent the votes cast, and that the election in many precincts was vitiated by violence and intimidation.

Under the South Carolina election law of 1868 all the ballots were sent from the precincts to the county seat, to be there counted for the first time by the county canvassing boards three days after the election. This gave so many opportunities for fraud, that in 1872 it was provided that the count should be made at the polling places by the precinct officers. The ballots and all election papers were then to be forwarded to the county canvassers, and after the completion of the county canvass all these papers were to be sent by special messenger to the governor and secretary of state. All acts in conflict with this act were repealed. The law of 1868 contained a provision making the county returns the evidence on which the State canvassers should base their certificate. Contestant claimed that this section was repealed by the act of 1872, and that the requirement that the precinct papers should be sent to the governor and secretary of state was a requirement that the State canvassers should use them as the evidence on which their certificate should be based. The committee seem to have been inclined to sustain this contention, but held that whether the former provision was repealed or not the two acts should at least be construed *in pari materia*, and the State canvass based on both the county returns and the precinct papers. No precinct papers were forwarded from three of the counties in this district, and the county returns were based on a canvass of only part of the precincts. The committee held that if a certificate is based on anything else than the legal evidence, "or only upon a portion of the data prescribed by law, it is without legal validity as regards the election of a member of Congress, and this wholly independently of the question as to whether this is done fraudulently, ignorantly, or is a mere *casus omissus*. The party relying upon such a certificate must prove his vote *aliunde*."

The committee, however, did not decide the strictly legal question as to the validity of the proceedings of the State board in the absence of part of the papers which should have been before it, as the case was controlled by other questions of law and fact.

The committee rejected the vote of the whole county of Edgefield, part of the county of Aiken, and several precincts in other counties on account of intimidation or fraud. Testimony in regard to every precinct in Edgefield county was quoted to show that the election was controlled by violence and intimidation on the part of organized and armed bodies of white men, directed entirely against the colored voters. Similar testimony justified the rejection of four precincts in Aiken county and several precincts in other counties. A number of precincts were also rejected because the ballot boxes were stuffed, and the large excess of ballots drawn out unfairly. It was possible to distinguish the ballots by the touch, and nearly all the ballots drawn out were Republican ballots.

Attention was called in each of the counties where the testimony showed extensive fraud or intimidation to the extraordinary result shown by the returns. The census of 1880 had been taken shortly before the election. In each of these counties more votes were

returned as being cast than there were males over 21 in the district as shown by the census, though the testimony showed that large numbers of voters were prevented from voting by intimidation and other causes. All the testimony showed that nearly all the colored voters were Republicans, and all the intimidation practiced against them by the friends of contestee was based on this assumption; yet the returns showed that in each of these counties if contestee received all the white vote he must also have received more colored votes than contestant, and in most cases more colored votes than white votes. Such a result could only be understood in the light of the evidence showing the fraudulent means by which it was obtained.

Restating the vote according to the findings of the committee, contestant was shown to have a majority of 1,489 votes, and the committee therefore recommended that he be seated.

The minority disagreed on all the questions in issue. There was an excess of ballots in some of the boxes, but there was no evidence showing how it came there, or connecting one party more than another with it, and the charge that the excess was unfairly drawn out was fully refuted. There was no evidence to sustain the charge that votes counted for contestant by the precinct officers were not counted by the county canvassers. The county canvassers counted all the *returns* made to them, and the precincts not included in their canvass were precincts from which no returns were made, but the ballots forwarded uncounted. Under the law of 1868 it was the duty of the county canvassers to count all the ballots, but the law of 1872 required this to be done by the precinct officers at the polls, and the county canvassers therefore had no right to count ballots not counted by the precinct officers. Neither could they be counted by the State canvassers, as the law expressly required them to base their canvass on the county returns. The failure of the canvassers of three counties to forward the precinct papers to the secretary of state was an entirely innocent mistake, and no harm was done by it. The law required them to be forwarded to the governor *and* secretary of state, and there had been some confusion as to whether separate copies must be sent to the two officers. The secretary of state, to remove this doubt, had issued instruction that no copies need be sent to him, and this was construed by the canvassers in these counties to mean that the papers need not be forwarded at all. This mistake certainly ought not to vitiate the action of the State canvassers, especially as the duty of forwarding the precinct papers did not by law devolve upon the canvassing boards, but on the individuals who had been chairmen of them. The papers were not required by law to be before the State canvassers, and were not to be forwarded to them, but to "the governor and secretary of state," though the governor was not a member of the board of canvassers.

The only other issue was the alleged intimidation, and even if the charges under this head were proved they would not justify seating contestant, though they ought to unseat contestee.

No principle in the law of elections can be regarded as better settled than that no candidate can be held to have been elected to office by the votes which, whatever the cause, were not in fact cast for him.

But the charges were not proved. The quotations of testimony in the majority report were all from one side and only the strongest parts of that side. Most of the facts sworn to in the portions of the testimony quoted disappeared or were greatly reduced by the cross-exami-

nations of the same witnesses, and on what was left there was a square issue of veracity between these witnesses and those of contestee. In intelligence, position, and responsibility the witnesses for contestee were far superior to those of contestant, and in any judicial proceeding their testimony would prevail on an issue of veracity. There were some personal altercations at the polls, generally started by partisans of contestant, but the freedom and fullness of the election were not affected by these occurrences. The only instances in which collisions between large bodies of voters were claimed to have occurred were brought about by the action of partisans of contestant in massing at certain polls with the object of taking possession of the voting place by force. There was no violence here, but some quiet resistance on the part of peace officers. In the precinct where the body of Republican voters did not vote this action was voluntary on their part and due to their failure to carry out their plan of securing possession of the polling place. There was much crowding at some polls, and some persons had difficulty in finding opportunity to vote before the polls closed, but this was due to the action of the Republicans in massing at certain polls. (Under the law a voter might vote anywhere in the county in which he resided.)

As the report of the majority on these questions seemed to be taken bodily from contestant's brief, the minority quoted contestee's brief, giving indexes to the testimony on *both* sides, and full quotations of the testimony by which the testimony quoted in the majority report was contradicted or explained away.

If the attempt made by the majority to try the case by the census, on the assumption that all colored voters are Republicans, could be justified, then contests and even elections might as well be dispensed with, and all elections in this and similar districts decided by the census. But the evidence showed that in this district very many of the colored voters were Democrats and voted for contestee, and that more would have done so but for social ostracism and a species of intimidation practiced against them by their own race.

The minority could find nothing in the record to destroy the title of contestee, and recommended that he retain the seat.

The House, by a vote of 141 to 5 (not voting 146) adopted the resolutions presented by the majority, and contestant was sworn in.

[2 Ells., 430-520.]

(14) LEE *vs.* RICHARDSON.

Fraud; ballot-box stuffing; intimidation; illegal rejection of returns. Majority report for contestee; minority report for contestant. No action by the House.

Majority report by Mr. Calkins; minority report by Mr. Pettibone. According to the returns as certified by the secretary of state, contestee had a majority of 8,468 votes. Contestant alleged that the county returns on which this certificate was based did not include the returns of all the precincts in the respective counties; that ballot boxes were stuffed in many precincts, and the excess unfairly drawn out, and that he was deprived of many votes by violence and intimidation. Mr. Pettibone presented a report signed by seven members of the committee, in which he analyzed the evidence in regard to each precinct,

and by correcting the vote according to the evidence found a majority of 284 votes for contestant. Mr. Calkins presented a brief report in which he stated that he agreed in the main with the minority report, but disagreed as to Darlington precinct. Unless this precinct was rejected a majority could not be shown for contestant. He therefore recommended a resolution, in which a majority of the committee concurred, dismissing the case without prejudice. There is no report representing the views of those of the committee who did not in the main agree with the minority.

In regard to Darlington precinct, Mr. Calkins said:

I do not think the evidence is sufficient to reject this return; it is purely a question of evidence, and I can not bring myself to believe that the evidence is sufficient to justify its rejection. There is no evidence in the record tending to prove how the vote would stand on the theory of contestant if the return was rejected. I think the evidence with reference to this precinct fairly establishes two propositions, viz: First, that the colored voters on the morning of election, in large numbers, took possession of the market house, where the elections were usually held. For some reason not apparent the poll was opened at the court-house instead of the market house, and the white voters at the opening took possession of it. Attempts were made by the colored voters early in the day to force their way to the box to vote, which seems to have been prevented by the white voters crowding the stairs leading to the box. This led to crimination and recrimination and considerable confusion and excitement, and a rumor seems to have prevailed among the colored voters that several stands of arms had been brought to the town the night before the election by the white Democrats, and that they were concealed in the court-house and in Earley's store. Whether this was so or not is immaterial in the view which I have taken of the testimony. There was no physical display of the guns on the day of election, and I find as a matter of fact that probably as early as 10 o'clock, and certainly not later than 11 o'clock on the day of election the colored voters, under the advice of one Smith, who was a leader and man of influence among them, dispersed and did not attempt again to vote on that day at that poll. The danger of bodily harm was not sufficiently imminent to warrant this course, and there was an entire lack of diligence on the part of these voters to maintain their right to vote. As a matter of law these voters had a right to vote at any precinct in the county. There was another voting precinct not many miles from Darlington, and there is no reason given why they might not have voted at that precinct if they were driven away from Darlington. For these and other reasons I am persuaded that Darlington should remain.

The minority report (which, on most points, may probably be taken as representing the views of a majority of the committee), discussed in detail the evidence in regard to all the precincts in issue in each of the counties of the district. In nearly all the precincts there was an excess, generally a very large excess, of ballots in the box over the number of names on the poll lists. All the officers of election were Democrats. The excess was nearly always accounted for, in part at least, by testimony showing that large numbers of "tissue ballots," all Democratic, were found folded inside of other Democratic ballots. From these facts, and in some precincts from more specific or corroborative evidence, it was concluded that the fraud was a Democratic fraud, and that the extra ballots fraudulently placed in the box were Democratic ballots. Under the law a blindfolded manager of election was required to draw out the excess of ballots. The Republican ballots were on very thick paper and the Democratic ballots on very thin paper, so that they could easily be distinguished by the touch. The proof showed in most instances the number of ballots of each sort drawn out, and they were mostly Republican. In some precincts the "tissue ballots" were first destroyed and only the remaining excess drawn out in this way, in others the tissue ballots were returned to the box with

the others, but none of them were drawn out. In all these precincts it was evident that the box had been stuffed, and where the fraud was shown to have been a Democratic fraud it must have been stuffed with Democratic ballots, and the truth could only be arrived at by correcting the returns on that basis. The Republican ballots which had been drawn out were therefore restored to contestant, and the entire excess deducted from contestee. This greatly reduced but did not overcome contestee's returned majority.

The county canvassers in several of the counties rejected the returns of a number of precincts for informalities. The supreme court of the State had since decided that these boards had no judicial powers. Nearly all the precincts in one county were rejected because the messengers who delivered the boxes containing the returns and other papers did not present written certificates authorizing them to deliver them, and in other counties returns were rejected on affidavits showing that the polls were not opened or closed precisely at the legal hour; one return was rejected because one of the judges signing it had not been legally appointed. The minority counted all these returns as made except where the boxes had been stuffed, and these they corrected, as in other cases.

There was violence and intimidation at a number of precincts, but in most instances it was not found sufficient to vitiate the election. The only important precinct rejected was Darlington, described above in the report of Mr. Calkins. The minority found that there was no competent evidence what vote was counted from this precinct by the county canvassers. The county canvassers had failed to forward to the secretary of state the precinct returns and other papers, and the certificate of the secretary of state only showed the total vote of the county. There was what purported to be a certified copy of the precinct return in the record, but the clerk who appeared to have certified it testified in another place that he had not certified to its truth, and the return had been so kept that its integrity could not be relied upon. The minority counted the other precincts in this county either according to evidence *aliunde* or according to the claims of contestee, but there was no evidence *aliunde* showing either the actual vote or the returned vote of this precinct. The proceedings at this poll were such as to vitiate any election. The steps leading to the ballot box were occupied by Democrats in red shirts, many of them armed and most of them intoxicated; supplies of arms had been quietly brought into the town the night before and deposited near the polling place, and Republicans who attempted to vote were prevented by violence, as was shown by the testimony of 240 witnesses, who swore they were present and desired to vote for contestant, but were prevented by threats or intimidation. The minority did not include any votes from this poll in their account.

Adding up the votes actually cast at the various precincts, as found by the minority, contestant was shown to have a majority of 284 votes, and the minority therefore recommended that he be seated.

These reports were made to the House on February 24, 1883, and were under consideration when the Congress expired by limitation, on March 3. The resolutions offered by the minority, declaring contestant elected, were adopted as an amendment, by a vote of 124 to 114. On the adoption of the resolutions as thus amended the vote was 128 to 6 (not voting 158), no quorum voting. A call of the House revealed

a quorum present, but on the next vote no quorum voted. This alternation of votes showing no quorum voting and calls of the House showing a quorum present continued until the Congress expired, so no final action was taken on the case.

[2 Ells., 521-561.]

(15) *MACKEY vs. O'CONNOR.*

Ballot-box stuffing; illegal rejection of returns; tampering with transcript of evidence; status of case when contestee has died and the member elected to fill the alleged vacancy has been sworn in. Majority report for contestant; minority report to dismiss contest. Contestant seated.

Majority report by Mr. Miller; minority report by Mr. Moulton.

According to the returns as certified by the secretary of state, contestee (Mr. O'Connor) had a majority of 5,272 votes. Contestant alleged that he had a majority of the votes on the face of the precinct returns, but that the county canvassers had illegally rejected a large number of precinct returns, and that one precinct return had been destroyed, and the contents of the ballot box altered, and the vote counted according to the ballots. He also alleged that in a large number of specified precincts the ballot boxes had been stuffed with Democratic ballots, and when the excess was drawn out in pretended compliance with the law nearly all the ballots drawn out were Republican, so that contestant was deprived of a large number of votes legally cast for him, and contestee given a corresponding number not cast for him. Contestee denied the charge of ballot-box stuffing, substantially admitted the charge of rejection of returns, and made counter charges of intimidation. On these issues testimony was taken. About the time the testimony was all taken contestee died, and the governor issued writs for an election for a member "to serve for the remainder of the term for which the said Michael P. O'Connor was elected." At this election Mr. Samuel Dibble received all the votes cast, and he was sworn in, the House laying on the table a motion to refer his credentials to the Committee on Elections.

Mr. Dibble contended that he could not be made a party to the case of *Mackey vs. O'Connor*, and that if his right was to be questioned it must be in a new proceeding. This claim was overruled by the committee.

The right of the contestant, as also of the people of that Congressional district, who, after all, are the real parties in interest, to have the facts of that election inquired into and adjudicated by the House, can not be changed by the fact of the death of the contestee. If the contestant really received at that election, as he claims, the largest number of legal votes, it is his right and the right of the people of that district that he be awarded the seat he was chosen to fill. The committee, however, are of opinion that Mr. Dibble, if elected to any position, was elected to fill a vacancy created by the death of Mr. O'Connor, and for his unexpired term. * * * The right of Mr. Dibble to a seat in the House depends upon the title of Mr. O'Connor, * * * and if it appears from the proofs that Mr. O'Connor was not elected, then there was no vacancy created by his death, no remainder of a term to be filled, and Mr. Dibble could have no rights to be prejudiced by any pleadings or agreements made by Mr. O'Connor.

If a contest could abate by the death of contestee, then it would abate by his resignation, and a contestee finding his case hopeless might at any time abate the case by his own volition and again offer

himself as a candidate at a new election in which he would have nothing to lose and everything to gain.

After this question had been settled by the committee Mr. Dibble made a second motion to suppress the testimony, alleging that the testimony as printed was not the testimony as originally taken, but that it had been altered and perverted by contestant, and also that the technical requirements of the statute in regard to transcribing and forwarding the testimony had not been complied with. In support of this motion Mr. Dibble submitted a number of *ex parte* affidavits, to which contestant replied by submitting the affidavits of 83 of the 94 witnesses examined by him, stating that their testimony as printed was correct, and again swearing to its truth, and the affidavit of the stenographer stating that in the limited time given him he had compared the printed testimony of 14 witnesses with his original notes and found it correct. If the testimony of any of the others had been incorrect there was ample time for Mr. Dibble to have had it compared and to have procured an affidavit to that effect.

The provisions of the statute in regard to the form and manner of taking and forwarding the depositions were directory merely, and the committee only inquired whether the testimony of the witnesses had been correctly taken, and forwarded as taken. The great preponderance of the affidavits showed that there had been no alteration of the testimony. The stenographic notes were, strictly speaking, the original evidence of what the witnesses deposed. It was agreed that they should be afterwards transcribed, and it was immaterial how or by whom they were transcribed, provided they were correctly transcribed, "since the notary public accepted the work as done by the copyists, and certified to the same as being the depositions taken by him. The fact that the contestant assisted in making transcripts of this evidence does not detract from its correctness." The committee, therefore, considered the testimony, and proceeded to determine the case on its merits.

Although contestee had a large majority on the returns as counted, contestant would have had a majority of 879 votes if all the precinct returns had been counted. The apparent majority of contestee was obtained by the rejection of twelve precinct returns, and by the fraudulent reversal of the vote of Haut Gap precinct. At this precinct an honest election was held, and the managers counted the votes and certified for contestant 1,037; for contestee, 46. The returns were sealed up in the box and delivered to the county canvassers. After the delivery of the box the seal was broken by someone, the returns abstracted, and the ballots changed. The county canvassers, finding no return, counted the ballots in the box and found 19 for contestant and 1,052 for contestee—substantially a reversal of the true vote as returned. The other twelve precincts were rejected by the canvassers. Contestee alleged that they were rejected because "threats, acts of intimidation, and violence were perpetrated by the partisans and supporters of Mr. Mackey;" but the county canvassers had no judicial authority to examine into such questions and reject polls, and there was no evidence before the committee to sustain any such charges. The committee, therefore, found that contestant had a majority of 879 votes on the face of the returns.

But the real majority of contestant was much larger. At forty-five precincts—two-thirds of the precincts in the district—the ballot boxes

were stuffed, as was shown by the large excess of ballots over the number of names on the poll list. The average excess in these forty-five precincts was 139 ballots, and in one box 1,071 extra ballots were found. The total excess in all the precincts was 6,247 votes.

This large excess, occurring, as it did, at over two-thirds of the polls in the district, warrants the conclusion that the excess at those polls was not the result of mere accident or local manipulation, but of a well-defined and matured plan.

It was very clear that these extra ballots were Democratic ballots. In accordance with advice publicly given by contestant and others, the Republicans at most of the polls went to the polls with open tickets, and folded them in the presence of the managers of election, so as to show that they only voted one ticket. All the election officers in all the precincts were Democrats, and the boxes could hardly have been stuffed without their connivance. Two sorts of Democratic ballots, one much narrower than the other and printed on fine tissue paper, were used throughout the district. In many precincts there was specific proof of finding several, and in one case 23, of these ballots inclosed in larger Democratic ballots. The fact that the extra ballots were Democratic was also conclusively shown at some polls by the fact that there were more Democratic ballots in the box than there were voters voted of both parties. In one case there were 465 more Democratic ballots than there were voters of both parties.

In drawing out the excess of ballots it was very easy to distinguish the Republican from the Democratic ballots by the touch, and the ballots drawn out were chiefly Republican. In twenty-nine polls 2,454 Republican and 383 Democratic ballots were drawn out.

Every Republican vote drawn out was a loss of one to Mr. Mackey and a gain of one to Mr. O'Connor. On the other hand, by the drawing out of a Democratic ticket Mr. O'Connor suffered no loss, because the excess being created by placing Democratic tickets in the box, whenever a Democratic ticket lawfully voted was drawn out one of the Democratic tickets illegally voted was counted in its place, so that the contestee's vote was not reduced thereby. In order, therefore, to ascertain the true state of a poll it is only necessary to add to the vote returned for the contestant at that poll the number of Republican ballots drawn out and destroyed, and to deduct from the vote returned for the contestee a like number, making, of course, such additional corrections as the testimony warrants.

Correcting the votes of the various precincts in this way, the committee found that contestant's majority of 879 votes on the face of the returns was increased to 9,278, and they therefore offered resolutions declaring that Mr. Dibble was not entitled to occupy the seat, and that contestant was elected.

The minority held that there was no contest legally pending, and also that the motion to suppress the testimony on the ground that it had been altered by contestant should be granted. The affidavits presented showed that all the testimony had been copied by contestant and his agents, and that contestant had made alterations in it. Mr. Dibble made affidavit to a number of alterations in Mr. Mackey's handwriting apparent on the face of the testimony. The notary did not compare any of the testimony with his notes after it was copied, but certified it without examination. None of it was written out in his presence, as the law required. The minority quoted a large number of decisions made under similar statutes, showing that it was always required that all the forms of law in the writing out and forwarding of depositions should be scrupulously observed, and that the

integrity of the depositions should be unquestionable. None of these depositions could legally be considered.

The minority also held that the papers offered as United States supervisors' returns and the tabulated statement purporting to be made by the chief supervisor were not admissible as evidence. Section 2029 of the Revised Statutes, as understood and explained at the time of its passage, took away from the supervisors outside of cities of 20,000 inhabitants or over all powers except those of mere witnesses, including the power of making returns. The certificates not being required by law, they were not evidence, and the facts sought to be shown by them should have been shown by the testimony of witnesses. The statements of the chief supervisor did not purport to be copies of any papers in his office, but simply a compilation from them.

Mr. Dibble's rights ought not to be in any way affected by the record in the case of Mackey *vs.* O'Connor. Mr. O'Connor was the returned member, and had a right to the seat for two years unless he died or the House adjudged him not elected, but he had no inheritable or transmissible interest in it.

The contest for *his* seat after his death is a contest for something that has ceased to exist.

Mr. Dibble had been duly elected and had been sworn in in accordance with a vote of the House. This gave him a right to the seat until someone should successfully attack *his* right. He was entitled to the notice of contest required by the statute, and to an opportunity to defend his right. The House has the right to adjudicate the question of the right of a member to his seat, either in the case of a contest between a contestant and a returned member, under the statute, or upon the protest of an elector or other person, or upon the motion of a member of the House. In the first case, that of a statutory contest, the proceeding is *inter partes* and abates on the death of either party. It must be conducted according to the statute. In the other cases the proceeding is under the Constitution, and the House must prescribe the rules for the conduct of each particular case. The case of Mackey *vs.* O'Connor was a proceeding *inter partes*, and Mr. Dibble could not be made a party to it. If contestant desired to question the right of Mr. Dibble, he must do it by a contest under the statute, opened by a due notice of contest. If the right of Mr. Dibble was to be questioned in any other way, it could only be by order of the House. The usual resolution of reference of contested-election cases to the Committee on Elections did not give that committee jurisdiction over the abated case of Mackey *vs.* O'Connor, much less did it give the right to make that case the basis of an inquiry into the right of Mr. Dibble to his seat.

We can not concur in establishing as a precedent that a member of this House, duly admitted to his seat, can be rightfully removed therefrom without any opportunity of defending his title thereto, either by pleading his defense or by introducing evidence in his behalf. Nor can we subscribe to the opinion that the Committee on Elections, under its ordinary powers, can summon a member of this House to defend a cause in which he is not the contestee, in which he is in no way named as a party, and in which the House has not only not required him to appear but has by its action declined to make him a party.

The minority discussed very briefly the contestant's claims on the merits of the case. It was not true that contestant had a majority on

the face of the returns. Counting all the rejected returns as claimed by contestant, there still remained a majority of 1,145 for contestee.¹

The attempt to build up a majority of 9,278 for contestant was based on the assumption that the ballot boxes were stuffed by Democrats, in the face of the fact that the very evidence relied on by contestant showed that at ten or twelve polls Republican ballots were found folded together.

The minority recommended that the case of Mackey *vs.* O'Connor be dismissed.

After many days of "filibustering" a resolution to send a committee to investigate the charges of tampering with the testimony was rejected by a vote of 97 to 139. The resolutions presented by the majority were then passed by a vote of 150 to 3 (not voting, 138), and Mr. Dibble was unseated and contestant sworn in.

[2 Ells., 561-602.]

(16) STOLBRAND *vs.* AIKEN.

Testimony not taken before legal officer. Case dismissed.

Report by Mr. Jones.

The testimony of contestant was all taken before a United States commissioner. Contestee objected at the outset to the competence of the officer, and the committee sustained the objection. The law specified certain officers before whom testimony might be taken, and provided that by the written consent of both parties it might be taken before other officers. There was no such consent in this case.

It is insisted that the House of Representatives, in judging of the elections, qualifications, and returns of its members, is not bound by the rigid rules of judicial procedure. This is true, but applies only to exceptional cases, not provided for by the "rules prescribed." It would be worse than idle to prescribe rules if they may be willfully and unnecessarily disregarded.

This view was decisive of the case, and the committee therefore recommended that contestant have leave to withdraw his papers.

The House agreed, without division.

[2 Ells., 603, 604.]

(17) CANNON *vs.* CAMPBELL.

Polygamy, illegal naturalization; status of Territorial Delegate with reference to the right of the House to try election contests. Reports by Messrs. Calkins, Pettibone, Miller, Jacobs, and Beltzhoover to vacate seat; by Mr. Thompson for contestee; by Messrs. Ranney and Alberton, and minority report signed by Messrs. Moulton (Alberton), Davis, and Jones for contestant. Seat declared vacant.

On the face of the returns contestant had 18,568 votes and contestee 1,357, but the governor issued the certificate to contestee on the ground that contestant was a polygamist and an alien, and hence ineligible, and that this involved the election of contestee. The Clerk of the House placed the name of contestant on the rolls, but at the beginning of the session the House refused to permit either to be

¹ In this statement Haut Gap precinct was retained as counted by the county canvassers.

sworn in, and referred the papers to the Committee on Elections, to report either on the *prima facie* or the final right to the seat.

Mr. Calkins made the fullest report in advocacy of the proposition that neither candidate was elected. A majority of the committee seem to have agreed in this conclusion, but there were several separate reports, each representing only the views of the member signing it.

Contestant presented a certificate of naturalization in due form purporting to have been issued in 1854 by a court of competent jurisdiction. Most of the members of the committee agreed that this could not be attacked in a collateral proceeding. Contestee attacked the certificate on the grounds that there was no legal record of its issue, and that contestant had not in fact resided in the United States the required length of time when the certificate was issued. The only record of naturalizations kept by the court from which this certificate was issued was the book of stubs from which the certificates were torn off. The stubs were not signed by the judge, but it was held that this was not imperative in the absence of a mandatory statute requiring it. It fully appeared by parol evidence that the judgment of naturalization had in fact been duly rendered by the court.

Mr. Cannon came to the United States when a boy, in 1842, and settled at Nauvoo, Ill. In 1847 he went with the rest of the Mormon colony to Great Salt Lake, in what was then Mexican territory. In 1848 this territory was ceded to the United States. Soon after Mr. Cannon went to California, and in about a year went to the Hawaiian Islands as a missionary, returning only a short time before his naturalization. These facts were not held to vitiate the naturalization, either because it could not be collaterally attacked or because Mr. Cannon was considered as having been constructively a resident the required length of time.

The only evidence in the case on behalf of contestant consisted of certified copies of the county returns. These were appended to his notice of contest, but were not otherwise put in evidence during the legal time or before any officer. They were admitted, however, by most of the committee, on the ground that this sort of certified documentary evidence may be put in evidence at any time.

All the committee except Mr. Thompson agreed that contestee was not elected and nearly all agreed that contestant was elected unless he was disqualified by polygamy. He admitted that he was a polygamist. Those who advocated refusing him his seat on this ground argued that a Territorial Delegate is not a member of the House, and is not an officer under the Constitution. He holds his seat by the courtesy of the House, which may at any time by a majority vote deprive him of it. His qualifications are whatever the House in any particular Congress may choose to prescribe; and even Congress can not by law bind any House but the one consenting to the law. Polygamy is a violation of the laws of the United States and a high crime against civilization. The House ought, in justice to its own dignity, to exclude a self-confessed polygamist from a seat on its floor.

Mr. Thompson, who reported for contestee, did so on the ground that his certificate of election must stand until overthrown by competent evidence, which had not been done. Contestant had given notice of contest under the statute, but had offered *no* evidence of any sort taken under the statute. He must be held to have abandoned his contest. If the certified copies of the returns were admitted, they did not prove

how many *legal* votes were cast. Under the laws of the Territory it was possible for women who were not citizens and other clearly unqualified persons to vote. There was no evidence how many of these votes might have been cast. The pretended naturalization of contestant was clearly void. There was no legal record of its issue, and contestant had not at the time it purported to have been issued been an actual resident of the United States the required time; constructive residence was not sufficient.

Those who reported for contestant did so on the ground that the committee had no right to investigate any other qualifications than those prescribed by the statute creating the office of delegate, or by the Constitution in regard to members, which applied to Delegates by analogy. A Delegate was so far a member that he ought not to be deprived of his seat except upon evidence that he was not elected or that he possessed some legal or constitutional disqualification. The personal moral character of the Delegate was no more to be considered in judging of his election, qualifications, and returns than in the case of a Member. If he was to be removed because of personal unfitness it should be by expulsion by a two-thirds vote.

The resolutions of the minority, declaring contestee elected, were rejected by a vote of 79 to 123. The resolutions declaring the seat vacant were then passed without division.

[2 Ells., 604-667.]

(18) STOVELL vs. CABELL.

Fraud; illegal influence; irregularities. Report for contestee. Contestee retained the seat.

Report by Mr. Atherton.

According to the returns contestee had a majority of 859 votes. If all the claims of contestant in his notice of contest in regard to precincts about which he took any testimony were conceded, this majority would not be overcome. Some testimony was taken in regard to precincts not mentioned in the notice of contest or upon issues in regard to others not raised by the notice of contest, but the committee held it to be inadmissible. Testimony was also thrown out because taken in one county before a notary public of another county, or before a county clerk, an officer not authorized by the statute. Most of the charges as to other precincts were not sufficiently proved. Contestant charged that at one precinct his supporters were subjected to social and business ostracism, and that the colored and white voters were required to vote at separate windows; the white voters voted rapidly and without challenge, while the colored voters were purposely delayed, so that many of them had not yet voted when the polls closed. The mere fact of receiving the votes at two windows did not affect the validity of the election. There was very little testimony tending to prove the charge of unfairness, and this was fully contradicted. Similar charges were made against a few other precincts, but not proved. Many votes were charged to have been rejected by the illegal rulings of election officers, but while some votes may have been so rejected, the number was much less than charged, and not great enough to affect the result.

The committee unanimously recommended resolutions declaring contestee elected. The House agreed without division.

[2 Ells. 667-675.]

(19) BAYLEY *vs.* BARBOUR.

Inhabitaney. Report for contestee. Contestee retained his seat.

Report by Mr. Wait.

Contestant abandoned all the claims in his notice of contest except the charge that contestee was ineligible by reason of not being an inhabitant of Virginia at the time of his election. In doing this he of course abandoned all claim to be himself entitled to the seat, and the committee would have preferred to have the question of eligibility raised by a memorial from the electors, who were alone interested.

It appeared that Mr. Barbour had no property in the city of Alexandria, but that his wife had, and it was assessed against her as a resident of Alexandria until shortly after the election in question. Mr. Barbour had a temporary home in Washington, but he always considered and announced himself as a resident of Virginia. Legal processes were habitually served on him in Alexandria. For two or three months before and after the election in question he had been actually present in Virginia, with no intention of ever permanently removing therefrom. The laws of Virginia required a year's residence in the State and three months in the county, city, or town. It was contended that Mr. Barbour had not these qualifications of an elector, but the committee, after discussing the cases of Bailey (C. & H., 411) and Key (C. & H., 224), held that it was not necessary that a member should be a voter in the State at the time of his election, but only that he be an inhabitant.

The committee recommended that contestee retain the seat, and the House agreed without division.

[2 Ells., 676-680.]

(20) JONES *vs.* SHELLEY.

Application for a special investigation. Majority report favorable; minority report adverse. No action by the House.

Majority report by Mr. Ranney; minority report by Mr. Belzhoover.

Mr. Shelley had been unseated (see case of Smith *vs.* Shelley) and a vacancy declared. A special election was called to fill the vacancy, and Mr. Shelley was certified to have been again elected. Contestant alleged that on the face of the precinct returns he had received a majority of about 10,000 votes, but that nearly all his votes had been thrown out by the county canvassers on frivolous pretexts. He exhibited to the committee the returns of the United States supervisors, which seemed to support the charge. Notice of contest had been duly served, but the time allowed by the statute for taking testimony would extend beyond March 4, 1883, when the Congress would expire by limitation. Contestant therefore petitioned for a more speedy way of investigating the election. The committee favored granting the application. The well-known history of the district (the Fourth Alabama) and the facts brought out in the contest of Smith *vs.* Shelley gave a show of probability to the claims of contestant, and if his allegations were true the House ought to know it. The committee therefore recommended that a subcommittee of three members be authorized to go to Alabama to take testimony.

The minority opposed employing any such plan. Contestant might have started his contest earlier and thus gained time. The time was now (January 23, 1883) so short that no special committee could take more than a small part of the evidence. Contestant and contestee were taking testimony in the regular way, and should be permitted to proceed. The only effect which an investigation by a special committee could have would be to prejudice the case of *Craig vs. Shelley*, which was pending in the Forty-eighth Congress. The Forty-seventh Congress had already had contests enough of its own "without embarking in the business of setting up small side shows to help along contests in the next House." All the presumptions were in favor of contestee, and the statement of the majority that the claims of contestant were "probable" was based on uncalled-for assumptions.

The rule of law being that the ordinary method of trying contested elections in accordance with the provisions of the act of Congress will not be departed from without good cause, it is respectfully submitted that under all the circumstances in this case no such cause has been shown.

The minority report was subsequently withdrawn by unanimous consent.

There was no action by the House.

[2 Ells., 681-686.]

FORTY-EIGHTH CONGRESS, 1883-1885.

Committee on Elections.

Mr. TURNER, Georgia,	Mr. ADAMS, New York,
DAVIS, Missouri,	RANNEY, Massachusetts,
CONVERSE, Ohio,	PETTIBONE, Tennessee,
COOK, Iowa,	MILLER, Pennsylvania,
BENNETT, North Carolina,	VALENTINE, Nebraska,
LOWRY, Indiana,	HEPBURN, Iowa.
ELLIOTT, Pennsylvania,	HART, Ohio,
Mr. ROBERTSON, Kentucky.	

Cases.

- (1) J. R. Chalmers *vs.* V. H. Manning, *Mississippi*.
- (2) George T. Garrison *vs.* Robert Mayo, *Virginia*.
- (3) Francisco A. Manzanares *vs.* Tranquilino Luna, *New Mexico*.
- (4) Charles C. Pool *vs.* Thomas G. Skinner, *North Carolina*.
- (5) S. N. Wood *vs.* S. R. Peters, *Kansas*.
- (6) Charles T. O'Ferrall *vs.* John Paul, *Virginia*.
- (7) William M. English *vs.* Stanton J. Peelle, *Indiana*.
- (8) Jonathan H. Wallace *vs.* Wm. McKinley, jr., *Ohio*.
- (9) James E. Campbell *vs.* Henry L. Morey, *Ohio*.
- (10) John E. Massey *vs.* John S. Wise, *Virginia*.
- (11) George H. Craig *vs.* Charles M. Shelley, *Alabama*.
- (12) A. C. Botkin *vs.* Martin Maginnis, *Montana Territory*.
- (13) James H. McLean *vs.* James O. Broadhead, *Missouri*.
- (14) Benjamin T. Frederick *vs.* James Wilson, *Iowa*.

(1) CHALMERS *vs.* MANNING.

Prima facie case: Neither party seated. Case on merits: Undue influence by Government officers; holding of incompatible office. Majority reports for contestant; minority report to declare seat vacant. Contestant seated.

Prima facie case: Majority report by Mr. Turner; minority report by Mr. Cook.

Case on merits: Majority report by Mr. Cook; dissenting report by Mr. Ranney; minority report by Mr. Davis.

The Clerk of the House did not place the name of either claimant on the roll, as the certificate of election of Mr. Manning had not been filed with him, and among the papers which were filed by the parties there was nothing which he regarded as a certificate of election. There was considerable debate during the first two days of the session as to what was the proper course to be pursued, and on the second day a resolution was introduced, with the consent of Mr. Manning, and passed, referring all the papers presented by both parties to the Committee on Elections, "with instructions to report immediately whether upon the *prima facie* case as presented by said papers said Manning

or Chalmers is entitled to be sworn in as a member pending the contest on the merits, and not to affect the final right to said seat."

The committee reported that—

This action of the House was either a refusal of the seat to Mr. Manning by the House on the usual evidence of the governor's certificate or it was a renunciation by him of his right to demand such seat upon the governor's certificate alone; perhaps it was both.

Among the papers referred was a commission issued by the governor to Mr. Manning, in due form. If the committee had confined their investigations to this paper alone, they would "unhesitatingly have affirmed Mr. Manning's right to occupy the seat pending the contest. Except in extraordinary cases, and in rare instances, we find that the commission or certificate concludes all inquiry as to which of the claimants of a seat shall occupy it until the contest on the merits is determined." But in this case *all* the papers had been referred by the House, and among them was the certificate of the secretary of state, upon which the certificate of the governor was based. This certificate showed a large number of votes returned for *J. R. Chambless*, which, if counted for contestant, would give him a majority of all the votes. Contestee in his answer to the notice of contest had conceded that these votes were cast for contestant, and had announced his intention of not claiming the seat on the certificate of the governor, or until he could prove his election by other evidence. The returns on which the certificate of the secretary of state was based showed that the votes in question were returned to the secretary of state as having been cast for contestant—the name "Chambless" appearing not on the face of the returns, but in a tabular statement written on the back of one of them. Under these circumstances, and on account of the instructions of the House, the admissions of contestee, and his refusal to take his seat in the usual way, the committee were "unable to agree that Mr. Manning should be seated upon his *prima facie* title. Mr. Chalmers having no such credentials as the law contemplates, we do not think that he ought to be seated pending the contest."

Mr. Cook filed a dissenting report, contending that the circumstances of the reference did not show that Mr. Manning had declined or the House denied his right to take a seat on his certificate. The only evidence proper to be considered on a *prima facie* case was the certificate, and, according to all the authorities, unless this certificate either showed on its face facts contradicting the result to which it certified or was issued by incompetent authority, it was conclusive of the *prima facie* right of its holder to the seat. To hold otherwise, and especially to hold that a person shown by other evidence than the certificate not to have received a majority on the face of the returns was thereby to be deprived of the *prima facie* title given by the certificate, would be to double the labor of every election case by requiring two adjudications, both based upon testimony.

On the *prima facie* case, a resolution that the credentials of contestee were "due and perfect" was defeated, by a vote of 106 to 139, and one that he be sworn in, by a vote of 91 to 157. The committee was then, without division, discharged from the consideration of the *prima facie* case.

The seat remained vacant pending the investigation of the merits. On the final adjudication the committee, by a nearly unanimous vote, decided that contestant was entitled to the seat. He was conceded to

have received a large majority on the face of the returns, but his election was sought to be overthrown by charges that officers of the United States Government, by illegal influence and bribery, had interfered with the election, and also by the allegation that contestant, by virtue of his employment as "special assistant to the district attorneys for the northern and southern districts of Mississippi," had been an officer of the United States, and was thereby disqualified from being a member of Congress.

The committee found that Federal patronage and the services of Federal officers had apparently been used in a way that was "a reproach to the civil service of the country." But while such practices were to be condemned, it did not appear in this case that they had affected the result of the election; indeed, their main effect seemed to have been to secure to contestant the nomination of his party, with which the House had nothing to do. As to the second question, passing the question whether the position of special assistant to the district attorney is an office within the meaning of the Constitution, the committee found that Mr. Chalmers was retained for a special purpose, "and that prior to the time for the convening of Congress the matter for which he was appointed or employed had been disposed of. * * * Practically his connection with the office of district attorney had ceased."

Mr. Ranney presented a report signed by himself and Messrs. Pettibone, Miller, Valentine, Hepburn, and Hart, all of whom agreed in the conclusion of the majority report, but protested against the insinuations of that report against the conduct of Federal officials and against the personal character of contestant. They claimed that the evidence entirely failed to substantiate any of these charges. They also discussed more at length the question of whether the office of assistant to a district attorney was a disqualifying office.

Mr. Davis presented a minority report in which he contended that the position held by contestant was an office within the meaning of the constitution. Contestant was retained for the prosecution of a number of cases, and the alleged settlement had to do with only one of them. Some of the cases were still pending, and contestant had not resigned his appointment until some months after the beginning of the session of Congress. He presented resolutions declaring the seat vacant on this ground and also on the ground of corrupt influence by Federal officials.

On the case on the merits the resolutions presented by the majority were passed by a vote of 163 to 56, and contestant was sworn in.

[Mobley, 7-52.]

(2) GARRISON vs. MAYO.

When certificate conclusive of prima facie right. Illegally rejected returns. Illegal votes. Report on prima facie case for contestee; on case on merits for contestant. Contestant seated.

Report on *prima facie* case by Mr. Lowry; on case on merits by Mr. Turner.

Contestee, having the certificate of election, was sworn in on the first day of the session. On the second day a resolution was offered referring the "certificates and all other papers" to the Committee on Elections, with instructions to report "which of the rival claimants

to the seat from that district has the *prima facie* right thereto, reserving to the other party the privilege of contesting the case upon the merits." The next day a resolution was passed referring the above resolution to the Committee on Elections, "with instructions to report on the legal question involved therein."

The committee took this latter resolution as implying that the House had not instructed the committee to examine other evidence than the certificate, and reported a resolution declaring

That upon the legal question involved in the case of Garrison *vs.* Mayo, the return of the governor, in the absence of anything appearing thereon or properly presented in connection therewith tending to impeach it, is conclusive as to the *prima facie* right, and that, pending the contest on the merits, the sitting member is therefore in this case entitled to retain the seat.

Mr. Davis dissented from the construction given to the resolution referring the case.

On the case on the merits the committee reported that contestee had been certified by the State canvassers as having received a majority of 1 vote, but that this result had been reached by throwing out the vote of one county on the ground that on the seal impressed on the return the word "county" was written over the word "circuit" of the seal. Counting this county, and also the return of an island precinct which had been delayed, contestant was shown to have a majority of 72 votes. The burden of proof thus shifted to contestee, and he sought to sustain it by showing illegal votes for contestant sufficient to overcome his majority. Some of these votes involved legal questions arising under the Virginia capitation tax law and votes found in the wrong boxes. The committee preferred not to decide these questions until the consideration of other Virginia cases of which they were decisive. Taking, however, the views of the law most favorable to contestee, and looking on the evidence of the facts claimed in the light most favorable to him, he had not shown enough illegal votes to overcome the majority of contestant. Contestant had also charged a very large number of such votes against contestee, and a consideration of the evidence would probably increase his majority, but as in any case he was elected, the committee did not think it necessary to examine all the evidence. The committee were unanimous in their decision in favor of contestant. The House agreed without division to the resolutions presented, and contestant was sworn in.

[Mobley, 53-59.]

(3) MANZANARES *vs.* LUNA.

Fraud. Report for contestant. Contestant seated.

Report by Mr. Robertson.

The notice of contest in this case was served within the time, on the wife of contestee, at his home, he being absent from the Territory. Other notices were sent to Washington by mail and express, but none was actually served on contestee until after the expiration of the thirty days. The committee held that the service was sufficient. The notice charged fraud in various counties, but the testimony was confined to the county of Valencia, where contestee was returned as receiving 4,259 votes, and contestant 0. The largest previous vote in the county had been 2,136, and there had been no increase in the population. The Democratic party, to which contestant belonged, had always pre-

viously cast from three to six hundred votes. At this election no votes were certified for contestee by the county board, though the poll books showed that he received 66.

Examining the evidence at particular precincts, the committee found that the election at precincts casting a vote of 2,357 for contestee was fraudulent, and that the votes must be thrown out. The proof of fraud in most cases consisted of proof that a much less number of votes was cast than returned. The names on the poll books in some cases were obviously fictitious; in some cases they were arranged in alphabetical order, as if copied from some index or registration list. In one or two cases the whole returns were forgeries. In one case the election was held the day before the legal day. Deducting from contestee the votes at the fraudulent polls, contestant was shown to have a majority of 938 votes. The committee unanimously recommended that he be seated. The House agreed without division and contestant was sworn in.

[Mobley, 61-64.]

(4) POOL vs. SKINNER.

Election to fill vacancy, held in new district. Majority report for the validity of the election; minority report that it was invalid, as held in the wrong district. House refused to consider case.

Majority report by Mr. Turner; minority report by Mr. Ranney; further dissenting report by Mr. Cook.

At the time of the election of members of the Forty-eighth Congress, the State of North Carolina had not yet been redistricted under the new apportionment law and had elected eight Representatives from the old districts and an additional Representative at large. Walter F. Pool was chosen the Representative for the First district. After the election the State was redistricted and Bertie County was taken out of the First district and Carteret County added to it. Subsequent to the passage of this law Mr. Walter F. Pool died and the governor issued writs for an election to fill the vacancy, to be held in the *new* First district. At this election Mr. Skinner received the majority of the votes. His election was contested by Mr. Charles C. Pool, his opponent, on the ground that the election should have been held in the old district, from which Mr. Walter F. Pool had been elected. Mr. Skinner was sworn in and a resolution passed directing the Committee on Elections to report whether he was elected from the proper district. The majority of the committee reported in favor of the validity of the election. At the time the election was held the law of North Carolina provided that for the purpose of electing Representatives in Congress the State should be divided into nine specified districts. This law expressly repealed all previous laws, saving no exceptions. At the time of the election the only First district in legal existence was the one in which the election was held. The governor had decided that it should be held in this district, and, while the precedents of Congress on the subject were conflicting, it was found that Congress had always acquiesced in the course of the State authorities. Whichever way the governor decided the question, the committee would not be inclined to overthrow his decision. They accordingly recommended a resolution that contestee "retain his seat without prejudice to the ultimate right to the seat."

The minority held that the election ought to have been held in the old

district. If the election in the new district was allowed to stand, one county would be without any Representative in Congress and another county would be represented by two Representatives. The difference in these two counties in this case made a difference in the political complexion of the district. If the principle on which the report of the majority was based was carried to its logical conclusion it might produce the most absurd consequences.

The law of the State only gave the governor the power to fix the time of elections to fill vacancies; they were to be held in the manner and places required by law. The writs and proclamations were to go to the separate precincts. A Congressional district is not a separate corporation, having an election machinery of its own; it is merely a designation of what counties shall have the right to choose a Representative. Under the precedents of the House, and a fair construction of the laws of North Carolina, the counties which should have filled the vacancy were the counties in which the vacancy occurred. The minority were of the opinion that the election should be declared invalid.

Mr. Cook filed a report agreeing in the conclusion of the majority, but on different grounds. He held that the election should have been held in the old district, and that the votes cast in Carteret County, not in the old district, should be rejected. But rejecting these votes, contestee was still elected, and his election could not be invalidated by the fact that the people of Bertie did not vote, for they could have voted under the law if they had desired.

This case was twice called up, but each time the House refused to consider it, and it was never acted on.

[Mobley, 65-78.]

(5) WOOD *vs.* PETERS.

Power of the State to superadd qualifications for Representative in Congress to those prescribed by the Constitution of the United States. Majority report for contestee; report by Mr. Bennett for contestant. Contestee retained the seat.

Majority report by Mr. Elliott; minority report by Mr. Bennett.

At the election for members of the Forty-eighth Congress from the State of Kansas four members at large were voted for. Contestee received the highest number of votes; contestant stood fifth in order. He contested the election of contestee on the ground that he was ineligible under the constitution of Kansas. This constitution provided that the judges of the district courts of the State should not "hold any office of profit or trust under the authority of the State or the United States during the term of office for which said justices or judges shall be elected." Contestee was at the time of his election a judge of one of the district courts of Kansas, and hence clearly came within the disqualifying provisions of the constitution. But the committee held that the States have no authority to prescribe other qualifications for Representatives in Congress than those prescribed in the Constitution of the United States, and the provision in question was consequently void. Story and Kent, and the recent cases of *Turney vs. Marshall* and *Fouke vs. Trumbull* were quoted as sustaining this doctrine.

Mr. Bennett presented an elaborate minority report, holding that the enumeration of certain qualifications in the Constitution did not

exclude the requirement of others, and that the requirement of these additional qualifications was among the reserved rights of the States. To hold otherwise would be to hold invalid provisions in the constitutions of nearly all the States (a complete list of which was given in the report), some of which were adopted before the Constitution itself. The debates in the Constitutional Convention clearly showed that no such limitation of the powers of the States was intended.

Mr. Peters being ineligible, Mr. Wood, being the eligible candidate who received the highest number of votes, should be declared elected. The principle that votes cast for an ineligible candidate were to be treated as nullities was sustained by all the English authorities and the best American precedents.

The House adopted the resolutions presented by the committee without division, and Mr. Peters retained his seat.

[Mobley, 79-186.]

(6) O'FERRALL vs. PAUL.

Nonpayment of capitation tax. Votes cast on tax receipts issued by "special collectors" and paid for by party committee. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Lowry; minority report by Mr. Miller.

Mr. Paul received a majority of 205 votes, as cast and returned, and was given the certificate; but, having been appointed to the bench of the United States court, he never qualified and sent his resignation to the governor. The seat remained vacant pending the contest. Contestant claimed the seat on the ground that a number of votes larger than the returned majority of contestee had been cast for him by persons who were disqualified by reason of nonpayment of the capitation tax required by the laws of Virginia. The charge applied to the whole district, but the only county discussed in the reports or fully covered by the testimony was Albemarle. Here the committee found that 676 votes were cast for contestee by persons who were on the delinquent tax list, and that 557 of these had not paid their tax, under any construction of the law, and must be rejected.

Under the law the assessment lists returned to the auditor of public accounts and the delinquent tax lists made out by him were required to show the color of each person included in them. In Albemarle County a witness testified that he had compared the poll lists of the various precincts with the delinquent tax list of the county and with a list of the tax receipts issued by the county clerk subsequent to the preparation of the said list, and had found that 676 persons had voted whose names were on the list of delinquents, and to whom no tax receipts had been issued by the clerk. As these persons had been permitted to vote, they had presumably presented tax receipts, and these receipts must have been those issued by certain "special collectors" appointed by the auditor of public accounts and their deputies. The right of the auditor to appoint these collectors and of the collectors to appoint deputies was in dispute. Conceding the right, it still appeared that the only person empowered to issue receipts was the county clerk. But expressly reserving all these questions and conceding for the purposes of this case the legality of the appointment of the collectors and their right to receive taxes and issue receipts therefor, there still remained the question—and on this question the committee chiefly

rested the case—whether all these receipts were paid for before the election. The evidence showed that they were not paid for by the voters, but by the party committee of contestee's party, and that only \$125 in cash had been paid before the election. As this \$125 was only sufficient to pay for 119 receipts, it followed that the remaining 557 votes had been cast by persons for whom no tax had been paid prior to the election. These votes were illegal, and ought to be deducted if it could be ascertained for whom they were cast.

The whole system of "special collectors" was shown to have been one adopted by contestee's party for political purposes. The auditor of public accounts was a leading manager of the party, the collectors and deputies were all partisans of contestee, and in Albemarle County, with a very few exceptions, it was shown that the tax receipts were given out only to known Republicans. They were paid for out of the Republican campaign fund. Moreover, it was shown that substantially all the voters voting on these receipts were colored. Twenty-one witnesses of both parties and colors, representing nearly all the precincts in the county, testified that the colored vote was cast with substantial unanimity for contestee. Under all these circumstances there could be no doubt that these votes were cast for contestee. Deducting them all from his vote left a majority for contestant of 352 votes. Including the vote of a precinct which had been rejected by the county commissioners because of irregularity in sealing, the majority of contestant would still be 248. The committee accordingly recommended resolutions declaring contestant elected.

The minority disagreed, and called attention to the fact that the resolutions appended to the majority report only received in the committee the votes of six of the fifteen members. The minority held that the evidence entirely failed to sustain the conclusions of the majority. Without deciding the question whether the "special collectors" were officers *de jure*, they were certainly officers *de facto*, acting under color of legal authority. Under the precedents the fact that the taxes were paid for by a political committee did not affect the status of the case, as the elector by accepting the receipt adopted as his own the act of the person paying the tax and adopted it as of the time of its performance. All this was practically conceded in the majority report, and the case of contestant rested on the assertion that only \$125 of the money was paid before the election. But the evidence showed that \$565 was paid before the election; \$440 of this was in a draft and was not indorsed by the collector until after the election, but it was received by him some weeks before the election. The contention of the majority report could only be sustained on the ground that the money represented by this draft was not paid until it was indorsed and cashed by the collector.

The testimony of only one witness was relied on to show who the 676 alleged delinquents were, and even he did not show who the 557 deducted by the majority were. He did not show that he knew any of the voters, or their color; but his testimony only showed that he had examined certain lists of delinquents and receipts and the poll lists, and whenever he found on any poll list a name also found on the delinquent list and not found on the list of receipts, he had included it in his list. There was nothing to show that the persons voting and those on the delinquent list were the same, and the large number of similar names rendered it very uncertain. The poll lists were not

required to show, and so far as appeared did not show, the color of the voters; and the testimony of this witness was based on the inference that if John Brown (colored) was on the delinquent list, and a John Brown voted anywhere in the county, the John Brown who voted must have been colored, and must have voted on a tax receipt issued by a special collector. Of the 676 persons included in this witness's testimony, only 557 were deducted by the majority, and there was nothing at all either in the testimony or in any possible inference to show which voters these 557 were. In four of the twenty precincts there was no testimony to show for whom the colored vote was cast, and in the others it was merely the impression of the witnesses as to the vote as a class. There was no evidence to show that any individual voter voted illegally, or for whom any individual voter voted. It was impossible, under the reasoning of the majority, even to state how many votes were rejected in any particular precinct. The minority accordingly recommended resolutions declaring contestant not elected.

The resolutions presented by the minority were defeated by a vote of 83 to 139.

The resolutions presented by the majority were then passed without division, and contestant was sworn in.

[Mobley, 137-166.]

(7) ENGLISH vs. PEELLE.

Recount; illegal ballots; undue influence; illegal rejection of votes. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Converse; minority report by Mr. Hart.

According to the returns contestee had a majority of 87 votes over contestant. Contestant charged (1) that the tickets of contestee were illegal, being printed on "plate" paper and easily distinguishable; (2) that there was an error in the count of the votes in Marion County whereby contestant was deprived of 99 votes; (3) that certain persons from the jail and infirmary voted under undue influence and were not legal voters; (4) that at one of the wards voters were prevented from voting by the improper conduct of the election officers; and (5) that a spurious Democratic ticket, containing the name of contestee, was circulated.

As it was not claimed that the last three charges, as far as sustained by evidence, were sufficient to affect the result, the case may be said to turn on the first two charges.

The statute of Indiana provided that—

All ballots which may be cast at any election hereafter holden in this State shall be written or printed on plain white paper, of a uniform width of 3 inches, without any distinguishing marks or other embellishments thereon except the names of the candidates and the offices for which they were voted.

The Republican tickets were printed on a material known as "plate," a very heavy, finely glazed paper, easily distinguished from the paper ordinarily used for ballots and on which the Democratic tickets were printed. These tickets, when lightly folded, would easily spring open when deposited in the box, thus facilitating double voting, and were generally known as "spring-back" tickets. The committee held that they were not only in violation of the statute, which provided that the ballots should be of "plain white paper," but also in violation of the

constitution of Indiana, which provided that elections should be "by ballot." An election by ballot implies the right of secrecy.

Any ticket printed on material, plain white in color though it be, yet so thick as to be readily distinguished from ordinary paper in use for such purposes, is as much a distinguishing mark and as much in violation of law as if it had the photograph of the candidate printed on it. * * * If there were no other facts in the case than those connected with the "spring-back tickets" your committee would find no difficulty in setting aside the election, and but little in recommending the seating of the contestant.

The error of 99 votes in the count of the votes of Marion County was shown by the testimony of Hon. Austin H. Brown. There had been a contest between two candidates for the office of sheriff of the county, and Mr. Brown was one of three commissioners appointed by the court to recount the votes for sheriff. At the instance of the father of contestant, Mr. Brown took note of the votes cast for Congress on the same ballots, and testified that as he counted it the plurality for Peelle in the county was 99 less than that returned by the precinct officers.

The committee held that—

The value of the recount made by him must turn upon the capacity of Mr. Brown to make the count and his veracity in testifying in regard to it. If these are both established, as much weight should be given his count as if he had been directed by the court to make it.

Mr. Brown's character and reputation for truth and veracity were shown by a number of witnesses to be very good, and he was also shown to be experienced in the keeping of accounts. He had held positions of trust and honor, some of them involving expertness in accounts. The ballots had been kept as provided by law, and in the custody of partisans of contestee, where if they had been tampered with it would not have been in the interest of contestant. At the time of the contest the ballots were still in existence and in official custody, but contestee had not seen proper to introduce them in evidence to contradict the testimony of Mr. Brown. Deducting the difference in the counts of Mr. Brown and the precinct officers was alone sufficient to overcome the majority of contestee and elect contestant.

It was also shown that inmates of the jail and poorhouse were taken to the polls by partisans of contestee and made to vote the Republican ticket. The election officers in one ward refused to receive the votes of Democrats who offered the affidavits required by law, and contestant was thereby deprived of a number of votes estimated by a witness as 100. Spurious Democratic tickets containing the name of contestee were also in circulation, but precautions were taken to prevent their use, and only 12 of them were voted. Deducting all these votes, the majority of contestant was increased. The committee accordingly recommended resolutions declaring contestant elected.

The minority disagreed on all the issues. The evidence on the last three points was entirely insufficient to show the state of facts alleged, and if it was, the result would not be affected. The case therefore turned on the question of the illegality of the Republican tickets and the recount in Marion County made by Mr. Brown. The tickets were conceded to have been printed on plain white paper, 3 inches in width, in literal compliance with the statute of Indiana. The tickets were printed on No. 2 book paper, while those of the Democrats were on No. 3 book paper. If the tickets could be distinguished by the thickness of the paper, it was no more true that the Republican tickets

could be distinguished by their thickness than the Democratic by their thinness. There was no way, under the law, of selecting either ticket as the standard. The evidence entirely disproved the charge that the selection of paper was for any fraudulent or illegal purpose. An Indiana court, in a case involving the same ballots and election, had decided them legal. But even if they were in violation of law, the law was only directory, and the penalty should be inflicted on those who violated it in procuring or receiving the tickets, and not on the voters by depriving them of their votes.

The recount made by Mr. Brown was utterly without validity. He was a commissioner appointed by the court to conduct a recount of other votes, and was neither authorized to conduct this recount nor sworn to conduct it correctly. He conducted a large part of his recount without the knowledge of the other two commissioners. After they discovered what he was doing they also kept a count. In all the precincts counted after all three had commenced to count the gains were for contestee, but Mr. Brown testified that on the whole recount he found a gain of 99 for contestant. He was paid by the father of contestant to make the recount. He had lost or destroyed all memoranda made at the time, but presented a statement which he said had been based on those memoranda. This statement did not show, and he could not testify, what the vote for either candidate in any precinct was or what gains or losses were made in any particular precinct. It only showed a net gain of 99. At the close of the recount Mr. Brown was shown to have said to his associates:

There is nothing in a recount for Mr. English.

This was a recount made chiefly in secret by an unsworn and unauthorized person under circumstances where if he had done the best he could it would be very difficult to be accurate. The original memoranda were not in existence, and no intelligent statement of the vote was given. Such a recount ought not to be permitted to overcome the sworn and otherwise unattacked returns of the election officials. The minority accordingly reported resolutions declaring contestee entitled to his seat.

The resolutions of the *minority* were first adopted as an amendment by a vote of 121 to 117. A motion was made to reconsider this vote. A motion to lay this latter motion on the table was lost, after a prolonged struggle, by a tie vote. The motion to reconsider was then passed by a vote of 133 to 130. After several other votes the substitute recommended by the minority was lost by a vote of 128 to 129, and the original resolution of the majority carried by a vote of 130 to 127, and contestant was sworn in.

[Mobley, 167-183.]

(8) WALLACE vs. MCKINLEY.

Ambiguous ballots; illegal votes. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Turner; minority report by Mr. Ranney.

According to the returns, as canvassed by the State canvassing board, contestee had a majority of 8 votes and was given the certificate. This result was arrived at by treating 23 votes returned for "John H. Wallace," "Major Wallace," "Wallace," "W. H. Wal-

lace," "W. W. Wallace," "Jonathan Wallace," "Maj. Wallace," and "J. H. Wallace" as cast for different persons. Contestee, in his argument before the committee, conceded that 16 of these votes should be counted for contestant. This would show a majority of 8 votes for contestant on the face of the returns and shift the burden of proof to contestee. The other 7 votes not conceded, being those returned for John H. Wallace, W. H. Wallace, and W. W. Wallace, the committee thought ought also to be counted for contestant, it being shown that there was no other candidate for the office by the name of Wallace. In one township the evidence showed that a number of ballots bearing names approximating that of contestant had not been included in the count or return of the election officers. The evidence as to the number of these ballots was conflicting, the estimates of the witnesses ranging from 2 to 15. The ballot box was introduced in evidence, but it had not been kept strictly in the manner provided by law, and there were reasons for suspecting that it might have been tampered with. In this box were found 11 ballots for "Major Wallace," "Ma. W-llac," "Wolac," "Mag. Wolac," "Wollac," "Wallace," "Woloc," "Mage. Wolac," and "Wolloc." The existence of this species of ballots, and their failure to be counted by the judges was established independently of the ballots in evidence, and the committee thought that on all the evidence their number could be taken as 11, as found in the box. In another precinct a ballot for "Walce" had not been counted. In another a ballot voted by inadvertence with a name and some figures on the back was thrown out by the judges. Recounts in three townships showed a gain of 4 votes for contestant, part of them being votes where the name of contestant was written in pencil, but the printed name of contestee not erased. They had not been counted by the election officers. Counting all these votes contestant had "a plurality of 30 votes to be overcome by his competitor." Contestee sought to overcome this majority by showing 55 illegal votes. Three of these votes were votes cast for "J. Wales," "Jonathan H. Walser," and "Jonathan H. Wallage," and counted by the election officers for contestee. On the principle previously followed, and especially in view of the fact that these ballots had been counted by the election officers, the committee did not think they ought to be rejected. The remainder of the votes were chiefly attacked for nonresidence. The committee did not discuss individual cases, but announced the conclusion that not more than eight of them were sufficiently proved. The rule had always been that the illegality of a vote once received must be shown "to the exclusion of all reasonable doubt." This was not done in these cases. In some cases the proof how the voter voted consisted of evidence of statements made by him after the election. This evidence was held to be inadmissible. The majority of contestant on the face of the returns not having been overcome by evidence, the committee recommended resolutions declaring him elected.

The minority dissented from the conclusions of the committee, and complained of the manner in which the majority report was written. The House was at least entitled to the names of the votes found illegal or sustained by the committee, and some statement or reference to the evidence on which the findings were based. The minority report accordingly contained a much more detailed statement of the issues and evidence than that found in the majority report.

The minority held that the contestee had rightfully obtained his

certificate, and that if the canvassing board had awarded it to anyone else it would have exceeded its ministerial powers. Under these circumstances it was—

erroneous to assume that the burden shifts from the contestant to the contestee, by proving one item of his claim, which alone considered might change the result.

Taking the evidence in detail: Contestee was clearly shown to be entitled to have counted for him 11 votes illegally rejected by the judges of election. Of the 55 illegal votes charged by contestee, 53 were shown to be illegal. The ballots for "J. Wales" and "Jonathan H. Walser" could certainly not be counted for contestant in the absence of all evidence of the intention of the voters. Similarly in regard to the ballots for "Willac," "Wolac," "Waloe," etc., which could not be counted for Jonathan H. Wallace without contradicting the ballot. The evidence in regard to the other alleged illegal votes is reviewed in detail in the minority report. The evidence of the way in which 8 of them voted was the declarations of the voters made after the election. The minority thought that under the precedents this was admissible, but if it was not it would not affect the result of the case. According to the conclusions of the minority contestee was elected by a majority of 67 votes. They did not think that the closest scanning of the evidence could even throw a doubt upon the correctness of their conclusions in more than five cases, and they accordingly recommended resolutions declaring contestee elected.

The resolutions recommended by the minority were lost by a vote of 108 to 158. The resolutions recommended by the majority were then passed without division, and contestant was sworn in.

[Mobley, 185-214.]

(9) CAMPBELL vs. MOREY.

Recount; irregular ballots; student votes; other illegal votes. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Lowry; minority report by Mr. Miller.

According to the returns, contestee had a majority of 41 votes. Contestant sought to overcome, and contestee sought to increase, this majority by recounts of some of the ballot boxes, and proof of illegal votes cast by students, other nonresidents, minors, idiots, and other disqualified persons. The decisive issue was the student votes.

The ballots of certain precincts were recounted, and showed a net gain for contestee of 8 votes, which were counted for him by the committee. In certain precincts ballots aggregating 11 were found in the boxes in excess of the number of names on the poll lists. The committee held that the fairest course was to deduct them *pro rata*, which would make a net loss to contestee of 3 votes. Two ballots which had been marked by the voters were thrown out by the election officers, under the statute requiring that ballots should be "without any mark or device by which one ticket may be distinguished from another." The committee held that these cases did not fall within the statute, and counted the votes. Certain ballots containing the name of contestee imperfectly spelled, and certain others on which the name of contestant (improperly spelled) was written under the words, "For sheriff," and the name of a candidate for sheriff written under the words, "For

Congress," were also counted by the committee. A written ballot in the Spanish language, $2\frac{1}{4}$ inches wide, was also counted for contestee, although the statute required the ballot to be "not more than $2\frac{1}{4}$ nor less than $2\frac{3}{8}$ inches wide." The exact size was held to be immaterial. Certain ballots sought to be thrown out on the ground that there was not the required space of one-fifth of an inch under the last name on the ticket were retained by the committee. These were all the questions involved in the case except that of illegal votes.

Ninety-six undergraduate college students voted in the precincts where the colleges were located. Twelve voted for contestant and 84 for contestee. The committee held that "with few exceptions they were not lawful voters." Numerous precedents, both of Congress and the State courts, were cited to show that there has been a gradual growth in the doctrine that very few college students are entitled to vote in the college town. Applying the principles laid down in these precedents, not more than 7 of the 96 students who voted were legal voters. The general testimony in regard to the institutions attended by these voters showed that the students did not in any sense form a part of the resident population. They were credited on the college catalogues to distant places. Many of them had left in the short time between the election and the taking of testimony, and there was every reason to suppose, from the surrounding circumstances, that students in these institutions were here for the temporary purpose of education alone. They had been addressed by outsiders or the faculty or sent marked copies of newspapers containing articles on the question of the right of students to vote. They did not pay taxes or work the roads. All the testimony showed that only an extremely small proportion of the students could be entitled to vote.

A number of other votes were shown to be illegal on the ground of nonresidence, and some votes of minors and idiots should be deducted. Three aliens voted whose naturalization papers were illegally procured. A number of other such cases was charged, but the evidence was not sufficient. Making all the required deductions and additions on both sides, contestant was shown to have a majority of 44 votes, and the committee accordingly recommended resolutions declaring him elected.

The minority were of the opinion that contestee, instead of being shown to be not elected, was shown to be elected by a larger majority than that given him by the returns. Adding to his majority on the face of the returns the votes admitted by contestant, contestee entered the contest with an admitted majority of 53 votes. Adding to this majority a number equal to the number of nonresidents, idiots, minors, and illegally naturalized aliens shown to have voted for contestant, the majority would be increased to 125 votes. From this should be deducted 6 student votes. None of the charges of illegality on other grounds made by contestant were sustained.

With six exceptions the minority found all the student votes to be legal. All the voters were mature men, who had been long separated from the homes of their parents, to which they had no intention of returning. They were supported by their own resources. All of them had been in the precincts long enough to acquire a residence, and many had voted at one or more previous elections. All of them testified that they had no other home. If they could not vote in the college towns they could not vote anywhere. The impression conveyed by the majority report, that the students as a body voted, was mis-

leading. Only a very small proportion voted, and only those who after a general and careful examination of the law were generally recognized as legal voters. Under all the precedents the votes of the students, with the six exceptions above noted, were properly received and ought not to be rejected. To arrive at the result reached by the majority it was necessary to throw out all these votes, and to allow every claim made by contestant and none of those made by contestee. The minority could not concur in such a result, and presented a resolution declaring contestee elected.

The resolutions recommended by the majority were passed by a vote of 139 to 62 and contestant was sworn in.

[Mobley, 215-363.]

(10) *MASSEY vs. WISE.*

Nonpayment of capitation tax; votes cast on receipts issued by "special collectors;" office of "special assistant" to a United States district attorney not a disqualifying office. Majority report for contestee; minority report to declare seat vacant. No action by the House.

Majority report by Mr. Elliott; minority report by Mr. Turner.

Contestant and contestee were the candidates for Representative at Large from the State of Virginia; contestee received a majority of 5,808 votes. Contestant charged that 15,712 illegal votes were cast for contestee. Nearly all these votes were attacked on the ground that the voters had not, previous to the election, paid the capitation tax required by the laws of Virginia. It was shown that the State auditor of public accounts had appointed collectors of delinquent taxes and placed in their hands for collection the delinquent tax lists certified to him by the county clerks. These collectors had issued tax receipts to the number of 15,000 or 16,000, and 1,200 or 1,500 of these were either issued blank, without payment of taxes, or on election day. The rest were paid for and issued before the election and the names of the voters inserted before they left the hands of the collectors.

It was questioned whether the auditor had authority to appoint these collectors or the collectors to issue receipts. But these collectors were certainly acting under color of authority and the voters could not be bound to know any possible defect in their title on pain of losing their votes. The system had been inaugurated by contestant himself when he was auditor of public accounts. The committee were of the opinion that large numbers of votes, probably considerably in excess of the majority of contestee, were cast on receipts issued by these collectors, but that where they were paid for by the voters themselves or other persons for them prior to the day of election the votes were legal. If they were not the proof did not show, except in a very few election districts, for whom the votes were cast.

It was claimed that contestee was disqualified from holding the office of Representative in Congress by virtue of having been employed as special assistant to the United States district attorney of Virginia in the trial of certain cases. But the committee held that this employment did not constitute an "office" under the law. The words "retain and employ" were used in the statute; the duties and compensation depended on a contract with the attorney-general, and the employment was for special cases and ceased as soon as they were finished.

The committee accordingly held that Mr. Wise was duly elected and not disqualified, and reported resolutions declaring him entitled to his seat.

Mr. Turner presented a minority report, signed also by Messrs. Converse, Davis, Bennett, Cook, and Lowry, conceding that the tax system of Virginia was somewhat obscure, and that the fact that the system of special collectors was originated by contestant, while not bringing the case within the principle of estoppel, would embarrass a decision on this point in his favor. But the position of "special assistant to the district attorney" ought to be held to be a disqualifying office. It was described as an "appointment" in the statute; the appointee received a commission and was required to take an oath of office; he was under the supervision of the Attorney-General and subject to all the liabilities of a district attorney, and he was paid out of the United States Treasury. This exhausted all the badges of office known. The minority accordingly presented a resolution declaring the seat vacant on account of this disqualification of the sitting member.

This case was never acted on by the House.

[Mobley, 365-371.]

(11) CRAIG *vs.* SHELLEY.

Precinct returns rejected by county boards of supervisors. Report for contestant. Contestant seated.

Report by Mr. Davis.

According to the returns as certified by the secretary of state, contestee had a majority of 2,724 votes. To arrive at this result the county boards threw out the votes of precincts casting a vote of 8,404 and giving contestant a majority of 6,732. The returns were thrown out for various informalities and technicalities. The committee did not criticise the action of these boards, but held that where the election was fairly conducted the votes ought to be counted. Out of extreme caution the committee counted only such precinct returns as were fully sustained by oral evidence. These gave contestant a majority of 3,459 votes (if the remainder of the returns had been counted his majority would have been 4,008), and the committee recommended that he be given the seat.

The resolutions presented were adopted without division, and contestant was sworn in.

[Mobley, 373-376.]

(12) BOTKIN *vs.* MAGINNIS.

Polling places illegally established; illegal votes. Report for contestee. Contestee retained the seat.

Report by Mr. Ranney.

This election was contested chiefly on the ground that the polling places of certain counties were illegally established, and that illegal votes were cast. Most of the specifications in the notice of contest lacked particularity, but, waiving this question, the committee held that none of the charges were sustained. The law required the county

commissioners to establish voting places at the regular meeting immediately preceding a general election. In three counties they were established at a different meeting, but the committee held the law to be directory merely, and as no harm had been done, but on the contrary the establishment of the precincts was in the interest of a free and convenient ballot, the votes ought to stand. There was testimony that some "soldiers" voted, but this designation alone was not sufficient to show the votes illegal. In some new towns along the railroad a large vote in proportion to the population was cast, but in a new country this was not evidence of illegal voting. There was no evidence to sustain any of the other charges, and the committee unanimously reported resolutions declaring contestee elected. The resolutions were passed by the House without division, and contestee retained the seat. [Mobley, 377-379.]

(13) McLEAN *vs.* BROADHEAD.

Precinct returns not counted; unregistered votes. Majority report for contestee; minority report for contestant. No action by the House.

Majority report by Mr. Elliott; minority report by Mr. Hart.

According to the returns, Mr. Broadhead received a majority of 102 votes. There were six precincts not counted. According to the majority of the committee these precincts gave a majority for contestant of 61 votes. According to the minority, five of them gave him a majority of 74 votes, and the proof in regard to the sixth was not sufficient to justify counting any votes. Contestant claimed that the remainder of the majority of contestee would be overcome by counting for contestant certain "independent" tickets not received or not counted by the election officers, and by counting for him the votes of 52 voters who offered to vote for him but were refused on the ground of nonregistration.

It was claimed that 25 "independent" tickets were thrown out under a mistake in the law. The majority of the committee held that the proof did not definitely show their number, and it only showed that Mr. McLean's name was on three or four of them. These were counted for him. These tickets were voted by a class of men who were very independent in their voting, and the tickets were largely scratched. The mere fact that Mr. McLean's name was regularly printed on these tickets was not sufficient to show that they were voted for him.

The minority held that it was to be presumed that the tickets were voted as printed, in the absence of proof to the contrary.

The constitution of Missouri required the legislature to pass a registration law applying to all cities of 100,000 inhabitants, and permitted it to pass a law in certain other cases. The law as passed by the legislature required registration and permitted no one to vote except in the precinct where he was registered. A "board of revision" was empowered to strike names from the registry list, under certain conditions. The committee held that the law was constitutional. It did not make registration an additional qualification, not named in the constitution, but only made it the necessary evidence of qualification. Such a provision was necessary to the enforcement of a registration law. Consequently none of these voters whose votes were rejected had a right to vote unless they were in fact registered. Six of them were shown to be on the "supplemental lists," and these the commit-

tee counted. There was no competent evidence showing that the others were registered. The only competent evidence of the incorrectness of the lists in the hands of the election officers would have been the original lists, which were not produced.

The majority of contestee not being overcome, the committee recommended resolutions declaring him elected.

The minority held that at least 23 of the "Independent" tickets and 35 of the unregistered votes should be counted. The Independent tickets were counted for contestant because his name was regularly printed on them, as noted above. All the unregistered voters were shown to possess all the qualifications required by the constitution. It was conceded that a few of them were, in fact, registered, and should be counted. But the minority held that the whole registration law was unconstitutional, and the lack of registration consequently no bar. Any law which in terms or in effect requires qualifications not required by the constitution is unconstitutional. This law in one section specified certain qualifications, omitting at least one of the constitutional qualifications and adding one not mentioned in the constitution, and then in another section required the registration of persons possessing the qualifications prescribed in the previous section—not those of the constitution. The revisory board were to strike off names of persons disqualified under the provisions of the act—not under the constitution. The law was therefore unconstitutional, aside from the question of the requirement of registration itself as an additional qualification.

But taking the law as constitutional, it could not be contended that the decision of the board of revision in striking a name from the list was a judicial one, from which there was no appeal, and that a person whose name was improperly struck off had no remedy. And conceding even this point, certainly voters whose names were left off by accident or mistake, without any affirmative action of the board of revision, were not without remedy. Thirty-five of these rejected voters had been registered and voted at the previous election; their possession of all the constitutional qualifications was affirmatively shown; and they were not among those whose names were struck off by the affirmative action of the board. Their names must have been left off by accident or mistake, and the minority thought that they at least should be counted. This would give a majority to contestant, and the minority accordingly recommended resolutions declaring him elected.

This case was never acted on by the House.

[Mobley, 383-399.]

(14) FREDERICK vs. WILSON.

Recounts. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Bennett; minority report by Mr. Miller.

According to the returns, contestee was elected by a majority of 23 votes. This included the vote of a precinct which had been thrown out by the county canvassers, but was counted by the State board (it having been irregularly returned to them) as giving a majority of 40 for contestee. The committee found that the officers of election in this precinct had been guilty of a grave irregularity in opening the box and counting the votes before the time prescribed by law, thus in

effect depriving the eight or ten voters who subsequently voted of the secrecy of the ballot; but the committee nevertheless counted the votes.

The majority of contestee was overcome by the committee by accepting the result of recounts of the ballots in a number of precincts. The law of Iowa did not specifically provide a manner of preserving the ballot boxes or conducting a recount, but the boxes had been safely kept by the official custodians, and were shown not to have been tampered with, and the recounts were conducted with sufficient safeguards against fraud or error. In a number of cases the error was proved by other circumstances quite independent of the recount. Illegal votes were charged by both sides, but the committee found that the charges sustained would about balance each other, and did not discuss them. Taking the result of the recounts, the majority of contestee was overcome, and the committee recommended resolutions declaring contestant elected.

The minority held that the way in which the ballot boxes had been kept would not, in most cases, justify accepting a recount. In two or three cases, where the error was shown independent of the recount, or where the ballot box had not been opened before the recount, the minority accepted its results. But contestant had hired an agent to go through the district, previous to the inception of the contest, to open the boxes and examine their contents. Nearly all the boxes recounted had been privately opened and examined by him, and some of them had been opened and privately counted two or three times. At these private counts no friend of contestee was present. Most of the boxes were left in rooms where they were accessible, and the ballots of four precincts were kept loose in an unsealed paper box in a public room. Ballots exposed and handled as these had been could not be received in evidence for a recount.

The minority were also of the opinion that a detailed examination of the illegal votes would be largely to the advantage of contestee. They recommended resolutions declaring contestee elected.

The resolutions presented by the majority were adopted without division, and contestant was sworn in.

[Mobley, 401-419.]

FORTY-NINTH CONGRESS 1885-1887.

Committee on Elections.

Mr. TURNER, Georgia,	Mr. HALL, Iowa,
LOWRY, Indiana,	PETTIBONE, Tennessee,
ROBERTSON, Kentucky,	PAYNE, New York,
BOYLE, Pennsylvania,	HAHN, Louisiana,
HENDERSON, North Carolina,	HOPKINS, Illinois,
GREEN, New Jersey,	ELY, Massachusetts,
CROXTON, Virginia,	DORSEY, Nebraska,
Mr. MARTIN, Alabama.	

Mr. HAHN having died, Mr. JONATHAN H. ROWELL, of Illinois, was appointed in his place.

Cases.

- (1) Frank H. Hurd *vs.* Jacob Romeis, *Ohio*.
- (2) Frank G. Campbell *vs.* J. B. Weaver, *Iowa*.
- (3) Charles H. Page *vs.* William A. Price (two cases), *Rhode Island*.
- (4) California cases.
- (5) Meredith H. Kidd *vs.* George W. Steele, *Indiana*.

(1) HURD *vs.* ROMEIS.

Irregularities; bribery; illegal votes. Majority report for contestee; first minority report to declare seat vacant; second minority report for contestant. Contestee retained the seat.

Majority report by Mr. Turner; first minority report by Mr. Green; second minority report by Mr. Robertson.

The contest in this case was confined entirely to the city of Toledo. Contestee had a majority, according to the returns, of 239 votes. Contestant asked to have two precincts in Toledo and the precinct of Kelly's Island thrown out and a large number of individual votes deducted as illegal.

One of the precincts was asked to be thrown out on the ground of "general bribery," and for irregularities. The testimony to show bribery was hearsay entirely, and only showed that a witness (whose character and credibility were not of the best) claimed to have talked with persons in the precinct who told him that the general sentiment was for contestant, but that it might be changed by the use of money. He reported these statements to the chairman of the national Republican committee, and was afterwards told that the change in sentiment had taken place. Another witness had heard a Republican say that he had paid nineteen ticket peddlers from \$3 to \$10 each. Neither of these witnesses knew anything about the facts except as they had been told; their testimony was entirely hearsay, and even if received did not show bribery. The irregularities complained of were that one of the judges was not a resident of the precinct, and that there was a discrepancy between the number of ballots and the number of

names on the poll list. The former, if an irregularity, was immaterial, and the latter, although the judges irregularly made up a deficiency of four votes on the official count by adding two votes to each candidate, did not affect the result, and ought not to vitiate the poll. Another precinct was asked to be thrown out on the ground that tickets were handled during the count by one Bell, a Republican outsider. The evidence was conflicting as to whether this took place at the election in contest or not. Bell was shown to be a person of good character, who had often served as election judge in the precinct, and if he did assist for a time in taking the ballots from the box, he could scarcely have changed them in the presence of the other judges, and the irregularity ought not to vitiate the return.

The precinct of Kelly's Island was sought to be thrown out on the ground of "intimidation alleged to have been attempted by one Kelly toward his employees." The committee said:

We think the burden was on the contestant to prove that this attempt was effectual. To justify the disfranchisement of an entire precinct on this ground, there ought to be some evidence to show its influence on the election. We fail to find such evidence.

The evidence of individual illegal votes consisted of the testimony of old residents of the various precincts who had examined lists of voters who voted at the October election and not at the November election, and who testified that they were not acquainted with the voters. The committee held that this sort of evidence could not establish nonresidence in crowded city precincts, whatever its value in country places. Very many of the voters were naturalized foreigners, with strange names, and the committee showed by examples from the poll lists how differently such names might be written by different clerks. This might account for the voters being unknown. But if the proof were taken as sufficient, there was no evidence to show how the voters voted. If such votes were to be deducted at all, it should be proportionally from all the candidates, which would not affect the result, and not from the candidate who received the majority in the precinct where they were cast, as contended by contestant.

Messrs. Green and Hall were of the opinion that the return in the First precinct above discussed was successfully impeached, and that enough illegal votes were shown in other precincts to affect the result after the elimination of this precinct. There being no evidence to show how these voters voted, the safest course would be (according to the rule laid down in McCrary) to order a new election, and they accordingly recommended a resolution to that effect.

The minority (consisting of Messrs. Robertson, Henderson, Croxton and Martin) were of the opinion that contestant was shown to be elected. They were of the opinion that all the precincts attacked should be excluded. The return in the first one was confessedly false, the judges having returned 2 votes for each candidate in excess of the count; the manner of the count was such that it was impossible for anyone to be sure of the true result, and the ballots had evidently been tampered with. In addition, the election here was vitiated by general bribery. The evidence was hearsay and would have been incompetent to show particular acts of bribery, or the guilt of a particular person, but "general bribery" could be shown in the same way as general character, by general reputation.

The other precinct ought to be rejected because it was clearly shown that an outsider, a partisan of contestee, had handled the ballots and

could have tampered with them. The burden was on contestee to show that this conduct had not affected the result, and he had not done so.

In Kelly's Island precinct it was clearly shown that intimidating influences were brought to bear by Kelly on a sufficient number of employees to affect the result. The minority thought the burden was on contestee to show that this intimidation did not affect the result. This not having been shown, the intimidation was so interwoven with the vote that it was impossible to separate the good vote from the bad and the whole must be rejected.

Of the 347 votes claimed to be illegal at least 212 were proved beyond question. To eliminate them by deducting them *pro rata* would not affect the result in this case, and rarely in any case, and consequently the rule contended for was a rule to allow illegal voting with impunity. If the rule of declaring the election void was adopted it should be applied only to the precincts where the illegal voting took place. The true rule should be to deduct the votes from whichever candidate had a majority in the precinct where they were cast, thus leaving "each candidate to take care of his own precinct."

A resolution declaring contestee not elected was lost by a vote of 105 to 168. The resolutions presented by the majority were then passed without division, and contestee retained the seat.

[Mobley, 423-453.]

(2) CAMPBELL *vs.* WEAVER.

Unregistered votes; other illegal votes. Majority report for contestee; minority report for contestant. Contestee retained the seat.

Majority report by Mr. Hall; minority report by Mr. Payne.

According to the returns contestee had a majority of 67 votes. Contestant charged that 71 votes were cast for contestee by nonresidents, aliens, minors, convicts, idiots, etc.; that some ten individual errors to his prejudice had been made by the election officers, and that 212 votes had been cast for contestee in three precincts by persons who were not registered and did not furnish the affidavits required by law. Contestee made countercharges of illegal voting. The case turned on the question of unregistered votes, both majority and minority agreeing that the other charges so far as proved could not affect the result.

The registration law of Iowa applied only to towns and townships having a certain population. The lists were to be made out by a board of registry, who were to make a list of *all* the qualified voters, taking the assessment lists and the poll books of the previous election, and adding to the names found on them the names of any other persons whom they knew or who might be shown to be qualified electors. If a person offered to vote whose name was not on the list he might vote on presenting an "affidavit showing that he is a qualified elector, and a sufficient reason for not appearing before the board on the day for correcting the register," and also presenting a confirmatory affidavit from a registered voter who was a freeholder. It was charged that 212 of these voters presented affidavits that did not comply with the law, or, more specifically, that 38 were vouched for by one Charles Blatner, who was not himself registered; that 31 affidavits gave no reason for not being registered; that 13 gave no other reason than "neglect," that 103 gave no reason except "left off the register," that

46 did not state the residence of the voters, and 3 had no *jurat* signed, and that a few were improperly vouched for.

The committee first discussed the question of the mandatory or directory character of the law, and found that the precedents of Congress and the courts in construing similar laws were conflicting.

But may not this conflict be reconciled in a manner entirely satisfactory and in recognition of a just rule of interpretation? It is difficult to escape the conclusion that where a registry law requires the production of an affidavit by an unregistered elector as the condition for his voting, it is mandatory to a certain degree and for a certain purpose. It is mandatory so far as to require good faith in its observance and to prevent its willful evasion. But the whole scope and purpose of such a law is to defeat fraud, subterfuge, and evasion, and to enable every lawful and qualified voter to vote and have his vote counted in a canvass purged of all illegal votes. The moment the operation of the registration defeats itself, operates to defraud the legal elector and defraud him of his vote, it not only ceases to be mandatory, but is *quoad hoc* void. * * *

When the elector offers to vote, that offer is itself an inquiry whether he is registered, and if the officers accept his vote without question, that acceptance is equivalent to an affirmative answer to his question.

A registry law is only reasonable when it puts the elector who does not comply with it in the attitude of remaining away from the polls or refusing to vote. To register or furnish an affidavit is a reasonable regulation accompanying the act of voting. If this act is omitted or refused, it is equivalent to remaining away and refusing to vote. But when this same statute deprives of his vote an elector who comes in good faith, and is advised by the authorities and believes he is registered, and whose vote is received in such manner as to deprive him of his right to rectify the omission by affidavit, it violates directly the constitutional clause conferring the right, and is to that extent void.

Hence we insist that a vote deposited in good faith by the elector, supposing himself to be registered, can not be rejected upon subsequent discovery that he was not. But where the elector is advised or knows that he is not registered no such consequence will follow. * * * This your committee believe to be the true rule, and announce it as a principle: Where the elector, acting in good faith and honestly supposing himself to be registered, deposits his vote, and the same is received by the judges, it is a valid vote. But where the elector does not act in good faith and knows he is not registered his vote should be rejected.

The provision of the statute in question, "no vote shall be received," etc., is only mandatory upon the election officers. A vote received by them must be held to be legal until the voter is shown not to have possessed the required qualifications.

But the practical question in this case was not the reception of votes without affidavits, but of imperfect affidavits. If it should be conceded that the general requirement of an affidavit was mandatory, still the provision what declarations should be set forth in the affidavits was directory only.

The distinction between the essential qualifications of the elector and the mere methods or machinery of the election must not be confounded. The judges of election can not by receiving a ballot give qualifications to one who is not a qualified elector.

However perfect the preliminaries, a vote cast by a person not in fact qualified must be thrown out on a contest. So if the preliminaries are in some respects imperfect, but the judges of election, who, though not empowered to pass on the essential qualifications of the voter, are empowered to judge of these preliminaries, have decided them sufficient, the proof necessary to throw out a vote is not proof of the imperfection of these preliminaries, but proof of the actual lack of some of the essential qualifications. It was not proved or even charged that the voters in question did not in fact possess every legal qualification.

Most of the particular cases were involved in two groups: Those

vouched for by Charles Blatner, and those in which no excuse, or the excuse "neglect," or "left off the register," was given. The evidence against the first group was merely the fact that "C. Blatner" was vouched for by Charles Blatner, from which it was inferred that Charles Blatner was not registered and had vouched for himself. But the registry list was not produced and there was no evidence that "C. Blatner" and Charles Blatner were the same person. It was stated outside the record that they were different persons, and the signatures to their affidavits were in different handwritings, confirming the statement.

There were only thirteen affidavits in which no excuse was given, not enough to effect the result; and in any case the omission was the mere accidental omission of a directory requirement. The words "neglect" or "left off the register" were ample and significant excuses in view of the fact that about 200 names, all of Democrats, amounting to one-fourth of the voters in the precinct, were omitted from the registry. So large an omission, affecting only one party, could not have taken place honestly; and the words "neglect" and "left off the register" referred to this conduct of the registering officers.

The contestee therefore retained his returned majority, and as a consideration of the individual illegal votes charged would increase his majority to 117 the committee recommended resolutions declaring him elected.

The minority (Messrs. Payne, Ely, and Pettibone) reported in favor of contestant. Under the plain wording of the law, and the precedents in interpreting this and similar laws, it was mandatory not only on the election officers, but on all concerned. The voters involved in this case were not voters who voted believing that they were registered; they knew that they were not registered, and presented affidavits for this reason. They were bound to know the law, and hence to know that it required their affidavits to contain "a sufficient reason" for not having appeared on the day for correcting the registry. Without deciding the question of the right of the House to reverse a decision of the judges when any excuse at all was presented, the votes cast on affidavits in which the excuse was entirely omitted must certainly be rejected. And the words "left off the register" "furnish no excuse for the nonappearance, and there is nothing for the judges to act upon. It appears to us impossible to spell out an excuse from these words." Rejecting these two classes of votes would show a majority for contestant, which the minority claimed would be increased by a consideration of the individual illegal votes. They accordingly recommended resolutions declaring contestant elected.

The resolutions presented by the committee were passed without division and contestee retained the seat.

[Mobley, 455-474.]

(3) PAGE *vs.* PIRCE.

Two cases. First case: Testimony taken out of time; leave given contestee to cross-examine and rebut. Second case: Bribery; majority report to declare seat vacant; minority report for contestee. Seat declared vacant.

Majority report on first case by Mr. Green; minority report by Mr. Ely. Majority report on second case by Mr. Turner; minority report by Mr. Rowell.

Contestant in this case served notice of contest, which was duly replied to, but he did not take any testimony during the ninety days allowed by law. Some time afterwards he served notice on contestee that he would take testimony, alleging an oral agreement that testimony might be taken at any time before the beginning of the session of Congress. Contestee denied the agreement, and refused to attend or cross-examine witnesses. The committee reported that the testimony taken "discloses such wholesale and open bribery, implicating even the contestee personally, that the House, in justice to its own dignity, must, in the opinion of the committee, take notice of the same." As the contestee had not cross-examined the witnesses or taken testimony in his own behalf, the committee reported a resolution giving him thirty days in which to summon and cross-examine the witnesses already examined and to take any testimony he might desire, and giving contestant ten days for rebuttal testimony.

The minority were of the opinion that the case of contestant should be dismissed. They were of the opinion that the time for taking testimony in a case ought to be extended only by leave of the House, and not by agreement of the parties; but if an agreement was to be accepted it should be in writing. An oral agreement was alleged in this case, but it was denied, and affidavits of its nonexistence offered. It was evident that contestant had abandoned his case, and only renewed it as an afterthought. He had been elected to the State senate of Rhode Island, and had served in that body during the time for which he claimed to have been elected to Congress. The minority therefore recommended a resolution declaring contestant not elected.

But this did not involve an abandonment of the investigation of the alleged corruption in the election, and the minority recommended a resolution providing for such an investigation by a subcommittee of the Committee on Elections.

The resolution presented by the majority was adopted, and testimony taken under it. At the next session the committee reported in favor of declaring the seat vacant. According to the face of the returns Mr. Pirce had a majority of 16 votes over all his competitors. The law of Rhode Island required a majority of all the votes to constitute an election at the first trial. The committee called attention to this provision of the law, and also to an evident error in summing up the returns, which if corrected would leave contestee a majority of only 3 votes over all. The committee then quoted without comment the testimony of 8 witnesses who were alleged to have been bribed, and of one witness who was alleged to have intimidated his employees, and reported a resolution declaring the seat vacant.

The minority called attention to the fact that the error in summing up mentioned in the majority report was not an error, but a misprint, so that contestee still started into the contest with 16 majority. The 8 witnesses whose testimony was quoted, even if it were proved that they were all bribed, would not overcome this majority. The only other charge seriously pressed was that an overseer of highways had intimidated his workmen. But the evidence only showed that he had asked them to vote as he did; he had never made any threats to discharge them if they voted otherwise, and if they voted according to his request it was not under any fear of discharge. If this claim were sustained, it would "overthrow all labor to secure votes for one party or another." Much of the testimony was entirely inadmissible under

any rule of law. The testimony of the 8 witnesses quoted, so far as it attempted to go beyond their individual votes, was entirely hearsay and inadmissible. Some of it was *ex parte*, the witnesses having testified at first without expectation of being cross-examined, and having subsequently refused to appear for cross-examination. Their testimony was thus discredited. Those who were cross-examined had all testified at their first examination that they were Democrats and had voted the Republican ticket for \$3. On cross-examination they contradicted themselves on material points, most of them saying that they had been Republicans at previous elections, and would have voted the Republican ticket at this election whether paid any money or not, and that the \$3 was not paid as an inducement to vote for contestee, but to pay them for their time in coming to the polls. Some of them had to come a long distance. Some of them did not know that they were to receive money until after they had voted. All of the 8 witnesses whose testimony was quoted by the majority persistently refused to give the names of the persons who had given them money. A ninth witness, who did not claim to have been bribed himself, did give the names of three men who he said were giving out money at the place the other men claimed to have received theirs. These three men promptly swore that they had given out no money, and an attempt to impeach one of them was hastily given up when the first witness called spoke in his praise.

The other charges made by contestant were not seriously pressed, and the minority found that there was nothing in them. Taking the legal evidence for all that it could possibly be held to show, it would not overcome the sitting member's majority of 16 votes, and the minority recommended a resolution declaring him elected.

The resolution granting an extension of time to take testimony was carried by a vote of 117 to 78. On the case on the merits a resolution declaring contestee elected was defeated by a vote of 108 to 130. The resolutions declaring the seat vacant were then passed by a vote of 130 to 33 (not voting, 155).

[Mobley, 475-479, 489-511.]

(4) CALIFORNIA CASE.

Constitutionality of apportionment law. Report for sitting member; no action by the House.

Report by Mr. Lowry.

The constitution of California required every bill to be read three times before passage. The apportionment bill, under which the sitting members were elected, had been read three times, but some amendments had not. The contestants claimed that this invalidated the law. The supreme court of California had recently decided this question, on a petition by the contestants in this case for a writ of mandamus on the secretary of state to certify them as elected. The full court had decided that the petitioners were not elected, they having received only a few votes, and three of the judges had held that the law was constitutionally passed. The committee quoted their opinions with approval, and recommended resolutions declaring the sitting members elected.

There was no action by the House in these cases.

[Mobley, 481-485.]

(5) KIDD *vs.* STEELE.

Bribery; irregularities; illegal votes. Report for contestee. Contestee retained the seat.

Report by Mr. Henderson.

According to the returns contestee had a majority of 54 votes. Contestant asked that four precincts be thrown out, and also charged illegal votes. Contestee made countercharges of illegal voting.

One precinct was asked to be thrown out on the ground that one of the officers of election was interested in a bet, and hence disqualified. But the evidence showed that he had withdrawn his interest in the bet before the election, for the express reason that he was going to be an inspector. There was no evidence of fraud or irregularity in the election.

The other three precincts were the three precincts of the township where contestee lived, and they were asked to be thrown out because "the proof of bribery, of the most open and shameless purchase of votes for money by Steele and his agents is full and conclusive." The committee quoted all the evidence on this point. Witnesses testified to one or two cases of bribery in each of these precincts, one of the cases being charged to be by contestee in person. But the testimony was contradicted; the witnesses did not testify in such a way as to attract confidence, refusing to answer questions, and contradicting themselves on material points; and the witness who testified to being bribed by contestee in person was shown to have afterwards confessed that his whole testimony was false.

Numerous charges of illegal votes were made, but the committee after a careful examination were of the opinion that the charges sustained would about balance each other. They unanimously reported resolutions declaring contestee elected. The House passed the resolutions without division, and contestee retained the seat.

[Mobley, 513-520.]

FIFTIETH CONGRESS (D.) 1887-1889.

Committee on Elections.

Mr. CRISP, Georgia,	Mr. MOORE, Texas,
O'FERRALL, Virginia,	ROWELL, Illinois,
OUTHWAITE, Ohio,	HOUK, Tennessee,
BARRY, Mississippi,	COOPER, Ohio,
MAISH, Pennsylvania,	LYMAN, Iowa,
HEARD, Missouri,	JOHNSTON, Indiana,
JOHNSTON, North Carolina,	LODGE, Massachusetts,
Mr. O'NEALL, Indiana.	

Owing to the fact that a contest was pending against his seat, the Speaker requested to be relieved of the duty of appointing the Committee on Elections, and it was elected by the House.

Cases.

- (1) George H. Thobe *vs.* John G. Carlisle, *Kentucky*.
- (2) John V. McDuffie *vs.* Alexander C. Davidson, *Alabama*.
- (3) Robert Lowry *vs.* James B. White, *Indiana*.
- (4) Nicholas E. Worthington *vs.* Philip S. Post, *Illinois*.
- (5) Nathan Frank *vs.* John M. Glover, *Missouri*.
- (6) Joseph D. Lynch *vs.* William Vandever, *California*.
- (7) Robert Smalls *vs.* William Elliott, *South Carolina*.
- (8) Frank J. Sullivan *vs.* Charles N. Felton, *California*.

(1) THOBE *vs.* CARLISLE.

Fraud and irregularities. Majority report for contestee; minority report to reopen case. Contestee retained the seat.

Majority report by Mr. Crisp; minority report by Mr. Lyman.

Contestant served a notice of contest, charging frauds and irregularities of various sorts, to which reply was duly made by contestee. Contestant took only a few depositions, not enough to establish any of his allegations, and contestee took no testimony.

Contestant moved the committee to reopen the case, alleging, and furnishing affidavits to show, that he had been deceived by his attorney, to whom he had trusted the entire conduct of his case; that the returns and poll lists from a number of precincts were all in the same handwriting, and consequently forgeries, and that there were certain suspicious circumstances in the conduct of contestee. Contestee presented a large number of affidavits in denial of the allegations of contestant. The committee held that as these allegations were not contained in the original notice of contest, evidence in support of them would not be competent even if the case were reopened. Under the precedents a case ought not to be reopened unless the contestant showed that he had used due diligence, and unless he made a showing, by the affidavits of witnesses to facts within their own knowledge, by which it would appear that on a rehearing he would probably be able to make out his case. Neither of these conditions existed, and a care-

ful examination of the papers satisfied the committee that none of the substantial allegations could be established by proof.

Taking the case, then, on the pleadings and evidence presented, the only ground on which contestant could rely was the admission of contestee in his answer to the notice of contest that the officers of election in a number of precincts were all Democrats.

But the law permitted the officers to be all of one party in the contingency that there were no qualified electors of the other party resident in the precinct. Contestee had not admitted that this contingency did not exist, and the burden of proof was on contestant to prove that it did not, which he had failed to do.

Even if the proof had been made, it would not vitiate the election, in the absence of proof of fraud or intimidation, as the officers were at least *de facto* officers, whose acts affecting third parties and the public must be held valid. The committee therefore recommended resolutions declaring contestee elected.

The minority (Messrs. Lyman, Lodge, Houk, and Johnston) favored an investigation of the case. They did not approve considering the counter affidavits of contestee, but believed that when contestant had made out a *prima facie* case by affidavits some way ought to be provided for permitting him to establish those facts, if he could, by legal evidence. The fact that contestee did not invite investigation, but opposed it, was a suspicious circumstance. The fact also that contestant was a poor laboring man, ignorant of the law, ought to entitle him to at least as much consideration as other citizens.

Mr. Rowell concurred in the majority report, but did not wish to be understood as approving a policy of trying disputed questions of fact upon *ex parte* testimony. But the main charge of contestant was that the returns of certain precincts were all in the same handwriting and consequently forgeries. The original returns themselves were presented, and effectually refuted the charge. They were plainly in different handwritings. The presentation of the original returns was "legitimate, and not of the same character as a counter affidavit upon disputed questions of fact."

The resolutions presented by the majority were adopted by a vote of 164 to 7 (not voting, 152), and contestee retained the seat.

[Mobley, 523-575.]

(2) McDUFFIE vs. DAVIDSON.

False counting. Majority report for contestee; minority report for contestant. Contestee retained the seat.

Majority report by Mr. Maish; minority report by Mr. Lodge.

According to the returns contestee had a majority of 11,487 votes. Contestant claimed that this large majority was due to widespread and wholesale fraud committed by the election officers, consisting for the most part in fraudulently counting for contestee ballots in fact cast for contestant. Seventy precincts were attacked in the notice of contest, but testimony was taken in regard to only forty-four of them. Thirty-three of these were attacked on the same ground, i. e., that the election officers falsely counted the votes, and the committee considered them together. Under the law of Alabama the ballot boxes were carefully preserved for the express purpose of permitting the ballots to be

used as evidence on a contest. The ballots were numbered to correspond to the names on the poll list for the same reason. Contestant did not claim that the election up to the moment of closing the polls was unfairly or fraudulently conducted, or that the ballots had been in any way tampered with, but simply that they had not been counted as cast. If this was true it could be conclusively shown by a recount of the ballots. The ballots were the best and only primary evidence of the vote, and under the universal rule of law contestant should have produced this evidence, and no other could be received so long as this existed. Such evidence as was presented by contestant was, moreover, inadmissible even as secondary evidence, and utterly insufficient to establish the charges. But as the House did not always follow the strict rules of the courts, the committee examined and considered the testimony as if it were admissible.

In ten of the thirty-three precincts of this class only one witness for each precinct was relied upon, and the committee quoted the testimony of these ten witnesses. It was all of substantially the same character, and to the effect that the witness issued Republican tickets to colored voters at their request, watched them vote them, and kept a count of the number, and found it very largely in excess of the number returned for McDuffie by the election officers. The differences in the testimony were chiefly in the varying degrees of care taken by the witnesses to know the vote. Some of them kept a list, some a tally, and some only a mental count; some of them took greater and some less pains to see that the tickets given out were actually voted. The committee found such evidence utterly insufficient to overthrow the returns. In the other twenty-three precincts under their charge more witnesses were called, but their evidence was "all of the same character, and simply cumulative."

There were ten other precincts in regard to which there were separate specifications of fraud. The committee discussed each of these in detail, and found fraud established in four of them. The evidence in regard to the others was insufficient, and these four precincts only reduced the majority of contestee by 2,597 votes, leaving him still a majority of 8,890. If the charges in all ten of these precincts were taken as sustained, it would not entirely overcome this majority.

The minority found that fraud, evidently the result of a corrupt conspiracy, was proved to such an extent as to vitiate the entire election in all the counties except Lowndes, the home of contestant. On the unimpeached returns of this county contestant had a large majority, and he should be given his seat on the vote of this county. This district was one which was purposely made to include nearly the entire Republican vote of Alabama, and it was universally conceded to contain a very large majority of Republican voters. Democrats had, however, been uniformly returned to Congress from this district, their seats had uniformly been contested, and the contestants had uniformly been seated by Democratic as well as Republican Congresses. The contestant in this case was an old and respected resident of the district and received the cordial and united support of his party. He could only have been defeated by fraud, and the evidence showed that he was defeated by fraudulent counting of the votes. A detailed review of the testimony on which this conclusion was based was given by the minority, and resolutions recommended declaring contestant elected.

The resolutions presented by the minority were lost by a vote of 122

to 144. The resolutions presented by the majority were then passed without division, and contestee retained the seat.

[Mobley, 577-622.]

(3) LOWRY *vs.* WHITE.

Citizenship of contestee. Majority report to declare seat vacant; minority report for contestee. Contestee retained the seat.

Majority report by Mr. Barry; minority report by Mr. Rowell; further dissenting report by Mr. O'Neill.

Contestant charged that contestee had obtained his party nomination by bribery, and also that he had not been seven years a citizen of the United States, and was consequently ineligible. The former charge the committee held to be immaterial; the latter charge was sustained by the committee, but not by the House.

Both parties to the contest were foreign born, but there was no question of the naturalization of contestant. Contestee came to America from Scotland in 1854, and took out his "first papers" in 1858, as shown by the record of the court. He claimed to have taken out his "second papers" in 1865, and to have received a certificate of naturalization, but he could not find the certificate and there was no record of the court to show the fact. He testified to it himself, and it was also testified to by the two persons who claimed to have been present at the time. The contents of the lost certificate were proved by presenting copies of other certificates, all in the same form, issued by the same court at about the same time. The negligence of the clerk in keeping his record of naturalizations and other important matters was shown, and also his habit of keeping the record of naturalization on the stubs from which the certificates were torn, and his failure in some instances to fill up the stubs. The committee held that the case involved three questions: (1) Can naturalization, in the absence of a court record, be proved by parol testimony? (2) If so, is the testimony of contestee sufficient to establish the fact? And (3) if contestee is ineligible, does this involve the election of contestant? The committee answered all three questions in the negative.

A number of cases were cited to show that naturalization was a judicial proceeding and must be entered of record, and also to show that this and other matters of record can be proved by the record alone. A few cases might be found where other testimony was admitted when the record was destroyed, but no case where oral testimony was admitted to prove a record which never existed. It was conceded that the record in this case was intact, and that if the naturalization of contestee did not appear on it, it had never appeared. It was claimed by contestee that the certificate which he said was given to him constituted a record. As this certificate was not in evidence, this point need not be passed upon.

But, if parol evidence was admissible, that presented by contestee was insufficient to show the fact of naturalization. Only two witnesses besides contestee claimed to have been present at the time; their memories about the proceedings were very vague and indefinite, and neither of them claimed to have seen the certificate or to know whether it was issued. Contestee did not attempt to prove its contents except by the production of other certificates issued about the same time, a sort of proof too speculative and inferential to be received. The testimony of the witnesses referred to facts which made it probable that the occa-

sion they remembered was the filing of declaration of intention in 1858. The fact that contestee, in a number of interviews and public speeches in which the subject was referred to before the election, did not once refer to this alleged naturalization in 1865 was a suspicious circumstance, and the fact that he had gone into an adjoining county during the campaign and procured naturalization papers was still more suspicious.

There was evidence that the question of the citizenship of contestee was much discussed, pro and con, previous to the election in the newspapers and in public speeches. The law as laid down by the supreme court of Indiana was that where the electors have notice of the ineligibility of the majority candidate, and in some of the cases even without reference to the question of notice, the candidate receiving the next highest number of votes is elected. But this doctrine is laid down by the courts of no other State. All the precedents of Congress and the opinions of the best writers are against it, and the committee held that—

To suffer a member to be seated from one State in pursuance of this view, and forbid the same right on the part of a member from another State, would destroy that equality and harmony in the membership of our National Legislature which the founders of our Government obviously intended to establish.

The committee accordingly recommended resolutions declaring that neither contestant nor contestee was elected—contestee because he was ineligible, and contestant because he did not receive a majority of the votes.

The minority held that the fact of naturalization might be shown by parol testimony, and that in this case it was conclusively shown. The certificate of naturalization given to contestee constituted a record, if a record was needed, and it was the only record made by the clerk of the court in this and many other cases. It having been shown to be lost or destroyed, it was proper to prove its contents by oral testimony, and this had been sufficiently done. Numerous cases were cited to show that such a certificate was original evidence, and conclusive of citizenship, without reference to any other record. The fact of naturalization having been proved, the contestee ought not to be deprived of his citizenship by any subsequent failure of a negligent clerk to make a record. Contestee had been for many years recognized as a citizen of the United States, had been a soldier during the war, and had been elected to Congress by a very large majority. Technical rules ought not to be applied to deprive him of his seat and the people of their choice.

Mr. O'Neill filed a dissenting report, agreeing with the majority that contestee was ineligible, but holding that the rule of the Indiana courts ought to be followed and the seat given to contestant.

The resolutions presented by the *minority* were passed by a vote of 186 to 105, and contestee retained the seat.

[Mobley, 623-646.]

(4) WORTHINGTON *vs.* POST.

Student votes; other illegal votes. Report for contestee. Contestee retained the seat.

Report by Mr. O'Ferrall.

A large number of votes were attacked by both parties as illegal, and votes were also asked to be deducted for irregularities in the bal-

lots and for errors disclosed by recounts. It was conceded that contestant was entitled to a gain of 11 votes by recounts. A number of ballots were thrown out under the statute of Illinois providing that when a ballot designates more persons for an office than there are candidates to be elected it shall be counted for neither of the persons designated. The committee, in accordance with the decisions of the supreme court of Illinois, held the statute to be mandatory and threw out a number of ballots containing the name of contestant written under the unerased name of contestee. A number of votes were asked to be thrown out on the ground that the affidavits presented by the voters in lieu of registration were not in compliance with the law. The committee found them all to be in substantial compliance with the law except 5, which were entirely blank; these were thrown out. A number of other votes were attacked on the grounds of nonresidence, minority, conviction of crime, etc. The committee discussed the evidence in the individual cases and found that, with the changes already made, there were not enough of these votes to change the result of the election. The only other votes in question were the votes of 18 students of Knox College and Lombard University.

The committee, in passing upon the legality of these votes, was of the opinion that where young men had entirely severed their connection with the home of their parents, and were relying upon their own resources, efforts, and means, and had no fixed determination as to their future place of abode, they were legal voters at the point where these colleges were located; that to hold differently would be to deprive many worthy young men of the right to vote, and disfranchise them during the years they might be engaged in their laudable efforts to secure an education.

Under this principle only 4 of the votes attacked were illegal.

After a full examination of the case the committee found that the majority of contestee was larger than that returned for him, and unanimously reported resolutions declaring him elected.

The resolutions presented were passed by the House without division, and contestee retained the seat.

[Mobley, 647-653.]

(5) FRANK vs. GLOVER.

Constitutionality of registration law and legality of rejection of non-registered voters. Report for contestee. Contestee retained the seat.

Report by Mr. Heard.

According to the returns contestee had a majority of 100 votes. Contestant sought to overcome this majority on various grounds, but the only one which involved enough votes to affect the result, and the only one considered by the committee, was the charge that 249 votes had been illegally rejected for nonregistration. Of this list 170 names had been stricken from the registration list and duly advertised according to law, and the parties named had not applied to the board of revision for reinstatement. It was conceded that if this fact deprived them of the right to vote under the Missouri registration law, and if the law was constitutional, the contestee would be entitled to retain his seat. As the committee were unanimously of the opinion that the facts were shown and that the law was constitutional, they did not enter into an argument of the question, but reported resolutions declaring contestee elected.

The resolutions presented were passed by the House without division, and contestee retained the seat.

[Mobley, 655-657.]

(6) LYNCH *vs.* VANDEVER.

Bribery; illegal rejection of votes. Report for contestee. Contestee retained the seat.

Report by Mr. Johnston.

Both sides charged bribery, but the committee found that neither charge was sustained. The only evidence on this charge against contestee was offered during the time for rebuttal. The committee found it insufficient to sustain the charge, and protested against its introduction as rebuttal testimony. There were some circumstances tending to show that political friends of contestant may have used money to influence the election, but if so it was without the knowledge of contestant.

The charge on which the case chiefly rested was that the county clerk of Los Angeles had illegally refused to register 183 names filed with him by the county assessor, which had been enrolled by persons claiming to be deputy registering officers. The clerk claimed that the appointments of these deputies should have been filed with him. Without deciding the legal questions involved, the committee found that there was no evidence showing that enough of these voters were legally qualified or offered to vote for contestant to overcome the returned majority of 55 votes for contestee. The committee unanimously reported for contestee.

The resolutions presented were passed by the House without division, and contestee retained the seat.

[Mobley, 659, 660.]

(7) SMALLS *vs.* ELLIOTT.

Illegal rejection of returns; fraud; ballot-box stuffing; intimidation. Majority report for contestee; minority report for contestant. Contestee retained the seat.

Majority report by Mr. Crisp; minority report by Mr. Rowell.

According to the returns as canvassed by the county and State canvassing boards, contestee had a majority of 532 votes. These boards rejected the returns of a number of precincts giving large majorities for contestant which, if counted, would have given him a majority in the district. Contestant claimed that all these returns should be counted, and that his majority should be further increased by counting votes offered for him and illegally rejected, and votes proved to have been cast for him in precincts where the returns were vitiated by ballot-box stuffing and other frauds. Contestee conceded that a few returns had been improperly rejected, but contended that most of them were properly rejected, and that three additional returns should be rejected for intimidation.

In two precincts the returns had been rejected because the ballot boxes and returns had been delivered to the county canvassing board by outside parties. In each case it appeared that they had been given to one of the managers to return according to law, but that the managers had left them in the possession of outsiders, by whom they were delivered. The returns made by the United States supervisors were in evidence, and the committee counted the vote according to these returns. The returns of another precinct had been rejected on the ground that none of the voters were registered. The committee sus-

tained the rejection of this return on the ground that it was a new precinct and that a new registration was necessary for it. The minority favored counting it on the ground that it was not a new precinct, but merely a separate polling place for Federal officers. The term "precinct," as defined in the South Carolina statutes, referred to the territorial subdivision, not to the place where the votes were cast, and only one registration was necessary for each precinct. The voters were all registered and produced registration certificates, and they should not be disfranchised merely because the list of voters was left at the other voting place, where the election for State officers was held.

Two other precincts, which were rejected on the ground that only two qualified managers served, were counted by the committee, but a third, where only one manager served, and he held the election in the open air, under a tree, and allowed unregistered voters to vote, and in other ways carried on the election in entire disregard of the law, was rejected. The minority favored counting this precinct, on the ground that there was nothing to impeach the fairness of the election; it was held by one manager, a clerk, and a supervisor, and the voters ought not to be disfranchised because of the failure of two managers to qualify. Another precinct was counted by the minority, but not counted by the majority on the ground that it was not mentioned in the notice of contest.

Contestant asked that three precincts be thrown out and only the votes proved outside the returns counted, on the ground that the ballot boxes were stuffed. In two of these precincts he produced evidence to show that there was an excess, in one case of 80 and in the other of 143 votes, in the box. This excess was drawn out under the South Carolina law. He then called individual voters, largely in excess of the number he claimed were returned for him, who testified that they voted for him. In the third precinct the election was held in one room and the votes counted in another. When the box was taken into the other room the doors were closed and the election officers, all of whom were Democrats, remained alone with the box eight or ten minutes before admitting the public. Voters were also called here to prove the vote. The committee held that in these cases there was no legal evidence what vote was counted by the county canvassers. Certified copies of the precinct returns could have been easily obtained, and in their absence oral testimony was inadmissible to prove the vote counted. The testimony of the voters to prove the vote cast was also immaterial. These voters were very ignorant, and an examination of their testimony showed that most of them did not know for whom they voted, and some of them did not know whether they voted at all for Congress. The excess of votes was "purged" under the provisions of the law. How it came in the boxes the evidence did not show. It might easily have been put there by the voters, and there was nothing to implicate the judges.

The minority held that these boxes were plainly stuffed. The fact that they were in the sole charge of Democratic election officers during the time that they must have been stuffed implicated these officials in the crime. They were evidently stuffed for the express purpose of resorting to the "purging" process. Where there was no proof of the vote they should be entirely rejected; otherwise they should be counted according to the proof.

There were other charges of irregularities and illegal rejection of votes, affecting a smaller number of votes, and also charges that the failure to open certain polls was for the purpose of depriving contestant of votes, but the main questions were the propriety of the rejection of Brick Church precinct, rejected by the county canvassers for intimidation, and of the rejection of the precincts of Beaufort, Ladies Island, and Central Schoolhouse, asked for by contestee on the same ground. The majority of the committee approved the rejection of Brick Church, and rejected Beaufort and Ladies Island; the minority favored counting all the precincts.

At Brick Church three managers were regularly appointed—

but two of them did not serve, one because he was sick, the other because he was afraid of being mobbed. Only one legally appointed manager conducted the election. It further appears that three times during the day this manager was compelled to close the polls for a time because of the riotous and violent conduct of contestant's friends; that the poll remained closed in all about thirty minutes.

For these reasons both boards of canvassers rejected the poll, and they were sustained in the rejection by the committee. The committee quoted quite fully the evidence in regard to this and the other precincts where intimidation was charged. The testimony quoted was to the effect that large numbers of colored voters were dissatisfied with contestant, on account of his having been convicted of bribe taking in 1876 and on account of the alleged irregularity of his nomination, and that on these accounts they were desirous of voting for contestee, but were prevented by intimidating practices instigated by contestant himself. These consisted partly of social and religious ostracism, turning Democratic negroes out of churches and organizations, refusing to associate with them, and inducing their wives to leave them, and partly of actual violence, committed chiefly by women and girls, who attacked Democratic processions and gatherings with sticks and stones and stood around the polls on election day cursing and shouting. Contestant himself was said to have advised these practices, especially the intimidation by the women, in his speeches. As a result of these practices, in the opinion of witnesses, many voters were kept from the polls, and many others induced to vote for contestant who would otherwise have voted for contestee.

In regard to Ladies' Island the committee summed up the evidence as follows:

Colored men inclined to vote or expressing an intention to vote for contestee were rudely assailed and violently assaulted; they were threatened with expulsion from their churches; they were threatened with expulsion from the island, where many of them owned land; they were threatened with a denial of sexual intercourse with their wives; they were threatened with beating; they were cursed and abused; and this conduct on the part of the followers of contestant began early in the campaign and continued uninterruptedly down to the closing of the polls on the day of the election. Smalls himself was a party to these acts, indeed he incited his followers to their perpetration.

Rejecting these precincts and deciding the other questions as above indicated would show a majority for Elliott of 323 votes, and the committee accordingly recommended resolutions declaring him elected.

The rulings of the minority in regard to most of the individual issues have already been given. The general argument of the minority report was that the election was carried for contestee as the result of a fraudulent conspiracy. The district was one constructed on most extraordinary lines, for the avowed purpose of making it an over-

whelmingly Republican district and making all the other districts Democratic. When, in spite of this, a Democrat was returned as elected from the "black district," it was condemned as a wholly needless fraud by the best Democratic newspapers of the State. The methods of carrying the election were substantially these: All the election, registering, and canvassing officers were Democrats; they systematically prevented qualified voters from registering; rejected the votes of registered voters; rejected polls where the election was fairly and regularly held; refused to open polls where there was a large Republican majority, and stole two ballot boxes and stuffed at least three more, removing the large excess of ballots in a manner grossly unfair to contestant.

The rejection of Brick Church precinct was entirely without justification. The minority cited evidence to show that there was no riot, no intimidation, and that the interruption of the voting was only for a few minutes, and deprived no one of his vote. It was caused by good-natured noise on the outside, and also by confusion in the attempt of the voters to vote too fast. In the other precincts where intimidation was charged the weight of evidence was overwhelmingly against the idea of intimidation, and the witnesses on the other side were so inconsistent as to be unreliable. A close examination of all the testimony showed that—

the only casualties that occurred in the Seventh Congressional district on account of political opinion were as follows: (1) A crowd of boys and women chased three men at Beaufort the evening of the day of a political demonstration, and one man was slightly injured by a piece of brick with which he was struck; (2) a colored man was lightly tapped with a switch by a woman; (3) a dog was shot—supposed on account of the political opinions of the owner; (4) a mule was shot—supposed for the same reason; both shootings by unknown parties; (5) Abraham Weston was turned out of the church, but it is not clear whether for women or politics; (6) the wives of Abram Scott and Roland White, two colored Democrats, deserted them for two or three weeks.

These facts were certainly not sufficient to be the basis of a charge of general intimidation and to throw out the returns of three precincts where the election was perfectly fair and peaceable, and thus change the result of the election in the district. The minority counted all the precincts, and as this, with the illegally rejected votes and the other votes counted according to the findings already noted, showed a majority for contestant of 2,120 votes the minority recommended resolutions declaring him elected.

The resolutions presented by the minority were defeated by a vote of 127 to 142. The resolutions presented by the majority were then passed without division, and contestee retained his seat. [Mobley, 663-746.]

(8) SULLIVAN vs. FELTON.

Fraud; bribery; intimidation; illegal voting; irregularities. Majority report for contestant; minority report for contestee. No action by the House.

Majority report by Mr. O'Neill; minority report by Mr. Rowell.

According to the returns contestee had a majority of 119 votes. Contestant claimed to have much more than overcome this majority by proof of fraud, bribery, intimidation, illegal voting, and various irregularities.

In the eighth precinct of the Forty-sixth assembly district, in San Francisco, contestant received only 2 majority on the face of the returns. The Democratic majority at previous elections had generally been 85 or more, even when the general result in the district was much more favorable to the Republicans than at this election. A recount of the ballots showed a majority for contestant of 94 votes, a change of 92 votes. A watcher who attended the original count in the interest of contestant, testified that tickets having the name of contestant were read as having the name of contestee, and that he had difficulty in securing permission to stand where he could see the tickets as they were read. Two of the inspectors at this precinct were non-residents, who had "boarded" in the precinct a few days in order to be appointed inspectors. It was shown also that there were three more tickets in the box than names on the poll list when the polls closed, and that the names of three persons who had not voted were then added to one of the poll lists. Three other persons were recorded as voting who did not vote. With all these badges of fraud the returns might well be rejected and only the votes proved *aliunde* (which were all for contestant) counted. But the committee thought that probably the fairest course was to accept the result of the recount and deduct 92 votes from contestee's majority.

In the city of San Jose the local Republican manager was shown to have received money—at least \$250—to be used for election expenses. In the Fourth Ward two men hired a room in a building adjoining that where the election was held, and less than 100 feet away, and spent the day "influencing" voters to vote the Republican ticket, or as much of it as they could be persuaded to vote. In order to show the success of their work, these men scratched off the words "For amendment I" at the bottom of most of these ballots with a pencil. There were 53 such ballots found in the box, and put in evidence. The statute forbade issuing or exposing any tickets within 100 feet of the polls, and also the circulation or use of tickets "having any mark or thing thereon by or from which it can be ascertained what person or class of persons used or voted it." If a ballot was "scratched" with anything but "lead pencil or common writing ink" the printed name erased was to be counted. Under all of these provisions, which, being under the control of the voter, and designed to secure honesty in elections, were mandatory, these 53 votes, the committee held, ought to be rejected. The committee quoted all the testimony showing the above facts. They also found that the "influencing" of voters in this case consisted of bribing them to vote for contestee, but none of the testimony relied on to establish bribery, in this or other precincts, is quoted or described in either majority or minority report, except that it is generally described in the minority report as "purely hearsay." There were 13 red marked tickets voted at another precinct which the committee rejected.

In two counties, 25 or 30 paupers voted for contestee in the precincts where the almshouses were situated. Under the statutes of California the residence of a pauper remained in the precinct from which he came to the almshouse. These voters were registered as residing in the almshouse; but under the law this could not be their residence, and the committee held that they could not be presumed without evidence to have come to the almshouse from the precinct in which it was located.

The second precinct of the Forty-eighth assembly district was not returned according to law, but was counted by the board of election commissioners, they deciding that the error was a mere irregularity. The evidence taken before this board was before the committee, and was considered by them on the ground that it was not objected to. This, with other evidence not before the board, showed that of the three envelopes, "No. 1," "No. 2," and "No. 3," required to contain the various election papers and to be signed by a majority of the precinct board, "No. 1" and "No. 2" (the only ones required to be returned) had been signed by the full board. The clerk of the board took the envelopes to his room at night and the next day returned "No. 1," properly signed, and an envelope marked "No. 3" and not signed. This was refused, and he took the contents of the second of these envelopes out, broke the seal of "No. 2" envelope, put them in it, and signed his own name to it. He then attempted to get other persons to sign the names of the rest of the board, but failed. The committee found that these circumstances showed that the original envelope in which the second package was contained had been destroyed and another one substituted before the first offer of return was made. These facts showed that the papers had been fraudulently tampered with. Other evidence, which had not been before the board, showed that this clerk had afterwards boasted of tampering with the papers, and complained of not having received the money agreed to be paid him for it. The committee threw out the whole vote of the precinct.

There was also general evidence of bribery in the Forty-sixth assembly district and in two other districts, especially by agents and members of the firm of Spreckels Brothers. The employees of the Almaden Mining Company were intimidated by their employers, being carried to the polls in a wagon of the company, stopped within 100 feet of the polls, and given folded tickets and told to "vote them and get back to their work." Similar methods were used by other employers of labor.

The minority of the committee held that the charges of intimidation and bribery were entirely disproved. All the officers and employees of the companies charged with intimidation were called as witnesses and denied its existence. The circumstances claimed to show intimidation were fully explained. All the testimony to the buying of votes was hearsay, frequently two or three times removed. All the specific charges of indirect bribery were fully contradicted and disproved. The question of the precinct where the returns were irregularly enveloped had been fully passed on by the board of election commissioners, and they had properly received them. The ballots scratched with red ink or pencil were not required to be thrown out under the statute, but merely to be counted as if not scratched. The precinct recounted might be counted according to the recount without overcoming contestee's majority, but the minority held that the fairness of the recount was not sufficiently shown. The original count was closely watched by friends of contestant, and the attempt to show that it was fraudulent, or that the watchers for contestant did not have sufficient facilities, was unsuccessful. The recount did not take place until the last day for taking rebuttal testimony, when there was no opportunity to produce evidence against it. The same ballots had already been recounted in a local contest, with no representatives of the parties to this contest to guard against fraud, and there was no testimony to show that they had not been tampered with at this or some other time.

The manner of the "scratching" found, as described in the testimony, showed haste and the work of a single individual. Contestant had endeavored to prove the vote by calling the voters, but could only find 127 who voted for him—3 less than were given him by the original count.

The minority found that all the charges of fraud, bribery, and intimidation on the part of friends of contestee were disproved or not sustained. The only bribery in the case was the buying of some 70 votes by contestant.

When this case was called up, the question of consideration being raised, the House, by a vote of 115 to 102, agreed to consider the case. A motion was made to reconsider this vote. On a motion to lay this latter motion on the table there was at first no quorum voting. After a number of votes a quorum was secured and the motion to table was passed. Many motions were made and voted upon, but the House finally proceeded to other business and this case was never acted upon.

[Mobley, 747-782.]

FIFTY-FIRST CONGRESS, 1889-1891.

Committee on Elections.

Mr. ROWELL, Illinois,	Mr. COMSTOCK, Minnesota,
HOUK, Tennessee,	CRISP, Georgia,
COOPER, Ohio,	O'FERRALL, Virginia,
HAUGEN, Wisconsin,	OUTHWAITE, Ohio,
LACEY, Iowa,	MAISH, Pennsylvania,
DALZELL, Pennsylvania,	MOORE, Texas,
BERGEN, New Jersey,	WILSON, Missouri,
Mr. GREENHALGE, Massachusetts.	

Cases.

- (1) Charles B. Smith *vs.* James M. Jackson, *West Virginia*.
- (2) George W. Atkinson *vs.* John O. Pendleton, *West Virginia*.
- (3) L. P. Featherston *vs.* W. H. Cate, *Arkansas*.
- (4) Sidney E. Mudd *vs.* Barnes Compton, *Maryland*.
- (5) Frank H. Threet *vs.* Richard H. Clarke, *Alabama*.
- (6) Francis B. Posey *vs.* William F. Parrett, *Indiana*.
- (7) Henry Bowen *vs.* John A. Buchanan, *Virginia*.
- (8) Edmund Waddill, jr., *vs.* George D. Wise, *Virginia*.
- (9) John V. McDuffie *vs.* Louis W. Turpin, *Alabama*.
- (10) James R. Chalmers *vs.* James B. Morgan, *Mississippi*.
- (11) John M. Langston *vs.* E. C. Venable, *Virginia*.
- (12) Thomas E. Miller *vs.* William Elliott, *South Carolina*.
- (13) Fred S. Goodrich *vs.* Robert Bullock, *Florida*.
- (14) James H. McGinnis *vs.* John D. Alderson, *West Virginia*.
- (15) John M. Clayton *vs.* Clifton R. Breckinridge, *Arkansas*.
- (16) Henry Kernaghan *vs.* Charles E. Hooker, *Mississippi*.
- (17) James Hill *vs.* T. C. Catchings, *Mississippi*.

(1) SMITH *vs.* JACKSON.

Irregularities and illegal votes. Majority report for contestant; minority report for contestee. Contestant given the seat.

Majority report by Mr. Dalzell; minority report by Mr. Crisp.

The issues in this case are of three sorts: (1) Which candidate was elected on the face of the returns and ought to have received the certificate; (2) certain precincts which contestee sought to have thrown out for irregularities, and (3) illegal votes, charged by both sides.

Contestant claimed to have a majority of 12 votes on the face of the returns as made to the governor. The returns, as counted by the governor, showed a majority of 3 votes for contestee, and contestee claimed that this count was correct. The counties whose returns were in issue were Ritchie, Calhoun, and Pleasants. In Ritchie County the county court made two returns, the second based on a recount made at the instance of contestee under the State law providing for a recount on

the demand of any candidate. It showed a gain of 3 votes for contestant. The county court of Calhoun County also made two returns, the second, showing a gain of 2 votes for contestant, made to correct a clerical error in the first. The governor counted the first returns from these two counties and ignored the second. This action was sustained by contestee on the ground that the county court, after the adjournment of the special session at which it was required to canvass the result of the election, was *functus officio* and had no power to reconvene for any purpose connected with the election. This point was overruled by the committee. The law providing for a recount on the demand of any candidate could not be construed to require that the demand should be made on the day of the first count. It would not in the nature of things be made until the first count was finished, and to require that it be made on the day of that first count would be to require a candidate to be present at the same time, in person or by proxy, in every county in the district. Similarly as to the correction of a clerical error: the power is inherent in every body charged with the ascertainment of the result of an election to correct an error when discovered and make its conclusions conform to the facts. Moreover, as is shown in the discussion of the next issue, the county court in West Virginia, in its jurisdiction in regard to elections, is more than a mere returning board.

The returns from Pleasants County showed for Smith six hundred and ninety-seven votes and for Jackson eight hundred and *two*. The law required the number of votes to be set forth "in words at length." The governor in a special proclamation quoted from cases in which the words "*thous*" and "*hund*" had been construed to mean "thousand" and "hundred," and concluded that it would be "more in consonance with adjudged cases" to add the letters "lve" to the "twe" of the return than to change the "e" to "o." Counting the vote as eight hundred and *twelve* and counting the first and not the second returns from Ritchie and Calhoun counties, gave contestee a majority of 3 votes, and the governor issued the certificate to him.

The committee held that the governor must have known that the word intended was "two." The fact that the law required the return to be "in words at length," added to the fact that "twe" was an unheard of abbreviation for twelve or any other number, made no other conclusion possible; but if there really was any doubt, the governor should have obtained evidence to explain the ambiguity, or, failing in that, should have struck out the word as meaningless and counted the vote as 800. The evidence before the committee showed that the vote was in fact 802, and the governor could and should have procured the same evidence. The evidence was a copy, certified by the clerk of the county court, of the duplicate return on file in his office. It was claimed on behalf of the contestee that this duplicate return was a record which the county court had no power to make. A recent decision of the supreme court of West Virginia was claimed to have established this point, but the point in question the committee found to be stated as a mere *dictum*, and on close examination, not to be applicable to the issues of this case. The county court was required to make out "separate certificates" of the result, one of which was to be forwarded to the secretary of state. As no provision was made for the other, it was presumably to be kept by the clerk of the court with his other records. The county court, in dealing with election matters, was the same body as in other matters.

If it was, as claimed by contestee, a mere returning board, and *functus officis* when its work was completed, it would not have been required to convene "in *special session*," for a mere returning board can have but one kind of session. Further, it was shown to be the uniform construction put on the law of 1882 ever since its passage, by all officers having to do with its execution, that the county courts should keep records of their proceedings in regard to elections, and that the duplicate certificates not required to be otherwise disposed of should be retained by the clerk as a part of that record; and on general principles any body with powers like those of the county court in West Virginia must have "the power to make such record as will perpetuate and make available its legitimate action."

Contestant being thus shown to have a majority of 12 votes on the face of the returns, the burden of proof shifted to the contestee to show that he had received a majority of the votes actually cast by qualified voters. This he sought to do by asking that the votes of eight precincts be rejected for informalities, and by charges of illegal votes cast for contestant.

Three precincts were attacked because the certificate of the oath on the returns was informal. In one case the oath was administered by a commissioner, and in another by a justice of the peace, who neglected to subscribe their official titles after their names. In the other case the three judges signed the oath, but in the printed blank certifying to the administration of the oath one of the names was signed in the wrong place, so that the certificate only showed on its face that the oath was administered to two of the three judges who signed the oath. The committee held that these informalities were not fatal to the returns, as even if the oath were held to be insufficiently proved, the officers were at least officers *de facto*. But it was claimed that the general rule could not be applied in West Virginia, because the commissioners of the county court were forbidden to count any return on which the taking of the oath did not properly appear until they had satisfied themselves by other evidence that it was in fact taken. The committee presumed that they had satisfied themselves of the fact in regard to these precincts before counting them.

Another precinct was attacked on the ground that no returns had been made. The certificate of the vote made by the precinct officers omitted the vote for Representative in Congress, but the tally sheet showed the vote, and a recount of the ballots by the county court, at the instance of contestee, showed the same result as shown by the tally sheet.

Two precincts were attacked on the charge that the ballot box had been left unsealed in the custody of only one judge. In one case the Democratic judge had been asleep for a short time. A Democratic outsider took his place while he was asleep, and the box was in the custody of the other two. In another case the box had been for a few moments in the possession of one of the judges, with a seal over the aperture, but the sliding lid not so fastened but that he might have got into the box without breaking the seal. During the count the officers stopped a short time to rest and the Republican judges went out for a few minutes, leaving the box unsealed in the custody of the Democratic judge and two Republican clerks. When they returned they found that the Democratic judge had also gone out, leaving the box with the clerks. In neither of these precincts was there any evidence of fraud nor any circumstances calculated to arouse suspicion.

The other precincts were attacked because the election was not held in the places established by law. In each case it affirmatively appeared that the place of holding the election was generally understood, and that no one had been prevented from voting by the change.

None of these informalities being sufficient to throw out the precincts attacked, the only question remaining was whether the contestee had shown enough illegal votes cast for contestant in excess of those shown to have been cast for himself to overcome the contestant's majority of 12 votes. This was the only point on which the majority and minority differed as to the count of the votes which should be made by the committee in judging the merits of the case. The minority agreed with the majority in regard to all the technical points on which it was sought to throw out precincts—indeed, these points were not seriously pressed by the contestee before the committee—and on the question of the rulings of the governor, by which the certificate was given to the contestee, the minority, while sustaining the legality of the governor's acts, agreed that the evidence in the record in this case, none of which was before the governor, showed that the actual vote in each case was as claimed by contestant.

The issue being reduced to individual illegal votes, the committee report laid down various propositions of law¹ in regard to residence, paupers, persons of unsound mind, and minors, and the evidence by which votes could be shown to be illegal on these grounds. The minority in general agreed to these propositions, but in applying them to the evidence in regard to illegal votes there were serious differences.

Contestant charged 102 illegal votes against contestee and contestee 127 against contestant. Of the 102 charged by contestant the committee found that the charges were established in 47 cases, the minority that they were established in 31 cases. Of the 127 votes charged by contestee the committee found that the charges were established in 19 cases, the minority that they were conclusively established in 66 cases and less clearly established in 21 others. Eliminating these votes according to the statement of the committee would increase the majority of the contestant to 39; according to the statement of the majority it would give the contestee a majority of 23.

The case was debated for several days. The resolutions presented by the committee were passed by a vote of 166 to 0 (many members not voting), and Mr. Smith was sworn in. It was in connection with this case that the parliamentary ruling of "counting a quorum" was made for the first time. When the case was called up the question of consideration was raised against it. The question being put, there appeared ayes 161, noes 2, less than a quorum voting. The Speaker announced the names of a large number of members who were present, but had not voted, counted them as part of a quorum *present*, and ruled that the *presence* of a quorum was sufficient. The House was at the time without rules, and the ruling was made under general parliamentary law. The ruling naturally excited prolonged discussion, and most of the time intervening between the calling up of the election case and its final disposition was taken up with the discussion of this parliamentary question. On the final vote, it will be noticed, just a quorum voted.

[Rowell, 9-41.]

¹ Noted under the proper headings in Part II.

(2) ATKINSON *vs.* PENDLETON.

Fraud and illegal votes. Majority report for contestant; minority report for contestee. Contestant given the seat.

Majority report by Mr. Rowell; minority report by Mr. O'Ferrall. On the face of the returns as at first made contestant had a majority of 7 votes, but a recount of the votes showed in two precincts in Wetzel County a change of 26 votes in favor of contestee, giving him a majority of 19 votes. Contestant claimed that the ballots of these two precincts had been fraudulently tampered with pending the recount, and that the original count correctly represented the votes as cast by the voters.

The committee found this claim to be sustained by the evidence. The recount of the various precincts in this county had lasted a number of days. After the package in which the ballots were was opened on the first day it was not afterwards sealed, but was kept in the safe in the clerk's office. The combination to this safe was known to a large number of persons having access to the office, and bottles of beer were kept in it for the convenience of these persons. When all the precincts in the county except these two had been recounted the presiding judge asked that the court adjourn for a few days on account of a telegram which he had received saying that his wife was sick. His wife was not sick; the telegram was not sent by the person whose name was signed to it, and the judge afterwards testified that he had known these facts at the time. When the court reconvened these two precincts were recounted, and 24 Republican tickets (in addition to those so counted by the precinct officers) were found to have the name of contestant scratched off in lead pencil and 2 to have the name of contestee written in. The testimony was conflicting as to whether these marks were strikingly distinct or apparently made by one person with one pencil or not. The officers of election all testified that they did not believe it was possible for so large a number of "scratched" ballots to have escaped their attention.

After the result of the recount had become known, one Lee Snodgrass, the deputy clerk in whose custody the ballots had been, entered into negotiations with the Republican committee, offering for \$3,000 cash to tell all he knew about the scratching of the ballots, and to furnish evidence of the truth of the statement he should make. The negotiations fell through, and Snodgrass then testified that he knew nothing at all about the scratching of the ballots, and that he had intended to deceive the Republican committee into paying him for telling what he knew, under the impression that he did know something. There was also evidence that one Grail had been in the safe while intoxicated.

The committee held that the suspicious adjournment of the court and the fact that the ballots had been left unsealed in an exposed place and in the custody of a man of the character of Snodgrass was sufficient to destroy the validity of the recount. Even if the evidence was insufficient positively to establish the crime or identify the criminals, it was certainly sufficient to destroy all certainty that the ballots were the same and in the same condition as those originally counted. Without such certainty no recount can be received to change the result of the original count.

The minority were of the opinion that the circumstances of the

first count in these two precincts were such as to make it very probable that mistakes such as those indicated by the recount should have been made. Of course, the election officers believed that their count was correct and would naturally testify to it. But the election officers were mostly old men, unaccustomed to such work, and with poor eyesight. The count had been long and tedious, lasting more than two days and nights, and the light at night had not always been sufficient. The evidence by which it was sought to show that fraud had been committed by or with the connivance of the presiding judge and the deputy clerk was insufficient for that purpose. The conduct of the deputy clerk was reprehensible, but it did not take place until some time after the recount. A recount could not be impeached on the ground of fraud by evidence that one of the officers connected with it had been guilty of censurable conduct some time afterwards.

According to the finding of the committee on this question, the contestant was elected, on the face of the returns, by a majority of 7 votes, and the burden of proof was on the contestee. According to the minority, the burden of proof remained with the contestant.

A large number of illegal votes was charged by both sides. Part of these were votes cast in precincts claimed not to have been legally organized, or where boundary lines were doubtful. In all these cases the voters voted just as they had been in the habit of doing for years, and there was no claim of fraud or harm. The majority and minority agreed in counting all these votes without inquiring into the technical questions raised. Eliminating these votes, there remained 178 individual illegal votes charged by contestant against contestee, and 102 charged by contestee against contestant. The charges were of the same character as those in the previous case of *Smith vs. Jackson*, and the rules of law laid down by the committee in that case were accepted by both sides in this, except that the minority were of the opinion that general proof that a man was a Republican or Democrat, without proof indicating his political preferences at the time of this particular election, was not sufficient to show how he voted, because of the large number of changes in political views that had taken place since the previous election.

Of the 178 votes charged by contestant, the majority found the charges sustained in 78 cases, the minority in 28. Of the 102 votes charged by contestee, the majority found the charges sustained in 86 cases, the minority in 54. The minority also presented a statement showing that under their statement of the individual votes the charges as to Wetzel County could be admitted without changing the result. The findings of the committee would give contestant a majority of 49, those of the minority would give contestee a majority of 85.

The case was debated for several days, and the resolutions presented by the committee were adopted by a vote of 162 to 0 (the Speaker announcing the names of 72 members present and not voting), and Mr. Atkinson was sworn in.

[Rowell, 43-74.]

(3) FEATHERSTON *vs.* CATE.

Conspiracy, fraud, violence, and intimidation. Majority report for contestant; minority report for contestee. Contestant given the seat.

Majority report by Mr. Houk; minority report by Mr. Outhwaite. Contestant charged that the election of contestee was obtained by the carrying out of a fraudulent conspiracy in Crittenden County and

by fraud in certain precincts in other counties. Contestee received a majority of 1,342 votes on the face of the returns as certified to the governor. This majority would be partly overcome by counting the returns of certain precincts which the county clerks refused to certify to the governor on account of irregularities. The remainder of the majority the committee found to be overcome and a majority shown for contestant by rejecting the returns of certain precincts where fraud was proved and counting only such votes as were proved *aliunde*. As the majority thus shown for contestant is only 86 votes, any precinct in which the change made is greater than 86 votes may be considered a decisive issue, and it is accordingly necessary to examine each precinct in detail, stating the number of votes changed in each case. Taking the charges by counties:

Crittenden County.—In this county a general conspiracy was charged and testimony also offered to show the manner of carrying out the conspiracy in certain specified precincts.

In support of the general charge of conspiracy the evidence (as stated in the majority report) showed the following facts: Prior to July, 1888, the county clerk and one other county officer had been indicted for drunkenness, probably under the statute providing for the removal of officials shown to be drunkards. The cases were set to be tried on July 12, 1888. On the morning of that day a body of 100 men, armed with Winchester rifles, appeared at the county seat, took forcible possession of all the county officers, except the sheriff (who was himself one of the armed band), and forced them to go across the river to Memphis, outside the State, threatening them with death if they attempted to return. The ejected officials protested that if there were any charges against them they were willing to stand trial for them, but they were told that "this is a white man's country," and that the people were tired of "negro domination." There were no indictments against any of the officers except the two mentioned above, and no charges except a suspicion that they were the authors of certain anonymous letters sent to negroes and purporting to have been written by white Democrats. This charge was denied, and no attempt was made to prove it. The contestee was present while these events were taking place, and his attorney, as well as the persons afterwards appointed to fill the place of the removed officials, were members of the armed body.

The officers deposed were all Republicans, and the testimony showed that the county was strongly Republican at all times, and especially so in the year 1888, on account of large defections from the Democratic party to the "Wheel" or Farmers' Alliance, of which the contestant in this case was State president. Democrats, members of the mob which had ejected the regular officers, were appointed in their places, and immediately began making plans to retain possession of the offices for themselves or their party. Great efforts were made to prevent the Republicans from nominating a county ticket, and then to prevent the candidates from accepting the nominations. Failing in both of these, threats were made that the election would be carried by them at all hazards.

Under the laws of Arkansas the election judges were to be appointed by the county judge at the July term, and both parties were to be represented on each election board. The county clerk created the county canvassing board, and certified the returns to the governor. The county court procured ballot boxes and poll books, and the sheriff

delivered them to the election officers. The Democrats, having obtained forcible possession of these three offices, had obtained substantial control of all the election machinery of the county. The Republican county judge had, previous to his removal, appointed all the election judges in the county, giving both parties representation as required by the law. The new county judge revoked all these appointments, and appointed boards composed entirely of Democrats. The county court neglected to procure ballot boxes or poll books, and the sheriff did not in all cases deliver poll books to the election officers. He did procure and deliver ballot boxes (one of which was in evidence in the case and exhibited in the House) provided with a double slot, so arranged that a ticket could apparently be deposited in the box by the judge, but in reality might enter the box or not, according to the choice of the judge. The new judges of election appointed failed to serve in two or three strong Republican precincts, and no election was held in them. When the returns were made the county clerk refused to certify 7 of them to the governor on account of irregularities in the poll books, in spite of the fact that the statute required the county canvassers to count and the county clerk to certify all returns received, without reference to any irregularities. These circumstances the committee found to be conclusive of the existence of a conspiracy to carry the election by fraudulent means.

Coming to the particular precincts, the committee first counted the returns of the precincts not certified by the county clerk (excluding Scanlan precinct, to be hereafter mentioned). These precincts gave contestant a majority of 531 votes, and deducting that number from contestee's returned majority of 1,342 votes, would leave him a majority of 811.

In Scanlan precinct the returns showed 61 votes for contestee and only 2 for contestant. The testimony showed that the usual Republican vote for the precinct was 112 or 113, the Democratic vote 8 or 9, except in some county elections, when it was sometimes as high as 25. A witness testified that some Republicans were afraid to vote, but he saw a large number vote the Republican ticket. He counted 73 as they voted, and then stopped counting. Another witness counted 8 or 10 as they voted. The fraudulent tin box was used, and the judges were all Democrats. The committee held that this evidence was sufficient to reject the return, and count only the votes proved. The return, not having been certified by the county clerk, was not included in contestee's majority, as above stated. Counting the 73 votes for contestant, and none for contestee, he having proved none, requires a deduction of 73 from the 811 majority remaining for contestee, leaving 738.

In Cat Island precinct the returns showed 120 votes for Featherston and 88 for Cate. The testimony showed that there were 180 or 182 Republican voters in the township, and only 14 or 15 Democrats. The Republicans turned out well, and cast a full vote. The judges, all of whom were Democrats, were not sworn, and the ballot box was where the voters could not see it. Of the 208 votes cast, contestee could not have received more than 15, and contestant must have received at least 193. Making the required deduction of 146 from contestee's remaining majority of 738 leaves 592.

In Crawfordsville the returns showed Featherston 147, Cate 88, Barrett 160. The evidence tended to show that contestant had received

a larger proportion of the vote than was shown by the returns, but as the evidence did not show the number of votes, and to throw out the return would merely aggravate the evil, the return was allowed to stand.

In Idlewild and Furgeson no election was held. These two precincts usually gave a Republican majority of about 250. But no election having been held, the votes could not be counted, and the failure to hold an election could merely be cited as an additional evidence of conspiracy.

All the evidence in regard to Crittenden County was taken in Memphis, Tenn., without *written* notice to contestee, and without being cross-examined. It was objected to by contestee before the committee on this ground, and the objection was sustained by the minority. The majority held that the circumstances of the case were such as to justify its acceptance. According to the testimony, contestant and his attorneys went to Crittenden County to take testimony, and there met Mr. Berry, the attorney for contestee, who agreed to act as notary. This agreement he afterwards refused to carry out; the only other officers competent to take testimony refused to serve; contestant and his attorney were refused accommodations; threats were made indicating that there would be bloodshed if an attempt was made to take the testimony at that time; and contestant gave up the attempt, giving contestee's attorney oral notice that the testimony would be taken at a specified time and place in Memphis, Tenn., just across the river. Contestee presented an *ex parte* affidavit from his attorney, denying that he had ever been notified of the taking of the Memphis testimony, and claiming that he was only employed as the attorney to take testimony in Crittenden County, and that notice to take it in Memphis could not have been legally served on him.

Contestee did not enter any objection to the reception of this testimony until more than sixty days after the printing of the record, when he filed his brief, and did not then offer to produce any proof that the facts shown by the testimony were not true. The committee held that his failure to object at the first opportunity, or to allege any substantial defense, amounted to a waiver of the whole question of notice. And the effort on the part of the attorney and friends of contestee to prevent the taking of testimony in Crittenden County was also reason for not requiring of the contestant strict and technical proof in regard to some of the precincts of this county (e. g., Cat Island). It was true that the record of the Clerk of the House showed that the package of testimony in question had not been received when the testimony was opened, and that contestant was given further time to procure it, but it was at least probable that contestee was notified of its character and contents.

Phillips County.—There was an agreement between the parties in regard to the vote of this county, by which 132 votes were to be deducted from Cate's majority. Deducting these from the 592 remaining after the deductions made in Crittenden County leaves 460.

Cross County.—In Smith Township the returns showed 84 votes for Cate and 15 for Featherston. The testimony of individual voters showed that Featherston had received 29 votes. This vitiated the returns. Cate not having proved any votes, lost those returned for him, and Featherston gained the 14 proved for him above the number returned. Deducting this difference of 98 from the 460 majority remaining to contestee leaves 362.

St. Francis County.—In Franks Township Cate was returned as receiving 269 votes and Featherston 131. The officers of election were all Democrats, and the ballot box was removed from the presence of the United States supervisor for an hour at noon and an hour after the polls closed. Contestant called 195 voters whose names appeared on the poll list as voting, and who testified that they voted for him. This vitiated the returns. Contestee proved 112 votes, and by hearsay testimony some others. Only the 112 were counted for him. Making the required corrections makes a deduction of 221 from contestee's remaining majority of 362, leaving 141.

In Blackfish Township no election was held. Twenty-nine persons attended for the purpose of voting for contestee, but the committee did not count their votes.

Lee County.—In Independence Township the returns showed 89 for Featherston and 224 for Cate. The vote for President was: Harrison, 435; Cleveland, 196, showing 319 votes not counted for anyone for Congress. Only one witness, Milton Powell, was examined in this township. He testified that all the judges of election were Democrats. He was at the polls working for Mr. Featherston; gave out 120 or 125 tickets with his name on, and went to the window with 92 voters whom he kept count of and saw them vote the ticket. The precinct was strongly Republican, and there was a good turn-out of the vote, in spite of the fact that it was a rainy day.

Immediately at the close of this witness's testimony he was arrested for perjury in testifying that he saw 92 votes cast for contestant, in the face of the returns showing only 89, and put under \$1,000 bonds. The attorney for the contestee proclaimed that he would similarly cause the arrest of any other witnesses testifying falsely. No more testimony was taken in this township, but witnesses were examined in other places showing a state of intimidation, and that the arrest of Milton Powell had deterred others from testifying. The committee held that contestee's attorney by his own act having prevented the testimony of the voters, or other witnesses, from being taken, contestee could not be heard to object to the sufficiency of the testimony. The testimony showed that more votes were cast for contestant than were returned for him, and the returns were consequently impeached. Giving to contestant the 3 votes proved above the number returned, and deducting from contestee the votes returned for him (he having proved none), would make a deduction of 227 votes from the 141 majority still remaining for contestee, and show a majority for contestant of 86 votes.

It was objected that contestant had conceded in his notice that contestee had received 224 votes, and consequently contestee could not be required to produce any proof of his having received that number. This point was overruled by the committee. The so-called concession in the notice of contest was coupled in the same clause with a claim that contestant had received 397 votes, and contestant asserted that but for the suppression of testimony he would have been able to prove the whole 397. Contestant could not be bound by the statement of the vote of contestee in his notice without also conceding to him the vote claimed for himself in the same clause. Moreover, contestee had denied both items of the clause in question, claiming that he had received 244 votes instead of 224. The pleadings, therefore, did not amount to a stipulation of the vote. Besides, even if the clause in

question were to be construed as a concession, it was not a concession that contestee had received 224 *legal* votes.

In the minority report arguments were advanced to show the insufficiency of the evidence in regard to several precincts where the majority report did not claim that it was sufficient. (It is stated in the minority report that the members signing it had had no opportunity of seeing the majority report before preparing their own.) These precincts will not be noticed. Taking up the other charges in the order in which they are treated in the above outline of the majority report:

Crittenden County.—All the testimony taken in Memphis in regard to Crittenden County was held by the minority to be inadmissible for the reasons noted above. The contestee had had no opportunity to object to it before filing his brief, as the package containing it had not been received at the time the testimony was opened in the presence of the parties, and was afterwards printed without his knowledge. There was no pretense that the written notice required by law had been given, and the attorney for contestee denied that he had been given any notice. The testimony was *ex parte* of the worst sort. Every advantage had been taken by leading questions and otherwise of the absence of contestee, and the whole testimony was of a character utterly unworthy of credit, even if admitted. But taking it as if it were admissible, the testimony in regard to several precincts not claimed in the majority report was quoted and discussed, and most of the testimony in regard to Scanlan and Cat Island precincts, where the majority found the charges sustained, was quoted with the comment that it was utterly insufficient.

Phillips County.—There was an agreement in regard to this county, as stated above.

Cross County.—No foundation was laid, by proving fraud or suspicious circumstances, for calling the individual voters of Smith Township to prove the vote. The 29 voters called were examined outside the county, though there was no proof that they could not as well have been examined in the county. Most of them could not read, and an examination of their testimony showed that most of them did not know for whom they voted for Congress.

St. Francis County.—In Franks Township the individual voters were also called without laying a proper foundation. The reason the judges were all Democrats was that the regularly appointed officers failed to appear in time, and the officers were selected from such electors as were present. The box was removed from the presence of one of the United States supervisors at noon, but he had the key, and it would have been practically impossible under the circumstances to tamper with it. Its whereabouts was accounted for during every moment, and all the officers of election testified that no fraud was committed. The supervisor testified that the election was quiet and fair, and no fraud was committed in receiving or counting the votes. An examination of the testimony of the 195 individual voters called by contestant showed that many of them had no knowledge for whom they voted for Congress. Eliminating those whose testimony was not clear and definite there would remain even less than were credited to contestant by the returns.

In Blackfish Township the testimony showed that the failure to hold an election was not due to any fraudulent purpose.

Lee County.—In regard to Independence precinct, only one witness, Milton Powell, was examined under notice. His testimony did not show anything suspicious in regard to the conduct of the election, and did show that prominent Republicans at this precinct were working for Mr. Cate, thus accounting for the discrepancy between the Presidential and Congressional vote. The circumstances surrounding the election were such as to make it easy for witness to have made a mistake of 3 votes in his count of the number of votes cast for contestant. He was arrested at the close of his testimony for perjury, and it was announced that any other witnesses testifying falsely would be similarly arrested. But surely it would not be claimed that witnesses could not testify freely unless they were given to understand that it was no crime to commit perjury in a contested-election case. Moreover, the notice to take testimony did not include any other name than Milton Powell's, and there was nothing to show that contestant had intended to examine any other witnesses.¹

The other witnesses, examined out of the county and without notice, did not attempt to show anything against the election, but confined themselves to describing a state of intimidation on account of Milton Powell's arrest, which would prevent witnesses from testifying. The testimony of Milton Powell was certainly not enough to overthrow the returns, and they should stand.

Allowing all that the contestant claimed in Phillips County, and counting the uncertified returns from Crittenden County, would still leave a majority of 595 for contestee, which could not be overcome even by the most extreme concessions in regard to other charges.

A discussion of the testimony in a somewhat different manner from that of the report, and showing a larger majority for contestant, will be found in a speech by Mr. Dalzell, on page 1912 of the Record. The case was debated from March 1 to 5, 1890, and the resolutions presented by the committee were adopted by a vote of 145 to 135 and Mr. Featherston was sworn in.

[Rowell, 75-146.]

(4) MUDD *vs.* COMPTON.

Irregularities, illegal votes, and intimidation. Majority report for contestant; minority report for contestee. Contestant given the seat.

Majority report by Mr. Cooper; minority report by Mr. Moore.

Contestant claimed to have been elected on the face of the returns, and that his majority would be increased by counting for both parties the votes of qualified voters who had offered to vote for them and been refused by the election officers. He also claimed to have been deprived of 175 votes in one precinct by violence and intimidation. The last charge, if sustained, would be decisive of the case in his favor; if it were not sustained, the decisive issue, as claimed in debate, was the charge that an error of 28 votes had been made in summing up the returns from Calvert County.

¹ This is a mistake (as was shown in debate). In the original manuscript of the testimony this notice to take testimony is the usual printed form; that the testimony of the "persons whose names appear on the attached sheet" would be taken. But the "attached sheet" is missing, and there is nothing to show whether it contained the names of others than Milton Powell or not. The notary taking this testimony had been killed, and the testimony was forwarded by his administrator, which probably accounts for the loss of this sheet.

The county returns of Calvert County, as certified to the governor, showed a total of 1,138 votes for contestant. Certified copies of the precinct returns, on which the county return was based, showed in the aggregate 1,166 votes for contestant. The return judges of all the precincts were called, and testified that the certified copies of the precinct returns in evidence were correct copies of the returns as made out and delivered by them. A newspaper editor testified that he had copied the returns for his paper on the day they were made, and they footed up 1,166 for contestant. The deputy clerk who footed up the returns for the county canvassers testified that he had made a mistake. The county clerk testified that as soon as he noticed in the papers that the county returns gave only 1,138 votes for contestant he wrote to the governor, saying he believed a mistake had been made and asked permission to correct it. No attempt was made to prove that any of the precinct returns had been tampered with. The committee held that the action of the county canvassers in footing up the totals of the precinct returns and certifying the result to the governor was a purely ministerial act. It was presumed that the addition would be performed correctly, but if a mistake was shown, as in this case, by the precinct returns themselves, the presumption of correctness was rebutted, and the vote should be counted as shown by the precinct returns.

The minority held that the result as found by the county canvassers was *prima facie* correct, and must stand until overthrown by competent evidence. The evidence in this case was insufficient. The correctness of the copies of the precinct returns was only shown by the memory of the judges of election some months afterwards. The law required two sets of returns to be made out by different clerks; one set to be deposited with the county clerk and the other sent to the governor. Certified copies of only one set in the county clerk's office were produced. In one of these returns the vote was written in figures, instead of words as required by law. It would have been easy to tamper with this return. The minority accordingly found that there was nothing to impeach the correctness of the total of the votes in this county as ascertained and certified by the county canvassing board.

Certain precinct returns had not been certified to the governor, because they were locked in the ballot boxes, where the county canvassers could not get them. The committee were unanimous in counting these returns. Counting these returns, and the vote of Calvert County according to the precinct returns, and giving to contestee 1 vote cast for "Compton" and to contestant votes cast for "S. E. Mudd," "S. N. Mudd," "Mudd," and 1 ballot on which his name appeared twice, would give the contestant a plurality of 2 votes on the face of the returns and shift the burden of proof to contestee. The minority, not counting the last-mentioned ballot for contestant nor the 28 votes in Calvert County, left the majority on the face of the returns with contestee.

The votes of certain precincts had been recounted by contestee in the contest under the provisions of the State law. Contestant lost 21 votes by the recount. The majority were doubtful as to the certainty of the identity of the ballots, but accepted the results of the recount. The minority were of the opinion that the identity of the ballots was conclusively shown.

The individual votes in issue were of three classes: (1) Voters whose

votes were refused on the ground that some one else had previously voted on the same name; (2) voters who had been registered and whose names were on the original registry list, but omitted from or incorrectly copied on the copy of the list furnished to the election judges, and (3) those whose votes had been rejected because of real or assumed doubts as to their identity. The committee held in regard to (1) that it was bad enough for a person who had no right to vote to get his vote in; it would be worse if thereby a legal voter was prevented from voting; (2) qualified and registered voters should have their votes counted on a contest, even where the judges under the law were required to reject their votes on account of the omission of their names from the copy of the registry at the polls; (3) where the identity of the voter was clearly proved, his vote should be counted. The minority held that votes of the first class could not be counted; that only such votes of the second class as should have been received by the election officers—i. e., those whose names appeared either correctly or *idem sonans* on the copy of the registry list in the hands of the judges—could be counted; and that the proof in regard to the third class was in most cases insufficient.

Applying the rules adopted by the committee, but deciding every doubtful point in favor of contestee, would leave contestant a plurality of 18 votes. This plurality would not be overcome if all the votes claimed by contestee and not conceded as even doubtful by the committee were counted for him. Applying the rules adopted by the minority (and not counting the 28 votes in Calvert County), would leave contestee a plurality of 37 votes.

In the third district of Anne Arundel County contestee received 168 votes and contestant 32. Contestant examined 175 colored voters of this precinct, 161 of whom were at the polling place desiring to vote for contestant, and the remainder of whom had started to the polls to vote, but turned back on learning of the occurrences at the polls. The evidence, as stated in the committee report, showed that most of the colored voters had gathered at the polls early in the morning under the leadership of one of their number, an old man of prominence and a large property owner. They formed in line to vote, and after four of them had voted the next three or four in line, including the leader, were violently pushed out of line by a number of roughs who had come out from Baltimore pretending to be United States deputy marshals. These Baltimore roughs were armed with pistols, and were firing them near the polls during the day. There were guns in their wagon. After being dragged from the line the most influential colored man asked if the negroes were not going to be allowed to vote, and being told that "not a damn nigger shall vote unless he votes for Cleveland," he turned to the others and advised them not to attempt to vote. Most of them remained around the polls all day, and whenever any of them attempted to vote he was violently prevented and threatened. The story was circulated that more men were coming from Baltimore on the next train, and a Democrat went around among the negroes telling them that it would be dangerous to vote; that he was a deputy sheriff (which he was not) and could not protect them, and advised them to go home.

Contestee did not call any of the persons identified as taking part in the intimidation, though some of them were present while the testimony was being taken, and the witnesses he did call only testified that

they believed that the negroes could have voted if they had made an earnest effort. The committee held that a voter could not be compelled to fight his way to the polling window, especially when to do so he must come in conflict with persons claiming to be officers of the law.

The minority held that no such intimidation was proved as ought to have intimidated men of ordinary firmness. There was no proof that the disorder was committed by more than three or four men; only one of the witnesses claimed to have seen a pistol in the pocket of one of them; the guns in the wagon were for the purpose of hunting; the pistol shooting was at a mark and some distance from the polls, and all the evidence tended to show that the voters refrained from voting not because they had reason to be afraid, but because they were "ordered" to do so by their leader or captain.

The committee held that these 175 votes could not be counted, but that the whole vote cast should be rejected. Making the requisite deductions would increase the majority of contestant from 18 to 154.

The case was fully debated, the resolutions presented by the committee were adopted by a vote of 159 to 145, and Mr. Mudd was sworn in.

[Rowell, 147-171.]

(5) THRETT vs. CLARKE.

False counting. Committee unanimously reported in favor of contestee, who retained his seat. The minority disagreed to the reasoning of the majority.

Majority report by Mr. Haugen; minority report by Mr. Crisp.

Contestant charged that in a large number of precincts ballots cast for him were fraudulently counted for contestee by the election officers. This charge the committee found to be sustained in regard to some precincts, but in regard to many of them the evidence was not sufficient to overthrow the returns. The evidence in some cases was based on estimates of the vote, and was rebutted by the testimony of the election officers and other witnesses swearing to the fairness of the election, and by proof of the good character of the election officers. Where the proof consisted of the testimony of witnesses who issued tickets and saw them voted, it was held to be sufficient to overcome the *prima facie* validity of the returns and throw the burden of proof on contestee. In some cases the evidence was not sufficiently rebutted by contestee, and in others it was. In one case only one of the election officers appeared; he organized a board under the statute and an election was held. In the evening it was discovered that none of the election officers could read the ballots, and they were carried off by the returning officer. The only proof of the vote was testimony that most of the voters were colored. This was held to be insufficient. In another case voters were refused registration, the registering officer alleging that he had run out of paper. The voters had done all that was required of them and the committee counted their votes.

Making all allowances for the frauds proved, they were still insufficient to overthrow the returned majority of contestee. The minority agreed in the conclusion, but announced their dissent from some of the reasoning on which it was based. The resolutions presented were adopted without debate or division.

[Rowell, 173-185.]

(6) POSEY *vs.* PARRETT.

Illegal votes. Committee unanimously reported in favor of contestee, and he retained the seat.

Report by Mr. Bergen.

Charges of bribery were made by both sides, but they were not sustained by evidence. The majority of contestee was only 20 votes, and contestant sought to overcome this by proof of illegal votes. A considerable part of this testimony was taken during the time for rebuttal, and in regard to votes not attacked in the testimony in chief nor in the testimony for contestee. The committee excluded all of this testimony. The voters against whom evidence was brought within the legal time were all charged to be illegal on the ground of non-residence. They were mostly of two classes—students in college, and persons who had come from Kentucky to work in Indiana. The students were 30 in number and all voted for contestee. They were Catholic theological students preparing for the priesthood. They were all of age and had all left the homes of their parents *animo non revertendi*. They were supported chiefly by the bishop. They all testified that they considered the college town their home and that they had no other. The committee held that the presumption was against the residence of a student in a college town, but these voters having testified that they had made it their home, and there being no proof by cross-examination or otherwise that they had not done so in good faith, and in a sense which would make it their legal residence, the committee held that under the state of the evidence in this case the votes could not be rejected. The case of the Kentucky voters was substantially similar.

Eliminating such votes as were proved to be illegal, the majority of contestee was reduced from 20 to 10, but not overcome, and the committee reported that he was entitled to retain his seat. The case was briefly debated and the resolutions presented were adopted by a vote of 125 to 4 (on division).

[Rowell, 187–191.]

(7) BOWEN *vs.* BUCHANAN.

Bribery, violence and intimidation, illegal votes, and irregularities. Committee unanimously reported in favor of contestee, and he retained the seat. The minority disagreed to portions of the majority report.

Majority report by Mr. Rowell; minority report by Mr. O'Ferrall.

According to the returns contestee had a majority of 478 votes. This contestant sought to overcome by charges of bribery, violence, illegal voting, and irregularities. Contestee made countercharges of illegal voting and irregularities. The committee found some illegal votes, but not enough to affect the result. Ten voters were shown to have been bribed to vote for contestee or not to vote, and about 10 others were induced not to vote for contestant by promises of immunity from prosecution. These votes were deducted. In one county the canvassing officers by mistake omitted the return of a precinct. After they had adjourned they discovered the mistake and reassembled and corrected it. The contestant asked that the vote of the county be thrown out, but the committee held that the canvassers had

done just what they ought to have done. The statute required that in all towns of over 2,000 inhabitants a transferred voter must have his transfer recorded at least ten days before the election, but in other places he might vote without such registry. The election officers of a town which had grown up since the last census enforced this statute on the assumption that the town contained more than 2,000 inhabitants. The committee held that they had no right to make this assumption in the absence of a legal determination of the population, and counted the rejected votes.

In another precinct the box was removed at noon and in the evening from the presence of the United States supervisor. But for the strong affirmative proof that no wrong was intended or done the committee would have rejected this return. It was asked that the precincts where the employees of the Stewart Land and Cattle Company voted be rejected on account of the coercion of its employees practiced by that company. It was shown that there was and had been a prevalent belief that voting the Democratic ticket was a condition of employment by this company, but there was no definite proof how many voters were influenced by this belief and nothing to implicate any of the members of the company except the fact that one of them distributed tickets at the polls.

In three or four precincts there were scenes of violence at the polls, but no one seems to have been intimidated except in one precinct, and there the number was small and definitely proved, so that the votes could be eliminated without rejecting the poll. A large number of voters were prevented from voting by not receiving transfers which they had trusted some one else to get for them, but they did not tender their votes, and their failure to receive transfers was the result of their own neglect. Altogether the majority of contestee was reduced by the proof, as found by the majority, by about 200 votes. The minority agreed that the contestee was elected, but believed that the large reduction in his majority found by the committee was not sustained by the evidence. They agreed that there was some bribery and some violence and intimidation, but protested that the people among whom these wrongs were committed were not responsible for them and should not be censured.

The resolutions presented were adopted by the House without debate or division.

[Rowell, 193-201.]

(8) WADDILL vs. WISE.

Constructive rejection of votes by undue delay. Majority report for contestant; minority report for vacating the seat and ordering a new election. Contestant given the seat.

Majority report by Mr. Lacey; minority report by Mr. Crisp.

The decisive issue in this case, and the only one discussed in either report, was the question of the disposition to be made of the votes of a large number of voters who attempted to vote for contestant in Jackson Ward, Richmond. Some of the facts in the case were not controverted. Contestee received a majority of 261 votes. In the precincts of Jackson Ward 722 voters were claimed to have been in line at the close of the polls, not having yet had an opportunity to

vote. Of these voters, 457 were examined as witnesses, and testified to the fact that they had been in line, most of them all day, and some of them most of the previous night, waiting to vote. They had not yet reached the window at sundown, and deposited the ballots they had intended to vote in boxes provided by United States commissioners, each making affidavit to the circumstances. The ballots they would have cast were for contestant. If these votes were counted they would give the majority to the contestant.

The committee differed as to the responsibility for the delay which prevented these voters from voting. The majority found that the preponderance of the evidence showed that the delay was intentional and fraudulent, the result of a conspiracy between the Democratic officers of election and the Democratic workers and challengers. Voters were asked frivolous questions, long explanations were made to them concerning certain constitutional amendments to be voted on, whether they chose to listen or not, and in every possible way the time consumed in passing on and receiving each vote was made as long as possible. The voters were in two lines, white and colored, voting alternately, and as the white line was much the shorter all the white votes were easily cast, and the votes excluded by the delay were all colored.

The minority found that the charge of conspiracy was not sustained. Much of the delay was necessary, and whatever was unnecessary was caused in one precinct by the slowness of the Republican judge, who had the colored registration books, in finding the names on the list, and in the other two precincts by the offensive and disorderly action of the Republican United States supervisors. The large number of colored voters having the same name and the well-known difficulty in recognizing colored men made it necessary to question each voter carefully in order to identify him. By the laws of the State conviction of felony or petit larceny was punished by disfranchisement. A large number of names were on the disfranchised list, and it was necessary to compare it carefully to guard against illegal voting. Voters had a right to know the nature of the constitutional amendments to be decided, and the judges were only doing their duty in explaining them.

In the application of the law to these facts the committee also differed. The majority held that the rule was well established that the vote of a legal voter, tendered and illegally rejected, should be counted on a contest. They held, also, that the action of the voters in this case in standing in line and making every effort to reach the window amounted in law to a tender of their votes, and that the action of the judges in intentionally delaying the vote amounted in law to a rejection of the votes prevented from being cast. The action of the voters in depositing their votes in boxes provided by United States commissioners was held not to constitute a casting of the votes. Without deciding the exact number of votes rejected, if the smallest number, the 457 called as witnesses, was taken, and the votes counted as if cast, it would be more than enough to give the majority to contestant.

The minority held that the law as found in court decisions was that a vote not cast could not be counted. But the precedents of the House seemed to establish the rule that if the vote of a legal voter was actually tendered, and unlawfully rejected by the election officers, and it was shown for whom the voter offered to vote, the vote could be

counted by the House on a contest. This was as far as the rule could safely go, and further than it had been carried by the courts. In this case the votes had not been actually tendered and not rejected.

The rule of the courts, as applied to this case, would thus leave contestee in his seat. But if, for the sake of the argument, it were conceded that the voters were prevented from voting by the deliberate and fraudulent act of the judges, the most that could be claimed would be that there was no fair election and the seat ought to be declared vacant. But there being no fraud in this case, the minority were somewhat embarrassed to determine what recommendation to make to the House. They were not satisfied of the justice of the established rule, which would leave contestee in his seat, and concluded that the fairest course would be to vacate the seat and submit the matter to a new election.

The case was debated at some length and the resolutions presented by the committee were adopted, the first without division and the second by a vote of 134 to 120, and Mr. Waddill was sworn in.

[Rowell, 203-253.]

(9) McDUFFIE vs. TURPIN.

False counting. Majority report for contestant; minority report for contestee. Contestant given the seat.

Majority report by Mr. Rowell; minority report by Mr. Crisp.

There was but one issue in this case—the charge that thousands of votes cast for contestant had been fraudulently counted for contestee—but this issue involved the separate consideration of evidence in regard to nearly every precinct in the district, and some 70 separate precincts were discussed in detail in the reports.

On the face of the returns contestee had a majority of 13,153 votes. The majority of the committee found that the evidence in regard to individual precincts and votes required changes in favor of contestant amounting in the aggregate to 17,634 votes, showing a majority for contestant of the votes as actually cast of 4,481 votes. The minority found fraud proved in only eight or nine precincts. Counting these according to the proof of the vote, and counting some precinct returns not counted by the county canvassers, made a change in favor of contestant of 4,049 votes, leaving contestee still a majority of about 9,000.

From the enormous majority returned for contestee and sought to be overcome by contestant, it was evident “either that this contest is a huge farce, or that this whole district is honeycombed with fraud.” To show that the claims of contestant were probable and reasonable, the majority of the committee in their report first discussed the general features of the case, and the “recent political history of the district.” It appeared from the census that about four-fifths of the population of the district was colored, and from the evidence that most of the colored voters were Republicans, and in this district took an active interest in politics. But if the returns were true contestee must have received the vote of every white voter in the district, 43 per cent of the colored voters must have failed to vote, and two-thirds of the remainder must have voted for contestee. Such a result was almost self-evidently false.

At the elections prior to that of 1878 this district had uniformly given large Republican majorities. At the election of 1880 and every subsequent election it had been returned as giving large Democratic majorities, but all these elections but one had been contested, and in each case the committee and the House had found fraud amounting to thousands of votes. In every case but one the Republican contestant had been seated; in one case by the unanimous vote of a Democratic House. The delay in deciding the case in the Forty-eighth Congress had prevented the contestant from prosecuting his case in the Forty-ninth Congress. In the Fiftieth Congress the majority of the committee had found fraud reaching into the thousands of votes, but not enough to overcome the returned majority. The minority had reported in favor of contestant. The law of Alabama required that where practicable each party should be represented on the election boards. In nearly every precinct in four of the counties in this district the inspectors were either all Democrats or the Republican inspector appointed was illiterate and incompetent to guard against frauds. In Lowndes County intelligent Republicans had been appointed for each of the nineteen precincts, but shortly after a visit of contestee their appointments were revoked and other appointments made. The probate judge testified that he had been informed that the first appointees, being school-teachers, did not wish to serve, and that so far as he knew, the second appointees were as intelligent as the first. The change was not made at the request of contestee, and the appointments were satisfactory to contestant.

A detailed examination of the testimony showed, however, that 12 of the original appointees either actually served or attempted to serve, and that 8 of the new appointees could neither read nor write. In each of the precincts where the original appointees did serve, the vote as counted was in exact accordance with the relative strength of the two parties in the precinct; in the other precincts it was just the reverse.

The minority of the committee did not reply to that portion of the report of the majority which treated of "the recent political history of the district," believing that every case should stand on its own merits and be tried by the ordinary rules of evidence. In answer to the charge that the change in the Republican election officers in Lowndes County was for the purpose of facilitating fraud, the minority quoted the testimony of the probate judge, a witness for contestant, showing that the new appointments were made for a legitimate reason, without suggestion by the contestee, and were satisfactory to contestant.

Substantially all of the minority report, and a large part of the majority report, was taken up with a detailed discussion of the evidence in regard to each of some 70 precincts. No general description of the evidence was given in either report, and no general rules of interpretation were stated. It will be impossible to condense the outline of the reports except by a very general description, but it is to be understood that the compiler and not the committee is responsible for the description. It is believed, however, that a careful and impartial examination of the reports will confirm all the statements made.

The testimony of contestant was of substantially the same sort in nearly all the precincts. Before the election the Republican voters in the various precincts had been organized into clubs, and plans had

been made for the purpose of rendering it possible to prove the vote without reference to the returns. These plans, when perfectly carried out, were substantially as follows:

Under the law no person except the voter in the act of voting and two challengers was allowed within 30 feet of the polls. At the most convenient point at this distance two or more persons, previously selected as clerks and ticket distributors, would station themselves, the voters forming a body behind them. One voter would come forward, take a Republican ticket, show it to the clerk, have his name recorded, and go to the polling window, holding the ticket out from his body so that it could be seen that he did not change it. On his return, if he had been seen to deposit the ticket, his name would be checked, and another voter would vote in the same way. When the votes were counted, it was generally found that from two-thirds to nine-tenths of these voters were returned as voting the Democratic ticket. Contestant claimed that the evidence of the ticket distributors and clerks, testifying to these facts and presenting the lists kept by them, was proof that the returns were fraudulent, and also proof of the number of votes received by him. Both the majority and minority of the committee agreed that such testimony was admissible for what it was worth, but the majority found it sufficient to overthrow the returns in a much larger number of cases than did the minority. The typical plan above described was not perfectly carried out in all the precincts. In some cases no list was kept, but only a tally or count; in some cases the polling window was so situated that it was impossible to see the ticket in the hand of the voter all the time while he was going to the window, and in some cases sufficient pains were not taken to do so when it would have been possible; in some cases the tickets were distributed more than 30 feet from the polls, and in some cases they were not separately read by the clerk who kept the list.

Contestee took no testimony in regard to some precincts, but in regard to the larger number he took the testimony of one or more of the officers of election, who testified that they saw no fraud committed. He also showed, wherever possible, by cross-examination or separate testimony, that some of the details of the typical plan above described were not carried out, so as to leave the chain of circumstantial evidence incomplete.

The majority of the committee applied the testimony substantially as follows: Where there was no testimony for the contestee, or the testimony was not such as to amount to a denial of the fraud, being the testimony of an illiterate inspector who could not have known whether the votes were correctly counted or not, or of one of the other inspectors, when the circumstances were such that the fraud could have been committed by the third without the knowledge of the other two, or where the election inspectors were impeached either by testimony or circumstances, and where the testimony for contestant was clear and definite, even though all the details of the above-described typical plan were not carried out, the returns were rejected and the vote counted according to the proof. Where there was a direct conflict of unimpeached testimony the returns were generally allowed to stand.

The minority found the testimony in most cases insufficient to overthrow the returns. Where there was no testimony at all for the contestee, and the precautions taken by the Republican voters were such

as to leave the chain of circumstantial evidence unbroken, the returns were rejected and the vote restated according to the proof. But where any of the election officers testified to the honesty of the election, or where the testimony for contestant was not perfectly clear and definite, they allowed the returns to stand.

The case was fully debated, and the resolutions presented by the committee were adopted by a vote of 130 to 113, and Mr. McDuffie was sworn in.

[Rowell, 255-327.]

(10) CHALMERS *vs.* MORGAN.

Conspiracy, fraud, intimidation, illegal voting. Majority report for contestee; report of Mr. Houk for contestant. Contestee retained the seat.

Majority report by Mr. Dalzell; minority report by Mr. Houk.

Contestee received a plurality of 8,161 votes on the face of the returns, which contestant sought to overcome by charges of conspiracy, fraud, and intimidation. The committee found that the charges were sustained as to at least twenty-three precincts, and that a restatement of the vote in these precincts, according to the proof, would overcome at least three-fourths of the plurality returned for contestee. But no evidence was taken by contestant in regard to a large number of precincts, and the evidence in regard to others was insufficient. The charges of fraud were confined to seven of the nine counties in the district. The election in the other two counties was honest, and while wholesale fraud was shown in each of the seven counties, only those precincts could be thrown out which were assailed by evidence, and these constituting but one-fourth of the district, and the fraud shown in them not being sufficient to overcome the entire returned majority, the presumption of fairness in favor of the unassailed boxes and the unimpeached vote of two counties must save contestee his title to his seat.

But, while reporting in favor of contestee, the committee severely condemned the fraud to which at least three-fourths of this returned majority was proved to be due. These frauds were of various sorts. In some places armed militia companies, composed entirely of Democrats, were organized and drilled just previous to the election. By their presence, and in some cases by their acts, many Republican voters were intimidated from voting. The election officers in many precincts were all Democrats, in violation of law, and where Republicans were appointed they were generally selected because of their illiteracy and inability to guard the interests of their party. In some precincts the judges of election were caught changing ballots, and in others the box was removed from the presence of the United States supervisor at noon and in the evening, and when the ballots were counted out of it the result differed very greatly from the vote as proved to have been cast. In some strong Republican precincts no election was held, and in a number of others the box was stolen after the votes had been cast. The county registering officers arbitrarily struck from the lists the names of a large number of Republican voters, and when these voters presented themselves at the polls their votes were refused. There was also testimony from members of both par-

ties showing that the general sentiment of the Democrats of the district was favorable to carrying the election by fraudulent means if necessary.

Mr. Houk filed a minority report, contending that contestant was elected. He claimed that a conspiracy to carry the election by fraud was proved to have been formed by all the officers connected with the election machinery, and that in those counties where the conspiracy was proved to have been carried out in a number of precincts there could be no presumption of fairness in favor of the precincts in regard to which no testimony was taken. Under the conditions shown to exist in Mississippi, counties should be taken as units and the votes of the unassailed boxes thrown out. If this course were followed as to the counties where the conspiracy was most completely proved, the majority returned for the contestee would be overcome and a majority shown for contestant, even on the findings in regard to individual precincts indicated in the majority report. But on the findings of Mr. Houk in regard to individual precincts, the majority would be overcome even without throwing out the unassailed boxes.

The case was briefly debated (contestant speaking in his own behalf), and the resolutions presented by the committee were adopted by a vote of 115 to 15 (on division, the Speaker "counting a quorum"), and the title of contestee to the seat was thus confirmed.

[Rowell, 329-433.]

(11) LANGSTON *vs.* VENABLE.

Fraud. Majority report for contestant; minority report for contestee. Contestant given the seat.

Majority report by Mr. Haugen; minority report by Mr. O'Ferrall.

Contestant claimed that the plurality of 641 votes returned for contestee was due to fraud and false counting on the part of the election officers. A large number of precincts were brought in issue, but only five were considered in the reports—the Third and Sixth wards of Petersburg and three outside precincts. The principal changes made in the vote were in the two wards of Petersburg, and on them the case turned.

Outside of Petersburg the returns of one precinct had been rejected entire by the county commissioners on account of irregularities in the returns of the Presidential vote. The committee unanimously counted the vote of the precinct for Congress. The return from another precinct was not signed or certified, and no testimony was offered to show its correctness. The majority of the committee stated that this precinct was attacked in the notice of contest, and rejected the so-called return. The minority stated that the precinct was not mentioned in the notice of contest, and on this account refused to reject the return. In another precinct new election officers, all political opponents of contestant, were appointed on the morning of the election. The election was held in a less commodious room than the one usually used. At noon an adjournment for dinner was had, and the box left in the room, the door being locked. A bundle of tickets containing contestee's name was on the table near the box. No friend of contestant was allowed to witness the count. The clerks of the election had gone out of the room at the close of the polls, and on returning had difficulty in gaining admission. During their absence the ballots had been taken out of the box and arranged on the table in separate piles for the three candidates. There were found to be 26 more ballots than persons vot-

ing (in a total vote of about 200), and the ballots were returned to the box and the excess drawn out by a blindfolded judge. One of the judges of election swore to the honesty of the count, and explained the change in the election officers and the delay in admitting the clerks. The majority concluded that these circumstances were sufficient to call for the rejection of the return. The minority held that the excess of ballots was not sufficient proof of fraud, and that the other circumstances said to be suspicious were satisfactorily explained; and in any case the whole return ought not to be rejected, as the utmost advantage contestant could claim would be to have counted for himself the highest number of votes estimated by his followers to have been cast for him.

In the Third Ward of Petersburg the returns gave contestant 174 and contestee 518 votes. Contestant claimed to have proved by the evidence of two witnesses that he had in fact received 284 instead of 174 votes, thus showing the falsity of the returns. These two witnesses testified that they stood at the polling window all day and took down the names of all the colored voters who voted; that 284 voters voted an open ticket with contestant's name on it, and that they read each of these tickets, saw them voted, and took down the names of the voters. The lists were put in evidence by contestant, and the committee called attention to the fact that none of the voters whose names appeared on them had been called by contestee to testify that they had not voted as claimed in the testimony of these witnesses.

Contestant began taking testimony in this precinct twenty-three days before the expiration of his time, in pursuance to a notice containing the names of 292 persons who, he claimed, would have testified that they voted for him. The first two witnesses, whose testimony is noted above, were cross-examined by contestee throughout the entire twenty-three days, and hence the testimony of the individual voters could not be taken. The committee held that the contestee was estopped from claiming that the testimony of the two witnesses was insufficient unless corroborated by that of the individual voters, he having by his own act prevented the latter testimony from being taken. The committee rejected the returns of this ward, and counted only the votes proved outside the returns.

The testimony in regard to the Sixth Ward was similar, except that the testimony of the individual voters was also taken. In this ward contestant was returned as receiving 139 votes and contestee 352. The officers of election were all political opponents of contestant. Two hundred and eighty-three voters testified that they had voted for contestant. Two witnesses who had stood at the window and read the tickets of the voters testified that they had seen 377 of them vote for contestant, and had kept a list of the names. Six days before the expiration of his time contestant began taking the testimony of 149 voters named in a notice, in addition to the 283 who had already testified. The first witness was cross-examined by the contestee throughout the entire six days, and was then arrested at the instance of contestee's counsel on the ground that he had refused to testify in the case. The other voters named in their notice were not examined. The committee rejected the return as fraudulent, and counted for contestant the 377 votes proved to have been cast for him.

At this poll there were two lines of voters, one composed of white men and the other of colored. The colored registration book was placed in the hands of the judge least familiar with the work, and

there was some delay in finding the names of colored voters. Votes were received from the two lines alternately. The colored line being much the longer, there were still 124 voters in it who had not voted when the polls closed. These voters all deposited the tickets they had intended to vote in a box provided at the instance of contestant after the polls had closed. Nearly all of the ballots were for contestant. No affidavits were made by the voters, no list of their names was kept, and they were not called as witnesses. The committee held that under this state of the evidence their votes could not be counted for contestant (for a different ruling under a different state of facts, see *Waddill vs. Wise*), but that, had their number been sufficient to change the result, the election should on this account alone have been declared void and a new election ordered.

The minority found that the testimony was not sufficient to show fraud or overthrow the returns of either of these wards. In the Sixth Ward one of the judges of election and the United States supervisor swore positively to the honesty of the count. The story told by the two outside list keepers was inherently improbable, as it would have been a physical impossibility for them to stand all day where they claimed to have stood and keep so close a scrutiny on the vote. They were, moreover, contradicted by a witness who said that one of them had been away from the polls two or three times instead of once as he had testified, and by a number of witnesses who had not noticed them at the polls at all. The two men who distributed the tickets for contestant did not mention these list keepers. Neither of the ticket distributors could read the tickets they gave out, and they only knew their contents from the fact that they got them from the leading manager of contestant's canvass in the district. The voters could not read, and could only testify that they voted the tickets given them by these illiterate ticket distributors. It would be out of the question to reject a return on such testimony.

The grounds on which it was sought to throw out the returns of the Third Ward were still weaker. Here the testimony of the voters was not taken at all, and the only testimony relied on was that of the two witnesses who claimed that they saw a much larger number of tickets voted openly for contestant than was returned for him. Three witnesses testified that these two men were not present so continuously as they claimed to have been, and that it would have been impossible for them to have scrutinized the ballots of the voters in the manner claimed in their testimony. A United States supervisor testified to the fairness of the election and count. The importance of the testimony of these witnesses justified a most thorough cross-examination, and the attempt on the part of the contestant to strengthen the testimony of these witnesses by claims of what he *would* have shown if he had more time was only a confession of the weakness of his testimony.

The case was fully debated and hotly contested in the House (it being under consideration most of the time from September 6 to September 23, 1890). The resolutions presented by the committee were adopted, the first by a vote of 151 to 1 (the Speaker "counting a quorum"), and the second without division, and Mr. Langston was sworn in.¹

[Rowell, 435-503.]

¹ It was in connection with this case that the minority party adopted for the first time the plan of withdrawing in a body from the Hall of the House, to avoid being counted as part of a quorum.

(12) MILLER vs. ELLIOTT.

Fraudulent refusal of registration and exclusion of ballots; ballot-box stuffing; election and registration law unconstitutional. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Rowell; minority report by Mr. Wilson.

On the vote as returned contestee had a majority of 1,355 votes. Contestant charged that by the statutes of South Carolina and the partisan manner of executing them many voters possessing all the constitutional qualifications for voting were prevented from registering and refused the right to vote. He also charged that the judges of election in a number of precincts repeatedly shifted the ballot boxes for the purpose of deceiving the voters and causing them to deposit their ballots in the wrong boxes, and that by this proceeding, as well as by ballot-box stuffing and other frauds, he was deprived of a large number of votes honestly cast for him by legal voters. All these charges the committee found to be sustained by the evidence.

The committee first reviewed the registration law of the State, and found that it was unconstitutional because it was not a reasonable regulation of the right to vote, but was, under the pretense of regulation, an abridgment, subversion, and restraint of that right. Its unreasonable or restrictive features were: (1) That it did not provide sufficient facilities for registration, and left to the registering officer a dangerous discretion; (2) that it attached the penalty of permanent disfranchisement for failing for any cause to register for the first election at which the citizen would be entitled to vote if registered; (3) that it affixed a like penalty for parting with or destroying a registration certificate; (4) that all applications for transfer or renewal of certificates must be made at the county seat of the county where the original certificate was issued; (5) that when the board of appeals had decided against an applicant for registration he might appeal, but must give notice in writing within five days and commence proceedings in court within ten days thereafter. This was a special remedy with a fifteen days' statute of limitations; (6) that the supervisor was given arbitrary power to strike names from the registry list without posting the names and without notice to anybody. In addition to the difficulties thrown by the law in the way of registration, the committee found that the manner of executing it was such as to make it still more difficult and often impossible for persons politically opposed to the registering officer to secure registration.

The minority, without entering into a detailed examination of the law, held generally that its provisions were reasonable and constitutional, and that there was nothing in the testimony indicating that it was executed in a partisan or illegal manner.

The issue in which the most votes were involved, and on which the case chiefly turned, was the question of counting a large number of ballots for contestant found in the boxes intended for the reception of ballots for Presidential electors. Under the law of the State the boxes for State officers and those for Federal officers were presided over by different sets of election officers, and the elections were often held at different places. At the State election poll six, and sometimes seven, boxes were required to be used; at the Federal poll two. The boxes were required to be labeled in plain roman letters, and the voter was

required to deposit his own ballots in the boxes. No ballot found in the wrong box could be counted. The judges were required, on demand, to read the names on the boxes. An inclosure was to be "railed off or otherwise provided." No person except the voter in the act of voting was permitted inside the inclosure, and no one except the officers of election was permitted to speak to the voter while in the inclosure.

The inclosures provided were generally close fences, which shut off the view from the outside. Large numbers of the voters for contestant could not read, and were consequently obliged to rely on the position of the boxes to know in which box to deposit their ballots. The managers in many precincts shifted the position of the ballot boxes from time to time, with the result that large numbers of tickets were deposited in the wrong boxes. One of the managers testified that he shifted the boxes for the purpose of "carrying out the spirit of the law, and testing the intelligence of the voters." Another testified that he did it in order to defeat the illegal action of the United States supervisors in surreptitiously sending out notes stating the relative positions of the boxes. All the election officers throughout the district were political partisans of contestee, the governor having, upon application, refused to accord to the party of contestant the right of representation on the boards.

The committee held that this provision of the election law was practically an educational qualification, and such qualification being forbidden by the constitution of the State, the law was unconstitutional. The provision that the election officers should read the labels on the boxes was easily evaded and of no practical effect, as there was no requirement that they should in any way designate the boxes while reading, or read the labels in any particular order. The practice of shifting the ballot boxes was not expressly forbidden by the law, but it was avowedly done for the fraudulent purpose of deceiving the voters and causing them to cast their ballots in the wrong boxes. The act was made fraudulent by its fraudulent purpose.

In the various precincts of the district contestant sustained a net loss of 1,049 votes, which were cast in the wrong boxes as a result of this conduct of the judges and were destroyed by them. The United States supervisors present at every poll testified to the number of ballots thus destroyed for each candidate, and on their testimony the committee counted for contestant 1,000 additional votes.

The minority held that the provisions of the law were constitutional and salutary, and that the shifting of the ballot boxes was a proper proceeding. The law contained many features of the "Australian system," and served much the same purpose. Its purpose was to carry out the provision of the constitution of the State protecting the voter from "an undue influence from power, bribery, tumult, or improper conduct." It provided that the voter should be separated from all others while voting, should deposit his own ballots in the boxes, and that he should receive any information he desired from the election officers alone. If the law was being violated by the reception of information by the voters from others than the election officers; "if the wise provisions of this law were being interfered with and rendered nugatory by any outsider at any poll; or if it came under the observation of those selected to supervise the execution of this law that its letter or intention or spirit was being violated, we submit it

was the duty of the managers to shift the boxes or perform any other legal act to subserve its proper execution."

The evidence by which the number of votes thus lost was sought to be shown was inconclusive, consisting chiefly of the memory of the United States supervisors, assisted by leading questions from contestant's counsel. The proposition to count for contestant, in violation of the State law, 1,000 votes cast—if cast at all—in the wrong boxes could not be sustained by any principle of law or reason.

In seven precincts the committee found that the ballot boxes had been stuffed in the interest of contestee. Under the law of the State if more ballots were found in the boxes than there were names on the poll list it was the duty of one of the judges, blindfolded, to draw out the excess of ballots. In each of these precincts there was an excess, in one case of nearly 400 votes, and in the other cases of from 75 to 100. The law in regard to "purging" the boxes had been complied with.

The committee held that the fact of the existence of so large an excess of ballots was proof that the boxes had been stuffed by some one. That they must have been stuffed in the interest of contestee was proved in every case but one by the testimony of a much larger number of voters than were returned as voting for contestant, who testified that they had voted for him. In three precincts, including the one where the voters were not called as witnesses, there was evidence indicating that the managers of election placed the excess of ballots in the box. In two of these cases the managers, who were all partisans of contestee, refused to exhibit the inside of the box to the United States supervisor or the voters present at the opening of the polls, as required by the law, alleging that the polls had been already opened and votes received, though no proclamation had been made and no opportunity given for voting. In the third case the boxes were emptied on the heads of barrels standing behind a counter, where the United States supervisor had not been permitted to go during the day. More votes were found in the piles of ballots thus made than had been voted by the voters.

The committee held that the statute for "purging" the ballot box had been provided for mistakes and not for frauds. The boxes in each of these cases having been proved to have been fraudulently stuffed, the legal course would be to exclude the entire returns and count only such votes as were proved *aliunde*. But contestant having in the claims of his original brief conceded to contestee all the votes in each of these precincts not proved to have been cast for himself, and it being now only a question of the size of contestant's majority, and not of the result of the election, the committee counted the vote according to the statements in contestant's brief. According to this method of counting contestant was shown to have a majority of 757 votes. According to the strictly legal method his majority would be 1,448.

The minority held that the testimony in all these cases was insufficient. The mere fact of the excess of ballots was not sufficient cause for the rejection of the returns, as the law of the State providing for such contingencies had been strictly followed. There was no proof that the boxes had been stuffed by the managers, and in the case of the largest excess there were grounds for believing that it had been done by the voters for contestant; one or more of the managers in each pre-

cinct testified to the honesty of the election; some of the testimony for contestant was impeached; and the testimony by which the amount of excess was sought to be shown was inconclusive, and in one case conflicting. No sufficient foundation for calling the voters themselves was, in most of the cases, laid by first overthrowing the presumption of the correctness of the returns. Large numbers of the voters called as witnesses for contestant could not read, and could not know with certainty for whom they voted. Part of the testimony in chief was taken during the time for rebuttal, and part of it was taken without notice.

The case was not debated. The resolutions presented by the committee were adopted by a vote of 157 to 1 (on division, the Speaker "counting a quorum"), and Mr. Miller was sworn in.

[Rowell, 505-580.]

(13) GOODRICH *vs.* BULLOCK.

Illegal refusal of registration and rejection of votes; stealing of ballot boxes; and fraud. Majority report for contestant; minority report for contestee. No action by the House.

Majority report by Mr. Rowell; minority report by Mr. Maish.

On the face of the returns contestee had a majority of 3,195 votes. The committee found that this majority was overcome and a majority shown for contestant by counting for him the votes of a large number of qualified voters who tendered their votes to the officers of election and were illegally refused the right to vote, by counting ballots illegally rejected on the ground that they had distinguishing marks on them, and by counting the votes proved to have been cast in certain precincts where the ballot boxes had been stolen, or for other reasons no returns had been made.

Under the law of Florida voters were required to be registered to entitle them to vote. The registration was a permanent one, but in 1887, under a new law, a new registration had been made. A certificate of registration was given to each voter, and if his name for any reason did not appear on the registry list in the hands of the judges this certificate was evidence of his right to vote. Voters changing their residence could procure transfer certificates, and if the change was from one precinct to another they could not vote without such transfers.

The committee found that this law had been so executed by many of the registering officers as to deprive large numbers of qualified voters of their votes, and also that by misinterpretations of the law the election officers had deprived many more voters of their votes. "The misconduct of registering officers consisted in unlawfully striking from the books large numbers of duly registered voters; in refusing or neglecting to restore the names ordered to be restored by county commissioners; in keeping their offices closed on days of registration; in unreasonably delaying applicants; in unlawfully requiring colored applicants to prove their places of residence by white witnesses known to the registering officers; in unlawfully refusing or neglecting to make transfers on due application; in furnishing unequal facilities for registration as between their party friends and their party opponents; and in fraudulently registering persons not qualified. By these means many voters were prevented from being registered, and many others who had been registered were struck from the lists. The election officers refused

their votes when tendered. The election officers in many places rejected the votes of persons whose names appeared on the list, but who did not present registration certificates, and also of persons whose names had been struck from the list, but who did present registration certificates. Under the law either evidence was sufficient. They also refused the votes of voters who had changed their residence within the voting precincts without procuring transfers. All such votes were counted by the committee, and 390 of them, in regard to which the minority found the evidence to be sufficient, were counted by the minority. The committee also counted the votes of a large number of voters who had been prevented from registering by the action of the registering officers or whose names had been illegally struck from the lists and who tendered their votes. The minority did not count this class of votes, with a few exceptions, holding that there was not sufficient proof of misconduct on the part of the election officers, and that in most cases the voters had, through ignorance, failed to perform all the acts necessary to make them voters under the law. The evidence of the qualifications of these voters the minority held to be in most cases inconclusive, and in many cases the evidence of their number was inadmissible or insufficient. Detailed statements of these votes were given in both reports. A large number of ballots, nearly all for contestant, had been rejected on the ground that they were not in the form provided by the statute. The statute was as follows:

The voting shall be by ballot, which ballot shall be plain, white paper, clear and even cut, without ornaments, designation, mutilation, symbol, or mark of any kind whatever, except the name or names of the person or persons voted for and the office to which such person or persons are intended to be chosen, which name or names and office or offices shall be written or printed, or partly written and partly printed, thereon in black ink or with black pencil, and such ballot shall be so folded as to conceal the name or names thereon, and so folded shall be deposited in a box to be constructed, kept, and disposed of as hereinafter provided, and no ballot of any other description found in any election box shall be counted.

Under this statute the committee counted votes which had been rejected for the following reasons: An extremely small asterisk, printed in the lower corner of the ticket; names "scratched" in red or purple ink; slight specks on the paper; a printer's dash in a place where no person was named for an office; printer's dashes separating the names on the ticket; the name of a candidate for justice of the peace written in with red pencil; and pencil marks on the tickets made by the judges in pushing them into the boxes with a pencil. The minority agreed in counting all these votes except those on which red ink or pencil had been used, in direct violation of the terms of the statute. The committee counted those where the red ink had been used, in spite of the statute, on the ground that this being the only ink to be had in the only store in the place its use was, in a manner, compulsory.

In one county no registration had been had, the governor having failed to appoint a supervisor of registration. The election had been held under the old registration; no harm appeared to have been done, and the committee unanimously counted the vote.

In Madison County the ballot boxes in several precincts had been stolen by a band of armed men on the evening of the election, and in some others the election officers refused to count the votes on various grounds. Testimony was offered to show the votes cast, and the committee counted the votes according to this testimony. The minority

found that the testimony was not sufficient to show conclusively the votes cast, being in some cases based on memory, in others on estimates, and in others on counts of the ballots made after the boxes had been exposed to the possibility of being tampered with.

Under the findings of the minority only part of the majority of contestee was overcome; under those of the committee it was all overcome and a majority of 337 shown for contestant. The case was not reached by the House.

[Rowell, 581-629.]

(14) MCGINNIS *vs.* ALDERSON.

Conflict as to majority on face of returns, and charges of illegal votes. Majority report for contestant; minority report for contestee. No action by the House.

Majority report by Mr. Lacey; minority report by Mr. Outhwaite.

The governor of West Virginia declared the result of the election in this district and issued the certificate to Alderson on the basis of the returns from all the counties except Kanawha, omitting the latter return on account of a writ of *certiorari* awarded by the circuit court of Kanawha County on the petition of contestee, suspending the judgment and decision of the board of county canvassers. Excluding this county, contestee had a majority of about 1,300, but counting it according to the returns based on the original count and forwarded to the governor, contestant had a majority of 16 votes. Counting it according to the results of recounts had on petition of contestee, contestee would have a majority of 7 votes.

The committee held that contestant having a majority on the face of the returns as forwarded to the governor, he should have received the certificate, and on the contest the burden of proof shifted to contestee. The certificate, based on the vote of only a part of the district, gave contestee no advantage as to burden of proof.

By a mistake in writing the figures or in footing contestant was credited with 512 votes in Boone County. The tally sheet and the evidence of three witnesses showed that the vote was 521. This would increase contestant's majority, previous to the elimination of illegal votes, to 25.

The committee held that the ballots in the two precincts in Kanawha County, where the greatest change in favor of contestee was found, had not been preserved in accordance with the law or with sufficient care to render the recount trustworthy. In the other precincts of the county the changes (of 1 or 2 votes in a precinct) were equally against both parties, but in these two precincts a change of 34 votes was made against contestant. The law required the packages containing the ballots to be sealed by the judges of election on the completion of their count, but neither of these packages was effectively sealed. In one case an attempt had been made to seal the package with mucilage, but it was carried several miles to the county clerk's office in a bag thrown across a horse's back, and in the clerk's office it was kept over the storm door, from which it was several times thrown down to the stone floor. When it was recounted it was found that the seal had broken or had never adhered. The ballots from the other precinct were forwarded in a cracker box, sealed on the top. After the recount it was noticed that one of the boards on the bottom of the box was

split, and there were marks apparently made by a sharp instrument used to pull off the board. One of the employees of the clerk's office had formerly been in the penitentiary, and was a man of intemperate habits and bad character. He had been at work in the office alone for some time one evening during the time that the box was there. There was conflicting testimony tending to show suspicious actions on his part during that time. The recount in one of the precincts was also impeached by contestant calling 143 witnesses who testified that they voted for him, though the recount only showed 138. The committee held that these circumstances were sufficient to destroy all certainty that the ballots recounted were the same and in the same condition as those originally counted. Without such certainty the original count must stand in preference to the recount.

The minority held that the recount of these precincts should stand. The breaking of the seal in one of these packages was sufficiently accounted for by the manner of its transmission and handling. The marks on the bottom of the box in the other case were not shown not to have existed before the ballots were placed in it, and probably did so exist, as it was a custom of the trade to sample the cakes originally contained in the box from the bottom, and similar marks were found on another box procured from the same place as this one. The original count in these precincts was conducted in such a way as to make mistakes probable. In one of the precincts over a thousand votes were cast, and the count lasted several days and nights. Part of the time the light was poor and most of the judges were old men with poor eyesight and unaccustomed to such work. The recounts were regularly conducted under the provisions of the law, there was nothing to indicate that the ballots had been tampered with, and the result of the recount should be accepted. The minority also held that the proof of the alleged mistake in Boone County was insufficient.

Contestant asked that two or three precincts be thrown out on the ground that the officers of election were not sworn. One of these had not been counted by the county commissioners under the mandatory provision of the State law forbidding them to count such precincts. Contestee claimed that this law was unconstitutional. While it was mandatory in terms, the committee refrained from passing on the question of whether it should be construed to be mandatory or directory and of its constitutionality, and counted the votes of these precincts.

Illegal votes were charged by both parties, but much the larger number of charges was by contestee. The committee found that most of the charges of contestee were not sustained. The illegal votes charged were mostly those of colored mine employees, and the charge was that they had not been in the State long enough to have acquired the right to vote. The testimony against them was mostly "wholesale;" that is, the same witness would testify as to the illegality of a large number of votes. The committee found the testimony of many of these witnesses to be discredited by proof that some of the voters testified to by them were legal voters. This weakened their testimony in regard to others. Some of the witnesses were also discredited by the fact that they had been officers of election, and had consented to the acceptance of the votes of the same voters to whose disqualification they testified. Much of the testimony was based upon declarations made by the voters after the election, and was hence incompetent.

Much of it was also based on the pay rolls and time books of the coal companies, but the insufficiency of this sort of testimony was shown by proof that some voters had been residents for a longer time than these pay rolls indicated. Making allowance for these circumstances, the committee found that proof sufficient to overturn the presumption of legality arising from the reception of the votes by the officers of election had been offered to show 13 votes illegally cast for contestant and 16 for contestee. Eliminating these would leave contestant a majority of 30.

The minority held that a very much larger number of illegal votes had been proved against contestant than against contestee. Of the 361 votes attacked by contestee the committee had only found 13 illegal, while of the 50 attacked by contestant they had found 16 illegal. The minority believed that a fair examination of the evidence would show illegal votes on each side more in proportion to the number of charges made and the amount of testimony taken. The circumstances were such as to render it extremely probable that more illegal votes would be cast for contestant than for contestee. The precincts where illegal votes were charged were close to the Virginia line. Coal mines had recently been opened in them, and were being worked by negro miners, all of whom had come from outside of the State, mostly from Virginia. They were extremely migratory, and lived where they could find work. All of them lived in houses belonging to the coal companies, and could only live in these precincts by being employed by these companies. They were all Republicans, and voted, if they voted at all, for contestant. Very few of them were taxed in West Virginia, and many of them had families in Virginia and habitually referred to that State as "home." The evidence of the pay rolls and tax lists, and of the employers of these men was conclusive of the length of their residence in West Virginia, and where that residence was less than a year the vote should be thrown out as illegal. Eliminating only those most clearly proved would give contestee a plurality of at least 174 votes.

This case was not acted on by the House.

[Rowell, 631-678.]

(15) CLAYTON *vs.* BRECKINRIDGE.

Ballot-box stealing, false counting. Majority report that contestant was elected and that (on account of his death) the seat be declared vacant. Minority report for contestee. Seat declared vacant.

Majority report by Mr. Lacey; minority report by Mr. Maish.

Mr. Clayton served a notice of contest on Mr. Breckinridge and took some testimony; but while in process of taking testimony in the town of Plummerville, where the ballot box had been stolen on the night of the election, he was assassinated by some one. Accusations were made in the newspapers and elsewhere that the assassination was connected with the theft of the ballot box or was in some way a "political assassination," and great public attention was attracted. The contest abated by the death of Mr. Clayton, but a resolution was passed by the House directing the chairman of the Committee on Elections to appoint a subcommittee to take testimony in the case "in regard to the methods of said election, to the contest, and all events relating

thereto or arising therefrom after said election, and as to whether the contestant or the contestee, or either of them, was lawfully elected."

Acting under the broad terms of this resolution, the subcommittee proceeded to Arkansas and took testimony in regard to the killing of Mr. Clayton, and a number of other murders and disturbances alleged to have been connected with the election or contest, as well as the question which candidate was elected. These questions were discussed pro and con in the reports at great length and with some feeling, but as they have no bearing on the issues of the contest proper they will not be further outlined here.

On the returns as made to the governor, Mr. Breckinridge had a majority of 846 votes. In this was not included the vote of the Plummerville box, which had been stolen by armed men on the evening of the election before the votes were counted. At this box 697 votes had been cast. The subcommittee took the testimony of the voters who voted for each candidate at this box, and counting these, Mr. Breckinridge's majority was reduced to 413. The theft of the Plummerville box was conceded, and accepting the proof of the vote, the minority of the committee held that Mr. Breckinridge's rightful majority was 413. The majority held that this 413 majority was overcome, and a majority shown for contestant, by testimony taken by the subcommittee in regard to four other precincts. In each of these precincts a larger number of voters than was returned as voting for Mr. Clayton was called and testified to having voted for him. The ballot boxes, with the numbered ballots of the voters, were produced, and in the four precincts, in addition to those already counted as voting for Mr. Clayton, 8, 29, 48, and 62 voters, respectively, the ballots corresponding to whose numbers in the box contained the name of Mr. Breckinridge, testified that they had deposited ballots containing the name of Mr. Clayton. The committee took this as evidence that the ballot boxes had been stuffed, and rejected the returns. There being no proof how many votes were cast for Mr. Breckinridge, the only votes counted in these precincts were those proved by the testimony of the voters to have been cast for Mr. Clayton. Counting in this way would give Mr. Clayton a majority of 459. Or, if the returns were simply rejected, and no votes counted for either party, he would have a majority of 11. The committee therefore recommended resolutions declaring that Mr. Clayton was elected, and that on account of his death the seat be declared vacant.

The minority of the committee arraigned the fairness of the majority, both in the manner of taking the testimony and in the statements of the report. Quotations were made from the committee report to show that the impression had been sought to be created that the majority of Mr. Breckinridge was due to the theft of the Plummerville box, whereas, in fact, if all the votes cast at that box had been for Mr. Clayton it would not have given him a majority. The committee had occupied less than two weeks in taking testimony, although the usual time, in an ordinary contest involving a narrower range of inquiry, was ninety days. Mr. Breckinridge claimed not to have had time to make all his defense, and consented to an adjournment of the taking of testimony in Arkansas only upon the agreement that he would be permitted to call witnesses in Washington. On the return of the subcommittee to Washington he had applied for permission to call the remainder of the voters in the four precincts above mentioned

and certain other specified witnesses. This application had been refused by the subcommittee, in violation, as claimed by Mr. Breckinridge and the minority, of the agreement entered into in Arkansas. The stenographer had omitted to take down the conversation in which this agreement was alleged to have been made, and conflicting versions of it were given by the majority and minority of the subcommittee. On account of all these circumstances, and because this was not an ordinary contest between parties, but an investigation conducted by a committee of the House, the minority held that it would be unfair to count for Mr. Clayton the votes said to have been proved in the assailed precincts without also counting for Mr. Breckinridge the remainder of the votes, in regard to which no testimony had been taken. If this course were followed the majority of Mr. Breckinridge would not be overcome. But the testimony by which fraud was sought to be shown was untrustworthy. Most of the voters testifying were weak and very ignorant. Those of them who had voted for Mr. Breckinridge would perhaps have been afraid to do so except for the protection of a secret ballot, and when this secrecy was removed by calling on them to testify the same causes would deter them from testifying that they had voted for him. Such testimony was certainly not sufficient to overthrow the oaths of all the officers of election.

The case was debated several days, and the resolutions presented by the committee declaring the seat vacant were adopted by a vote of 105 to 62.

[Rowell, 679-781.]

(16) KERNAGHAN *vs.* HOOKER.

Partisan and illegal appointment of election officers, fraudulent registration, false counting, ballot-box stuffing, interference with United States supervisors, violence, and intimidation. Report for contestee. No action by the House.

Report by Mr. Rowell.

The returns of this election showed a majority of 8,491 for contestee. Contestant sought to overcome this majority by a charge of general conspiracy and the commission of the frauds named above. The committee found that the evidence showed a large amount of fraud of all the sorts charged, but not enough to overcome all of the majority of contestee by rejecting the returns of the precincts where fraud was proved and restating the vote according to the evidence.

It was shown that the colored population of the district was about twice that of the white population, and that the colored voters were nearly all Republicans; that the election officers in many of the precincts were all Democrats, and in the other precincts the Republican inspector was illiterate and incompetent; that in the city of Jackson and some other places violent demonstrations were made the evening before election for the purpose of keeping the colored voters from the polls; that in part of the district no Republican tickets were distributed; and there was general testimony showing that public sentiment favored carrying the election for contestee by fraud and violence if necessary. The committee found that the evidence justified throwing out the returns of the city of Jackson and fifteen or twenty precincts in other parts of the district, and in some cases counting votes for contestant on proof *aliunde*. In a number of precincts a larger number of voters

testified to having voted for contestant than were returned for him, and in other precincts there was other proof of fraud. But the fraud not being shown to have affected enough votes to overcome all of the majority returned, the committee recommended resolutions declaring contestee elected.

There was no action by the House.

[Rowell, 783-799.]

(17) HILL *vs.* CATCHINGS.

Conspiracy, interference with United States supervisors, and fraud. Committee report for contestee. Report by Mr. Lacey to declare the seat vacant. No action by the House.

Majority report by Mr. Rowell; dissenting report by Mr. Lacey.

The committee found that while the majority of 7,011 returned for contestee was much larger than his real majority, the testimony did not show frauds sufficient to overcome the entire majority. The district contained about four times as many Republican voters as Democratic, but the Republicans were not entirely united nor properly organized. There was evidence, however, that the party of contestee would have endeavored to carry the election by fraud if it could not be carried without it, and that in a considerable number of precincts fraud was resorted to. In some cases United States supervisors were prevented from discharging their duties, and in all such cases the committee held that the returns were invalidated. In most of the precincts the officers of election were all Democrats, in violation of the law, and where they were not the Republican inspectors appointed were not the ones recommended by the party committees, and were either entirely incompetent or were distrusted by the party they were supposed to represent. The committee held that these circumstances were suspicious, but that the returns could not be thrown out on account of them without further evidence.

A letter written by the contestee was in evidence, written to the chairman of the district committee of his party after the election, and referring to the taking of testimony in the contest, in which occurred the words:

I do not think it would hurt at all if one or two of them should disappear. It might have a very happy effect on Hill, his witnesses and lawyers.

The committee found that this was "a suggestion to hinder unlawfully the taking of testimony in the case;" but, as there was no evidence that the suggestion was acted on, it could not affect the result of the contest. The committee accordingly recommended resolutions declaring contestee elected.

Mr. Lacey filed a dissenting report, in which he contended that the law *ought* to be that where a successful candidate, or others with his connivance, engages in fraud, bribery, or intimidation to affect the result of the election, the election ought to be declared void, even if it can not be shown that the contestant was elected. In this case the existence of the frauds was clearly shown, and the attempt of contestee, as shown in his letter, to suppress the evidence of the frauds connected him with their commission and brought him within the scope of the above rule.

There was no action by the House.

[Rowell, 801-813.]

FIFTY-SECOND CONGRESS, 1891-1893.

Committee on Elections.

Mr. O'FERRALL, Virginia,	Mr. JOHNSTONE, South Carolina,
MOORE, Texas,	HAUGEN, Wisconsin,
COBB, Alabama,	TAYLOR, Tennessee,
PAYNTER, Kentucky,	DOAN, Ohio,
BROWN, Indiana,	JOHNSON, Indiana,
LOCKWOOD, New York,	REYBURN, Pennsylvania,
LAWSON, Georgia,	CLARK, Wyoming,
Mr. GILLESPIE, Pennsylvania.	

Cases.

- (1) Alexander K. Craig *vs.* Andrew Stewart, *Pennsylvania.*
- (2) Henry T. Noyes *vs.* Hosea H. Rockwell, *New York.*
- (3) John B. Reynolds *vs.* George W. Shonk, *Pennsylvania.*
- (4) John V. McDuffie *vs.* Louis W. Turpin, *Alabama.*
- (5) Thomas R. Greevy *vs.* Edward Scull, *Pennsylvania.*
- (6) Thomas E. Miller *vs.* William Elliott, *South Carolina.*

(1) CRAIG *vs.* STEWART.

Illegal votes. Nonregistered voters failing to make the affidavits required by Pennsylvania law. Majority report for contestant; minority report for sitting member. Contestant seated.

Majority report by Mr. Brown; minority report by Mr. Johnson.

This case involved some of the technical questions discussed in the case of Greevy *vs.* Scull, below, but turned upon the single question of unregistered voters, which is the only one discussed in either report.

According to the returns the sitting member was elected by a plurality of 123 votes. Contestant claimed that a greater number of votes than this returned plurality had been cast for the sitting member by persons whose names did not appear on the register and who did not make the affidavits required by law of unregistered persons.

The constitution of the State of Pennsylvania provided (article 8) that—

Every male citizen twenty-one years of age possessing the following qualifications shall be entitled to vote at all elections: (1) He shall have been a citizen of the United States one month; (2) he shall have resided in the State one year, or, if having previously been a qualified elector or native-born citizen of the State, he shall have removed therefrom and returned within six months immediately preceding the election; (3) he shall have resided in the election district where he shall offer to vote at least two months immediately preceding the election; (4) being twenty-two years of age or upward, he shall have paid within two years a State or county tax which shall have been assessed at least two months and paid at least one month before the election.

The registration law of Pennsylvania (act approved January 30, 1874), providing for a registration of all the electors of the State, contained, however, the clause:

And no man shall be permitted to vote at the election on that day whose name is not on said list, unless he shall make proof of his right to vote as hereinafter required.

The "proof required" was an affidavit from the voter himself and at least one witness, showing explicitly that the voter had the qualifications specified in the statute and constitution, which affidavits were required to be preserved by the election board and, at the close of the election, filed with the prothonotary, in whose office they were to remain on file, subject to examination like other election papers.

The courts of Pennsylvania had decided that compliance with this law was mandatory on the voter. Congress had decided the question both ways.

Contestant sought to prove by the certificates of the various prothonotaries certifying to copies of all the affidavits on file in their offices, and by a comparison of the registration and poll lists, showing a large number of names on the poll lists which were not included in either the registration list nor in the certified copies of affidavits, that these persons not so included must have voted without having complied with the law either by registration or the making of affidavits. Contestee denied the sufficiency of the evidence to establish this conclusion, and contended that the votes would not be illegal even if the contention were established.

It was conceded by both sides that if these votes were illegal a sufficient preponderance of them was cast for the sitting member to change the result of the election. It was conceded also that a large part of these voters did in fact possess the constitutional qualifications, and that they were not challenged at the polls, though the law made it the duty of the judges of election to challenge unregistered voters.

The majority of the committee held that the absence from the prothonotary's office of a large number of the affidavits required to be there, especially when many other affidavits were found there, was sufficient proof to raise the *prima facie* conclusion that the missing affidavits were never taken.

We insist that the presumption is that if these affidavits had been executed they would have been found where the law provides they should be filed, and that on failure of the officer to produce them the burden of proof was cast on the contestee to show that they were in fact executed. He offered no evidence on this point, and by this failure of the contestee the *prima facie* case of the contestant becomes conclusive.

The minority referred to a number of cases in which under this and similar laws it had been held that the possession of the constitutional qualifications established the right to vote, which could not be negatived by the failure of some of the election officers to perform all of their duty with reference to securing the evidence of the existence of these qualifications; but no definite ruling on this point was stated by the minority. They denied, however, that the certificate of the prothonotary to copies of the election affidavits on file in his office at a certain date was sufficient evidence that no other papers had ever been filed, and still less could it establish the conclusion that no such affidavits had been made by the voters at the polls. The burden of proof was on the contestant to prove his whole case—to prove that the affidavits were not in fact made—which he had not attempted to do.

The minority concede that the contestant has shown a sufficient number of votes to have been cast by nonregistered persons for the contestee, and counted for him by the election officers, to overcome his plurality, but they strenuously deny that the contestant has proved that these persons failed to make and procure affidavits required of nonresident [nonregistered?] voters, and they doubt whether he is entitled to be seated even if he has; that the burden of proof is on the contestant to establish his claim and contest is too plain to require the citation of authority. Assuming for

sake of the argument that he is entitled to a seat in this body if he proves that non-resident [nonregistered?] voters sufficient in number to overcome the plurality of the contestee voted for the latter at the said election without having made the affidavits required by law, it will not suffice for him to prove a part of these facts. He must establish his entire case, and show affirmatively that every method whereby such persons might have become legal voters was neglected. It is not enough that he has proven certain persons to have voted for the contestee at such election without having made and furnished affidavits, since such persons may have been duly registered, and hence possessed the right to vote without affidavits; nor will it suffice for him to show that certain persons voted without having been registered, since nonregistered voters could still enjoy the right of suffrage by making and producing affidavits. * * *

On the question as to whether the contestant has sufficiently proven that no affidavits were made and produced by the nonregistered voters at this election, the minority contend that he has not. When a person offering to vote is challenged at the polls no presumptions are indulged in favor of his right to vote. He is then and there called upon to furnish evidence of his qualifications as an elector. But when he has once voted unchallenged, and his ballot has been deposited in the ballot box and counted and canvassed and a certificate of election issued upon it, quite a different rule prevails. Every reasonable intendment should then be indulged in his favor, and his vote should not be rejected upon technical presumptions and because some degree of doubt may be thrown upon it. Particularly is this the case where a contestant upon whom rests the burden of proof and who asks that the vote should be rejected refuses to make positive proof of the voter's disqualification, which it appears it is easily within his power to do if the voter in point of fact had not the right of suffrage.

The officers of election or the voters should have been called to show that the affidavits were not in fact taken.

The contestee is not required to prove that this improper disposition of the affidavits was actually made by the return judge, for the reason that the contestant has the burden of proving that the affidavits were not taken, and his having merely shown that they were not filed in the prothonotary's office does not establish the fact that they were not taken.

The case was fully debated in the House, and the resolutions proposed by the minority were defeated by a vote of 57 to 152. The resolutions of the committee were then adopted without division, and on February 26, 1892, Mr. Craig was sworn in.

[Stofer, 1-21.]

(2) NOYES *vs.* ROCKWELL.

Illegal votes; distinguishing marks; bribery; unauthorized recount. Majority report for contestant; minority report for contestee. Contestee retained the seat.

Majority report by Mr. O'Ferrall; supplementary report by Mr. Haugen; minority report by Mr. Cobb.

Under the law of New York the inspectors of election were required to make out and sign three written statements of the result, and to attach to these statements samples of each of the sorts of ballots cast, writing upon each the number received like the sample. The remaining ballots were then to be destroyed.

In six districts of four wards of the city of Elmira there were discrepancies between the numbers written in the body of the returns and the numbers written on the sample ballots. If the statements in the body of the returns were received, contestant was elected by a plurality of 30 votes. If the statements on the sample ballots were received, contestee had a plurality of 15 votes. The county canvassers of Chemung County counted the statements on the sample ballots. The matter was carried into the State courts, and the supreme court,

in special session, issued a writ of peremptory mandamus commanding the county canvassers to count the vote according to the face of the returns. An appeal was taken from this order, and pending the appeal the State board of canvassers met, counted the votes as indorsed on the sample ballots, and awarded the certificate of election to Rockwell. The supreme court, in regular session, on appeal, affirmed the action of the court in special session, and this order, being appealed to the court of appeals, was again affirmed. The committee held that upon these facts contestant was *prima facie* elected, and the burden of proof was on contestee to establish his title to his seat.

Your committee are of the opinion that the decision of the court of last resort of a State upon the construction of a statute of that State and in a matter before them involving the construction of a statute of that State should be binding upon them, and therefore they held that under the decision of the said court of appeals affirming the lower court Noyes was *prima facie* elected and was entitled to and ought to have been awarded the certificate of election, and that the burden of proof was shifted from Noyes to Rockwell, and it was incumbent upon him (Rockwell) to establish his title to the seat upon the full merits of the case.

Upon the merits contestee sought to sustain the count as written on the ballots in the six Elmira districts by showing that it was based on a recount of the ballots of these districts. On the night of the election the sample ballots were not attached to the returns nor the ballots destroyed, as the law required, and when the county clerk refused to receive the returns in this form a part of the board of inspectors met and recounted the ballots, attached the samples, and wrote on them the results of the recount. The ballots recounted had no legal existence, they were not recounted by the full board of inspectors, and they had not been in legal custody nor kept under any effective precautions. The committee rejected these recounts. The ballots—

had no legal existence after the board of inspectors dissolved the night of the election and the board itself was *functus officio*; there was no legal custodian nor depository of the ballots; they were worthless as evidence * * *

Now, while we hold that under the statutes of New York there could not be a legal recount of ballots in any election, yet, even if it were authorized by law, no confidence whatever could be reposed in a recount of ballots which had been kept as the ballots were from the time they were counted on the night of the election to the recount made from twenty-four to forty-eight hours thereafter.

There were a few illegal and improperly rejected votes, and 2 votes alleged to have been bribed, which the committee corrected according to the evidence, and found a majority of 6 votes still remaining for contestant. These votes could only be overcome by rejecting 16 ballots known as the "Doyle ballots," on the disposition of which the case turned.

In the town of Waterloo, Seneca County, at two neighboring polling places, the name of Robert Earl, which headed the list on both Republican and Democratic ballots as candidate for justice of the court of appeals, was scratched on 16 Republican "paster" ballots, and the names of A. Doyle, B. Doyle, C. Doyle, D. Doyle, E. Doyle, F. Doyle, G. Doyle, H. Doyle, I. Doyle, J. Doyle, K. Doyle, L. Doyle (2), M. Doyle, N. Doyle, and T. Doyle substituted, all written in the handwriting of one Duncan McArthur, a Republican committeeman. There was said to be some evidence that McArthur had bribed 2 voters who did not vote these "Doyle ballots," and there was printed in the record a deposition (given in full in the report) of an obviously stupid or drunken witness who described himself as "a little off" in

his head, who had a "faintest recollection" that his was a Doyle ballot, and who was shown by the stenographer's notes to have said: "He gave me a pair of pants" for his vote. Witness insisted on correcting this statement to "I wished he did give me a pair of pants," and then refused to sign the testimony even as corrected.

On this testimony the contestee asked that the 16 "Doyle ballots" be thrown out for bribery, which the committee refused to do, on the ground that there was only this very doubtful deposition against one of them and no evidence at all in regard to the others. If the ballots were to be objected to as having distinguishing marks, the committee called attention to testimony (objected to, however, by contestee as testimony in chief taken in time for rebuttal) showing that in one precinct there were 28 ballots cast for Rockwell in which there was a check mark in one corner and a figure, on some "5" and in others "8," on the diagonally opposite corner.

Since these findings still left contestant a majority of 6 votes, the committee recommended resolutions giving him the seat.

Mr. Haugen assented to all of the report, except the statement that 2 voters had been bribed to vote for Noyes. He presented a supplementary report stating that there was no evidence how they voted.

Mr. Cobb and Mr. Gillespie signed a minority report, the conclusions of which secured the approval of the House. They did not dissent from the finding of the committee in regard to the recounts, but on minor issues reduced the majority of contestant to 4 votes. They then threw out all the "Doyle ballots" and thus found a majority for the sitting member. They said:

Let it be remembered that fraud can rarely, if ever, be proved by direct evidence, and that the rule is that whenever a sufficient number of independent circumstances which point to its existence are clearly established a *prima facie* case of its existence is made, and if this case is not met by explanation or contradiction it becomes conclusive.

The circumstances in this case were: (1) the Doyle ballots were pasters which had been written on contrary to law; (2) they were so marked as to be identified; (3) they were all prepared by one man, who "was a briber of voters;" (4) one voter at least and, as the minority believed, two, were bribed to cast Doyle ballots; and (5) the name Doyle was fictitious.

Moreover, the ballots marked in this way were in contravention of the statute which provided that "No voter shall place any mark upon his ballot by means of which it can be identified as the one voted by him," and made violation of this provision punishable as a misdemeanor. The 28 Rockwell marked ballots were all marked alike, and hence were not open to the same objection. Moreover, the testimony in regard to them was not properly in the record.

This case was very fully debated, and the *minority* substitute, declaring that Noyes was not elected, was adopted (April 22, 1892) by a vote of 140 to 98. The substitute resolution declaring Rockwell elected was then adopted by a vote of 128 to 106. A motion to recommit the case to the committee to take further testimony was defeated by a vote of 110 to 124, and the resolutions as amended were adopted without division.

[Stofer, 23-45.]

(3) REYNOLDS *vs.* SHONK.

Fraud, bribery, and intimidation; excessive expenditure for campaign fund. Report for sitting member, who retained the seat.

Report by Mr. Moore.

According to the returns, the sitting member was elected by a plurality of 1,484. Contestant did not claim the election for himself, but sought to impeach the title of contestee by alleging "fraud in the election, and bribery, intimidation, and corruption of voters * * * in every election district in the Twelfth Congressional district of Pennsylvania." Contestee demurred to the very vague notice of contest and denied its allegations.

The committee took no formal action upon the exceptions filed to the notice of contest, nor pronounced their decision upon it, but we are of opinion that the notice of contest in its various charges upon which there was any testimony is too vague and indefinite, and does not conform to the act of Congress referred.

The committee, however, heard the whole case upon its merits. The principal charge seemed to be that Mr. Shonk spent \$9,550 in his canvass, which he admitted, explaining specifically the purposes for which it was expended. The committee found that by the testimony of "a great many prominent men and officials of both parties," these sums "were not immoderate, but rather in conformity to the custom as practiced in Luzerne County."

The report was unanimous, and the resolutions recommended confirming the sitting member in his seat were passed on February 15, 1893, without debate or division.

[Stofer, 47-50.]

(4) McDUFFIE *vs.* TURPIN.

False counting. Majority report for contestee; minority report for contestant. Contestee retained the seat.

Majority report by Mr. Lockwood; minority report by Mr. Johnson.

The issues and testimony in this case were very similar to those in the case between the same parties in the previous Congress, and to other cases from the same district (the Fourth Alabama). According to the returns as canvassed and filed with the secretary of state, Turpin received 9,595 votes; McDuffie 4,931, and G. T. McCall 3,899. McDuffie contested, alleging that in a large number of precincts votes cast for him were counted for Turpin or McCall, and that in other precincts in which he received large majorities the returning officers failed to deliver or the county boards refused to canvass the returns. The evidence in most cases, as in previous contests, was the testimony of unofficial ticket distributors and clerks, who gave out McDuffie tickets one at a time to voters, watched them voted, and kept a list or tally sheet of those who voted, which list, when it differed very radically from the returns, and was in accordance with the known political division of the precinct, while the returns were the reverse of this division, he claimed was sufficient to establish the fraudulent character of the returns and to determine the true vote.

In a number of precincts in which elections were held, but the returns failed to be made or were not counted and the evidence was not contradicted, the committee counted the vote as shown by the evi-

dence. This would add to the vote of Turpin 13 votes, to that of McDuffie 684 votes, and to McCall 1 vote—a change not sufficient to overcome the returned majority of contestee. In the other precincts, in which returns were made and counted, the committee refused to disturb them.

It is a well-established rule of law that the best evidence should be produced if possible to produce the same. In this case it was within the power of the contestant to have produced from each of the precincts the ballot boxes with the ballots in each of the election precincts, with the exceptions hereinbefore stated, and the ballots, together with a list of all the voters, could have been placed in evidence, as there is no proof of their loss or destruction, and if a fraudulent count of the ballots by the inspectors and a fraudulent return of the votes for the several candidates had been made, the same would have fully and satisfactorily appeared by a recount and examination of the ballots.

Instead of this best evidence, contestant had offered the lists kept by his partisans, who were frequently ignorant and were stationed from 30 to 100 feet from the polls.

It would be an exceedingly dangerous precedent to permit the actual returns, as made by the inspectors and sworn officers of the election, to be disregarded and impeached by returns made out by irresponsible partisan workers at the polls.

The committee therefore recommended resolutions declaring contestee entitled to his seat.

The minority report went elaborately into the history of other contests from this district, showing that its elections had been disputed for many years, and that the House, both in Republican and Democratic Congresses, had usually found large amounts of fraud proved. Newspaper articles were also quoted, showing that the existence of fraud was recognized and deplored by the people of the State. The testimony in regard to each precinct in the present case was then analyzed, with the result, according to the findings of the minority, that a majority of 604 votes for contestant was conclusively proved, and the probability was established that his actual majority was much larger.

The case was fully debated in the House, and on February 28, 1893, the minority substitute resolution declaring contestant elected was defeated by a vote of 64 to 190. The committee resolution was then adopted without division and contestee retained his seat.

[Stofer, 51-140.]

(5) GREEVY vs. SCULL.

Illegal votes; irregular precincts. Report for contestee. No action by the House.

Report by Mr. O'Ferrall.

This case involved practically the same legal questions as the case of Craig vs. Stewart, *supra*, but the report goes much more fully into the technical issues, and does not mention the general question of the effect of the Pennsylvania registration law, discussed in the former case. The record in this case covered 2,633 printed pages, and involved the separate investigation of about 1,300 disputed votes, most of them cast by voters who were not registered and did not appear to have made the affidavits required by law of nonregistered voters. Contestant relied in most cases on the testimony of the voters themselves to show for whom they voted. The committee found that this evidence

was secondary and inadmissible, since the best evidence, the numbered ballots, could have been produced. However, the committee considered it "proper to report the names of such persons who cast illegal votes, and who, as shown by their own testimony, voted for the contestee."

Contestant attacked the vote of eight townships on the ground that the votes were cast in boroughs which were distinct from the townships. In each of these cases the borough poll was the only place where the residents of the township could vote and was their usual place of voting. The committee held, however, that the constitutional provision of the Pennsylvania constitution of 1874 that a voter "shall have resided in the election district where he shall offer to vote at least two months immediately preceding the election" required the rejection of these votes. They therefore excluded the 1,200 votes cast for contestant and the 1,363 votes cast for contestee in these boroughs by voters resident in the townships.

While the committee regard it as a hardship upon the electors in these different townships to reject their votes, yet the constitution and laws of Pennsylvania must be obeyed. The provision of the constitution of that State requiring, without qualification, the electors to vote in the districts in which they had resided for at least two months immediately preceding the election must be enforced. A mistaken idea of the law upon the part of the electors, however honest, or a neglect or refusal upon the part of the lower courts to establish voting places within the townships, can not render void the plain provisions of the constitution. The power to fix the qualifications of voters is vested in the State, subject only to the limitation contained in the fifteenth amendment to the Constitution of the United States. Each State fixes for itself these qualifications, and the United States must adopt and has uniformly adopted the State law upon the subject, and the House of Representatives should not in any case fail to act in conformity with it.

There were also several districts in which the boundaries of precincts had been changed previous to this election, but it appeared in each case that the voters voted at the polling place in the precinct in which they were actually resident and had been resident for the legal period, and that the registration lists of the former precincts were in use at the polls of the new precincts, and sufficiently established the qualifications of the voters. These votes were counted as returned. Certain minor technical questions involving a few votes were also decided, and the committee submitted four statements, based on four different theories. Statement No. 1 excluded all illegal votes, including those in which the only evidence of the way the voter voted was the testimony of the voter himself. Statement No. 2 excluded only those illegal votes in regard to which the ballots were introduced. Statements 3 and 4 were submitted on the basis of contestant's claim that votes cast in new townships and those cast by residents of the annexed territory of Altoona should be rejected, though the committee held that these votes were legal. Contestee received a majority by all these statements: By statement No. 1, 716 votes; No. 2, 687 votes; No. 3, 614 votes; No. 4, 585 votes. Statement No. 2 was adopted by the committee as correct.

The committee recommended resolutions declaring contestee entitled to the seat. There was no minority report, and (the report having been submitted late in the second session) there was no action by the House.

[Stofer, 141-164.]

(6) MILLER vs. ELLIOTT.

Defective ballots. Majority report for contestee; minority report for contestant. No action by the House.

Majority report by Mr. Paynter; minority report by Mr. Johnson.

According to the returns as certified by the precinct managers, Miller received 7,026 votes, Elliott 3,793 votes, and E. M. Brayton 1,413 votes, a plurality for contestant of 3,233 votes. In addition to these votes, Miller received 324 votes in two precincts in which all his ballots were thrown out by the precinct boards on the grounds hereafter discussed, making his majority of the vote as cast 3,557. Elliott appeared before each of the boards of county canvassers in the district, in person or by counsel, and moved that all of the ballots cast for Miller be thrown out on four grounds: (1) That the ballots were one-sixteenth of an inch shorter than required by the statute of the State; (2) that the word "for" appeared on the ballots preceding the word "Congress;" (3) that the paper on which the ballots were printed was not "plain white paper," as required by statute, and (4) that the name "Thomas E. Miller" was so printed upon the ballots as to be visible through their backs when folded. The boards of canvassers in four counties sustained this motion, and excluded all the ballots cast for Miller; the boards in the remaining five counties overruled the motion and counted the votes as returned. Counting the Miller votes in the five counties and rejecting them in the four would give Elliott a plurality of 478 votes. Appeal was taken to the board of State canvassers from all of these decisions—by Miller from one set of decisions and by Elliott from the other. The vote in the State canvassing board on this appeal was a tie, and no decision was reached. The matter was then taken to the supreme court of the State, which decided that, the State canvassing board having failed to come to any decision, the decision of the county canvassing board in each case must stand. A writ of mandamus was therefore issued to the State canvassing board commanding them to make out a statement of the vote as certified to them by the boards of county canvassers. The determination of the case on the merits was recognized as the province of the House of Representatives. The Miller votes were therefore counted in the five counties and not counted in the four, and the certificate was issued to Elliott.¹

The statute of South Carolina prescribing the form of ballot to be used was as follows:

SEC. 115. The voting shall be by ballot, which ballot shall be of plain white paper of two and a half inches wide by five inches long, clear and even cut, without ornament, designation, mutilation, symbol, or mark of any kind whatsoever, except the name or names of the person or persons voted for and the office to which such person or persons are intended to be chosen, which name or names and office or offices shall be written or printed, or partly written and partly printed, thereon in black ink; and such ballot shall be so folded as to conceal the name or names thereon, and so folded shall be deposited in a box to be constructed, kept, and disposed of as hereafter provided; and no ballot of any other description found in any election box shall be counted.

Contestee claimed that all of Miller's ballots were obnoxious to this law for the four reasons above given, and the committee sustained the

¹This statement is derived principally from the minority report, the briefs and testimony, as the majority report does not clearly state the history and issues of the case.

claim on the last two grounds, viz, that the paper on which Miller's ballots were printed ("40-pound white book paper," described by some witnesses as of a "dirty white" or "dark white" color) was not "plain white paper" within the meaning of the law; and that the name "Thomas E. Miller" was printed in heavy type in a position on the ticket which made it possible to distinguish it from the back when the tickets were folded. The testimony of some witnesses was quoted to show that they could distinguish the folded Miller ballots, at a considerable distance, from the Elliott ballots, which were printed "on a finer and whiter paper," and that if the ticket was folded in a certain manner and turned in the right direction it could be distinguished at a distance of 6 or 8 feet by the impression of the type showing through the back. A witness testified to a conversation with contestant, indicating that contestant had procured the ballots to be so printed for the purpose of making them distinguishable. Contestant denied this conversation.

The object of the law was to, so far as possible, prevent bribery and intimidation of the voters; that for whom the elector voted should alone be his secret, thus preventing anyone from knowing or questioning him as to the ticket which he voted. * * * The terms of the law requiring the ballot "shall be so folded as to conceal the name or names thereon" is no more mandatory in its terms than its other provision regulating as to size, kind of paper, ink, etc. It was not proper to count the ballots which were excluded from the count. The terms of the act are plain and unambiguous and give a full and conclusive answer to the charge that the ballots were improperly omitted from the count, which no sophistry can obscure or evade. * * * Simply because to reject ballots would have the effect of disfranchising electors is no reason for counting them if they are in violation of law. This result was intended by the law when the electors disregarded its provisions. * * * No court in South Carolina, so far as the committee is aware, has passed upon this law. The committee hold that the statute is mandatory; that the ballots were properly excluded, and should not have been counted; that the law-making power should be upheld in its effort to preserve the secrecy of the ballot, thus securing, as far as possible, a pure and honest ballot.

Miller's ballots being illegal, the committee proposed resolutions confirming Elliott in his seat.

The minority complained of the action of the committee in delaying the report on this case until within seven days of the expiration of the Congress, and insisted that the Miller ballots were legal and should have been counted. All the rejected ballots in the case were in the possession of the committee, and an actual examination of them showed that the objections to them were not well taken. A large number of them were fully 5 inches in length, as required by law, and the shortage of one-sixteenth of an inch in the remainder was easily accounted for and was immaterial. "*De minimis non curat lex.*" The word "For" before "Congress," on the ballots, would have been understood if it were not expressed; it appeared upon other ballots which were counted by the same canvassing boards, and could not possibly be construed as a distinguishing mark.

The complaint of the color of the ballots was equally untenable. Miller's ballots were printed on an ordinary grade of white paper. Elliott's ballots were printed on a finer grade, of a lighter shade. Brayton's ballots were printed on a still finer grade, of still lighter shade. No two grades of white paper are exactly alike, and it is impossible to secure absolute uniformity of appearance except by having all the ballots officially printed in identical form, as is done in those States in which absolute uniformity is contemplated. All three grades of paper

used at this election were correctly described, both in a popular and a technical sense, as "plain white paper." If one of them were to be taken as the standard, and Miller's ballots thrown out because Elliott's were whiter, then Elliott's should be thrown out because Brayton's were whiter still. The minority declared, from actual inspection of the ballots, that it was impossible to recognize either ballots by the difference in shade when separately presented, though, when placed side by side, they could be distinguished at a very short distance.

From the same inspection of the ballots it appeared that the complaint of the manner of printing them was also unfounded. Miller's name was printed in heavier type than Elliott's, but Elliott's was printed in sharper type than Miller's. The name was visible through the back in occasional tickets of both sorts. The charge that Miller's tickets were folded in a peculiar way, so as to show the name, was disproved by the tickets themselves, which were in evidence with the original creases made by the voters in folding them, and were not so folded.

In conclusion of the whole matter the minority affirm that Thomas E. Miller was clearly and legally elected over William Elliott to represent this district in Congress by a plurality of 3,283 votes, and that the rejection of his ballots by the election officers of the district, whereby the certificate of election was given to Elliott, was without a shadow of excuse either in law or in fact.

The report was submitted on February 25, 1893, and the Congress expiring by limitation on March 4 the case was not reached for action in the House.

[Stofer, 165-197.]

FIFTY-THIRD CONGRESS, 1893-1895.

Committee on Elections.

Mr. O'FERRALL, Virginia.	Mr. WOODARD, North Carolina.
BROWN, Indiana.	TAYLOR, Tennessee.
PAYNTER, Kentucky.	WAUGH, Indiana.
LOCKWOOD, New York.	DANIELS, New York.
LAWSON, Georgia.	MCCALL, Massachusetts.
HAYES, Iowa.	THOMAS, Michigan.
PATTERSON, Tennessee.	WHEELER, Illinois.

Mr. DENSON, Alabama.

(On January 8, 1894, Mr. JONES, of Virginia, was appointed to the committee. On December 6, 1894, Mr. PAYNTER was excused and Mr. BECKNER appointed.)

Beginning with this Congress, there are no compilations of the cases, and all the references are to the original reports,

Cases.

- (1) W. W. Whatley *vs.* J. E. Cobb, *Alabama*.
- (2) A. H. A. Williams *vs.* Thomas Settle, *North Carolina*.
- (3) Warren B. English *vs.* Samuel G. Hilborn, *California*.
- (4) P. H. Thrasher *vs.* B. A. Enloe, *Tennessee*.
- (5) Thomas E. Watson *vs.* James C. C. Black, *Georgia*.
- (6) H. L. Moore *vs.* Edward H. Funston, *Kansas*.
- (7) Charles H. Page, *Rhode Island*.
- (8) Louis Steward *vs.* Robert A. Childs, *Illinois*.
- (9) Charles E. Belknap *vs.* George F. Richardson, *Michigan*.
- (10) J. T. Goode *vs.* J. F. Epes, *Virginia*.
- (11) John J. O'Neill *vs.* Charles F. Joy, *Missouri*.

(1) WHATLEY *vs.* COBB.

Returns not forwarded. Report for contestee, who retained the seat.

Report by Mr. Taylor.

According to the returns, as canvassed by the secretary of state of Alabama, contestee had a majority of 1,928 votes and received the certificate. Contestant claimed that certain returns had not been forwarded by the precinct inspectors to the county canvassers. Evidence was presented indicating that at these polls contestant received 2,701 votes and contestee 1,228, but as this would still leave a majority of 515 for the sitting member, the committee considered that the case was concluded by these figures. They reported, however, that the whole of the evidence by which contestant sought to establish his claim was inadmissible, being all secondary or hearsay. Most of the argument of contestant was characterized as based on "suppositions," into which the committee declined to follow him. "The contestant suffered a fair defeat. He should have accepted the result without complaint."

The committee was unanimous in the conclusion that contestant had not sustained his claim, and, on March 23, 1894, the House adopted the resolutions presented, without debate or division.

[Report 267, second session Fifty-third Congress.]

(2) WILLIAMS *vs.* SETTLE.

Illegal registration, illegal votes, and irregularities. Majority report for sitting member, minority report for contestant. House refused to consider.

Majority report by Mr. Paynter; minority report by Mr. Woodard.

The principal point of contest in this case was the legality of the registration of certain voters who were recorded on the registration books under the heading "place of birth" as giving simply the State of birth, or in some cases the name of a county which might not be in North Carolina, without giving the State. The code of North Carolina contained (sec. 2676) the following provision:

No registration shall be valid unless it specifies as near as may be the age, occupation, place of birth, and place of residence of the elector, as well as the township or county from whence the elector has removed—in the event of a removal—and the full name by which the voter is known.

The supreme court of North Carolina, in a recent case [Harris *vs.* Scarborough, 110 N. C. R., p. 232],¹ had construed this statute as mandatory, and held that the registry of a certain precinct in contest was fatally defective in stating the elector's place of birth as simply "North Carolina." The county of birth should have been specified. If the failure to give a more accurate description had been due to the fault of the registering officer it would not have disfranchised the voters, but if the officer simply read the headings of the columns to the voters he "certainly did all that the law required of him." He is presumed to have performed this duty, and the voter is presumed to have known the imperative requirements of the law as to the specific answer he should make. His failure to be registered correctly "must be considered due to the carelessness or inexcusable ignorance of such electors."

This decision had been rendered by a divided court, and the majority of the committee plainly inclined to the views of the dissenting judges, but all the committee (as stated in the minority report) agreed to be bound by the decision of the State supreme court, and the majority report was confined to showing that, under the state of the evidence in this case, the conclusion did not follow that the returned majority of contestee must be reversed by rejecting votes illegal on account of this irregularity in registration. The minority (Messrs. Woodard, Patterson, Hayes, Denson, and Jones, all of the majority party of the committee) held that the decision of the supreme court was binding, and that its application required the seating of contestant. There were also many minor questions of irregularity discussed in the case.

Contestant presented oral testimony and also, in some cases, official certificates to show that in a large number of precincts certain named voters had been imperfectly registered as to place of birth, and that

¹This decision has since been reversed by the supreme court of North Carolina (see Quinn *vs.* Lattimore, 120 N. C.).

certain of them were colored voters. He introduced general testimony as to these precincts that the colored voters voted for contestee, and asked that the votes of those shown to have voted without valid registration be deducted from the vote of contestee. The committee held that the proof was insufficient. In a number of cases it was proved that the registry referred to was a new register, and there was no competent evidence to show that the new registration had been legally authorized. No poll books were presented to show that any of the voters in question voted, and in four counties there was no transcript of the registration books. A certificate that the books purported to show certain facts could not take the place of a transcript of their contents. "If this conclusion is correct, then there is no competent testimony in this record as to how any elector was registered or as to whether or not he voted either in the counties of Rockingham, Stokes, Durham, or Caswell. We will, however, proceed to present this case independent of the conclusion which the committee has reached as to these questions. However, the effect of these conclusions would be to permit the contestee to retain his seat."

The committee entered into a detailed analysis of the vote in each precinct, showing that if the white votes shown to be illegal by the same evidence as that produced against the colored votes were to be deducted pro rata from contestant and from Lindsay, the Populist candidate, the result would be unaffected. In some precincts in which the testimony showed nearly all the voters to have been irregularly registered, and there was no evidence how the small remainder voted, the committee suggested the alternative plan of rejecting the entire poll, which would lead to the same result.

Certain other precincts had been rejected by the county canvassers or were asked to be rejected by the committee on the grounds:

First. Certain judges or inspectors of election were not sworn.

Second. Registration books were not kept open thirty days.

Third. Some of the officers absented themselves from the polling place for a brief time during the election.

Fourth. Because parties other than the officers handled the ballots.

Fifth. The officers of election began to count some of the ballots before the polls closed.

Sixth. An inspector or judge of the election was a candidate.

The committee discussed the evidence in regard to all these precincts in detail, and found in each case either that the facts charged were not established or that the irregularities were shown not to have affected the honesty of the election or the correctness of the ascertained result.

Contestee was certified by the board of State canvassers as having received a plurality of 329 votes. On the precinct returns his plurality was 623, but certain of these returns had not been certified to the State board by the county canvassers, for the reasons mentioned. Under any of the theories discussed by the committee this majority could not be overcome, and the committee therefore recommended resolutions declaring contestee elected.

The minority of the committee quoted the decision of the supreme court of North Carolina in the case of *Harris vs. Scarborough*, and complained that the majority had not properly applied it to the evidence in this case. In every precinct in contest, except one, it had been shown that the registering officers did all the law required, and the imperfection of the entry of the birthplaces of the voters on the regis-

tration lists must therefore, in the words of the court, be attributed "to the carelessness or inexcusable ignorance of such elector." The objection of the committee to the failure to prove the legality of the new registration was groundless, for all the votes in question were newly-registered votes, entered since the passage of the law under which this election was held. The evidence in regard to the registration lists was in legal form. It was not necessary to have introduced a transcript of the entire book, including names not in question. The minority asserted, further, that there was no proof to sustain the allegation that a large number of white voters voted illegally for contestant. They also excluded from consideration all the testimony taken in Rockingham County before a notary who was a minor. The majority had not passed on this question. The minority claimed that the county canvassing boards, which excluded the returns from certain disputed precincts, were vested by the laws of North Carolina with judicial powers, and especially emphasized the correctness of their action in one of the precincts in which one of the judges of election was a candidate for constable.

Under the findings of the minority 630 illegal votes were found to have been cast for contestee and 48 for contestant. As the difference was greater than the apparent plurality of 402 votes given to contestee by the minority, they reported resolutions declaring contestee not elected and contestant entitled to the seat.

The case was called up on August 6, 1894, but the author of the minority report having been called to South Carolina by sickness, the case was postponed until the next session. It was again called up on February 28, 1895 (near the close of the last session of the Congress), and, the question of consideration being raised, the House, by a vote of 102 to 144, refused to consider the case. This left contestee in his seat.

[Report 337, parts 1 and 2, second session Fifty-third Congress.]

(3) ENGLISH *vs.* HILBORN.

False count. Recount. Majority report for contestant; minority report for sitting member. Contestant seated.

Majority report by Mr. Brown; minority report by Mr. Waugh.

Contestee received a plurality of 25 on the face of the returns. One precinct at which he received a plurality of 8 was not received by the board of supervisors in time to be included in their count. Adding this, contestee's majority was 33.

The only issue in the case was the vote of Altamont, Alameda County. According to the returns contestant received 15 votes and contestee 37. This was the reverse of the usual result in the precinct, which was a small farming district of fixed population, and had always been Democratic. Contestant called 47 of the voters in this precinct as witnesses and 37 of them testified that they voted for him. Contestee then had the ballots recounted, with the result that the vote was, contestant 29 and contestee 22. If the testimony of the voters was taken, but the voters not called were presumed to have voted for contestee, contestant would have a plurality of 3 votes in the district. If the whole poll was rejected and only the votes proved counted, he would have a plurality of 26 in the whole district. If the recount

was accepted, contestee would have a plurality of 4. The committee sustained either of the two former counts; the minority accepted the recount and reported for contestee. The rule that the ballots are the best evidence was explained by the majority as having grown up before the adoption of the Australian ballot system. Under the old system the ballot was selected and deposited by the voter in his own way, and was his written act, not to be overcome even by his own testimony. Under the new system the ballot is only in part the act of the voter and, in the case of an illiterate voter, may be wholly the act of an official not chosen and perhaps not trusted by him. The rule ought, therefore, now to admit the testimony of the voters. In this case the recount was not sufficiently sustained. The ballots recounted had been for some time in a sealed package on the floor of a public room, and might have been tampered with.

The minority held that the ballots were the best evidence, and referred to the testimony showing that the ballots recounted were the identical ballots in the identical condition that they were when counted and sealed up by the election judges. According to the recount, contestee still had a plurality of 4 votes.

The case was debated for a short time on April 3 and 4, 1894, under the limitations of a special rule. The resolution declaring contestee not elected was passed by a vote of 170 to 13 (many members not voting) and that declaring contestant elected by 165 to 17. Mr. English was then (on April 4, 1894), sworn in.

[Report No. 614, second session Fifty-third Congress.]

(4) THRASHER *vs.* ENLOE.

Illegal votes. Irregularities. Both reports for sitting member, who retained the seat.

Majority report by Mr. Patterson; minority report by Mr. McCall.

According to the returns, contestee had a majority of 118. A mistake of 3 votes in his favor was conceded, leaving him a net majority of 115. Both sides made charges of illegal votes, imperfect ballots, and other informalities. The majority of the committee subtracted 363 invalid votes from the vote of contestee and 358 from the vote of contestant, leaving contestee still a majority of 110 votes. The minority made fewer changes, and left him a majority of only 25.

Thirty-six votes were returned as cast for "Benjamin B. Enloe" instead of Benjamin A. Enloe, and 119 were returned for "P. H. Thrasher" instead of P. H. Thrasher, but these were all clerical errors. "These clerical errors could not affect the validity of the ballots."

A number of ballots were thrown out by the election judges on the ground that they were not of the dimensions prescribed by law. The majority sustained this exclusion; the minority counted the votes. The law on the subject was explicit and mandatory.

It provided, in the first section:

The ballots to be voted shall be of plain white paper, 7 inches long and 3 inches wide, upon which the office to be filled, with name or names to be voted for, shall be plainly written or printed.

The second section was:

That it shall not be lawful to print or place any picture, sign, color, mark, index, or insignia thereon, and any ballot of less or greater dimensions than as provided in the first section of this act, or any ballot upon which said picture, sign, color, mark,

index, or insignia may be placed, if found in the ballot box, shall not be counted by the judges holding said election, but shall be treated as invalid.

The majority said:

This statute is, without question, mandatory. No language could be employed that would be more emphatic. There is no room for construction. We must follow the plain mandate of the law or refuse outright to obey it. It is insisted by counsel for contestant that while the statute may be mandatory yet the difference between the dimensions of the ballots in question and the ballots prescribed by law is so slight that it ought not to be recognized in determining their validity. One-eighth or one-sixteenth of an inch difference in width or length, he insists, is too slight to be noticeable. The fact is the difference was material and was readily noticed by the judges.

The statute does not prescribe how nearly the ballot shall approach the dimensions of the prescribed ballot, but expressly says that "any ballot of less or greater dimensions shall not be counted." The extent of the variance is not material; it is the fact of substantial variance the law deals with. It may be conceded that the law did not contemplate a literal compliance with its mandate, but any difference which could be easily observed on comparison with the prescribed ballot would clearly fall within its meaning.

The minority counted the votes, saying:

The evidence shows that the ballots in question were short of the required dimensions by from one-sixteenth to one-eighth of an inch, and upon that ground they were rejected by the judges of election. The statute is mandatory, but the undersigned are strongly of the opinion that the variance from the prescribed dimensions must be of a substantial character.

The object of this provision doubtless was to preserve the secrecy of the ballot and to prevent a ballot being cast of which the size would be a distinguishing mark. But if it is to be held that the ballot must be of precisely the dimensions prescribed by the statute, then it would be a practical impossibility to secure a legal ballot with the ordinary appliances used in printing. Fine mathematical instruments would always show some infinitesimal deviation from the exact dimensions prescribed by law.

We can not believe that the statute was ever intended to have such a construction. A deviation of from one-sixteenth to one-eighth of an inch would not be noticeable and would not serve to mark the ballot. The report of the majority disregards these ballots. We believe that they were substantially in compliance with the statute, that they were cast by legal voters, and that they clearly expressed the intention of the voter to vote for the contestant. They should therefore be counted for him.

The majority also deducted from the count of both sides ballots having at the head the words: "For President, Benjamin Harrison," and "For Vice-President, Whitelaw Reid," on the ground that these words came within the prohibition of a "picture, sign, color, mark, index, or insignia" in the law above quoted. The minority counted these votes.

The constitution of Tennessee provided:

There shall be no qualifications attached to the right of suffrage, except that each voter shall give to the judge of election, where he offers to vote, satisfactory evidence that he has paid his poll taxes assessed against him for such preceding period as the legislature shall prescribe and at such time as may be prescribed by law, without which his vote can not be received. * * * The general assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot box.

The law in force at the time of this election provided that the "satisfactory evidence" of the payment of the poll tax should consist of the tax receipt, a certified copy thereof, or a specified affidavit. Any person voting or any judge of election knowingly permitting any person to vote without complying with the act was declared guilty of a misdemeanor. The committee said:

The constitution is mandatory, and the statute is especially so. There is no room for doubt. Unless the evidence required by the constitution and specially prescribed by the statute is furnished to the judges the elector liable to a poll tax has no right to vote. It is illegal to receive his vote, and illegal to count it if it is received.

Most of the electors in question had, in fact, paid the tax, and in one case the constable who collected it was an officer of the election and had his collection book with him, but the evidence required by law was not presented, and the committee held that no other could cure the defect.

While it is conceded that the judges in this instance were honest, and to enforce the law will work a hardship on the contestee and deprive electors who, in point of fact, paid their poll taxes of their ballots, yet it is better to do this than to subvert the safeguards which the State has thrown around the ballot box to prevent fraud and the evasion of the law.

The minority did not throw out these ballots, and discussed the facts and the justice of the case, but did not analyze the law. "On the whole, we incline to the opinion that these ballots should be counted."

Contestant attacked the vote of the city of Jackson on the ground that it was held under "Dortch" Australian ballot law, to which its population did not entitle it, and that the law itself was unconstitutional, as imposing an educational qualification forbidden by the constitution of the State. The law provided for printing the names in alphabetical order, and did not permit the voter assistance except in case of physical infirmity. The objection as to population was answered by the census, and the objection to the constitutionality of the law by the fact that the supreme court of Tennessee had, in the case of *Cook vs. the State*, declared it constitutional. The minority of the committee did not agree with the State court, but followed its decision. They said:

The constitution of Tennessee, in effect, prohibits the enactment of any statute requiring that a man shall be able to read and write in order to vote. It is clear that the Dortch law imposes such a requirement, and it would appear to be clearly repugnant to the principles of the constitution. But the supreme court of Tennessee has decided this law to be constitutional, and we feel constrained to follow that decision in the present case, in accordance with the general rule. We are clear in our opinion, however, that this law disfranchises men who possess all the constitutional requirements of voters.

The committee also excluded the vote of Savannah, Hardin County, on the ground that no registration of voters had been made, in violation of the law requiring registration in towns of 2,500 inhabitants and upward. "It is evident that the failure to open registration books under this law will defeat an election." The minority did not definitely state its ruling on this vote, but called attention to the provision of the law making the original certificate the sole evidence of registration. By buying up these original certificates it was possible by bribery to disfranchise all voters who would sell them, and the minority was informed that this was a common practice.

The committee were unanimous in the conclusion that contestee was elected, and the House, on July 10, 1894, passed the resolutions recommended, without debate or division. So contestee retained the seat. [Report 842, second session Fifty-third Congress.]

(5) WATSON *vs.* BLACK.

Irregularities, intimidation, bribery. Report for sitting member, who retained the seat.

Report by Mr. Lawson.

Contestant asked that the votes of a number of precincts be thrown out for irregularities, bribery, and intimidation. The committee

called attention to the fact that if all his claims were allowed the evidence did not show that enough votes were affected to change the result, but entered into a discussion of each of the claims, finding the evidence generally insufficient and the legal objections untenable.

In the city of Augusta there were three ballot boxes at each precinct, but the evidence showed that this number was necessary to poll the large vote, as the law did not permit the number of precincts to be increased. The law was, moreover, directory, containing the provision:

Paragraph 1334 (1362) (1281). *Election not void by reason of formal defects.*—No election shall be defeated for noncompliance with the requirements of the laws, if held at the proper time and place by persons qualified to hold them, if it is not shown that by that noncompliance the result is different from what it would have been had there been proper compliance.

There was also complaint that the boxes were so placed that the United States supervisors could not properly supervise them all, but the evidence was not clear, and it was evident that no harm was intended or done and that the supervisors did not take proper steps to have the difficulty remedied, if any existed. Some ballots were also handled by unauthorized persons, and some officers of election were absent for a few moments at a time, but no harm was done "and the affair appears, on the whole, to be too trivial to deserve rebuke."

The principal charge was indirect intimidation, bribery, and wholesale repeating. There was some bribery at two precincts, but there was no evidence that more than \$11 or \$12 was expended, and the number of votes affected could not be more than 20, and was probably much less. There was some free whisky at some of the polls, but less than usual. There was also some conflicting evidence, part of which indicated that some mill hands may have voted for contestee for fear of discharge, but the evidence was contradicted, and very few votes were even claimed in evidence to have been affected. The committee said, moreover, "We can conceive how an ardent and active politician among employees in a factory could become obnoxious and merit his discharge apart from his support of any candidate." There was also a considerable amount of vague and unsatisfactory evidence on the subject of repeating, but nothing sufficient to justify any definite conclusion. No protest was made at the time and there were no arrests, possibly because, if there was repeating, both parties expected to profit by it.

Some votes offered at one precinct were not accepted, but the reason for the rejection did not appear and was presumed to have been good. Certain returns had also been rejected as not signed, but some of them were signed in part and were enough to show that the election was legally held and for whom the votes were cast. The committee counted these returns as coming within section 1334 of the code, above quoted.

Most of the contentions of contestant not being sustained, and all of them if sustained being insufficient to overcome the returned majority of contestee, the committee reported resolutions confirming contestee in his seat.

The case was called up on June 29, 1894 (by Mr. Pence, not a member of the committee). Mr. Brown, of the committee, raised the question of consideration, and the House voted, by 220 to 0, to consider the case. Mr. Pence then moved that the case be postponed for two days and the contestant be then given leave to speak. The motion

was lost, 77 to 126. Mr. Pence then "filibustered," and the Committee on Rules brought in a "no intervening motion" rule, which was passed by a vote of 132 to 54 (11 being counted present to make a quorum). The resolutions of the Committee on Elections were then passed by a vote (on division) of 106 to 10, and contestee was accordingly confirmed in his seat.

[Report 1147, second session Fifty-third Congress.]

(6.) MOORE *vs.* FUNSTON.

Illegal votes; fraudulent registration. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Jones; minority reports by Mr. McCall and Mr. Paynter.

According to the returns contestee had a plurality of 81 votes. Contestant sought to overcome this majority by showing illegal votes, fraudulent registration, and irregularities, all in the interest of contestee, and covering a much larger number of votes than his returned plurality. The majority of the committee found most of the charges sustained, the minority found most of them not sustained, and on individual questions of illegal votes, held that the majority of the sitting member was increased. Mr. Paynter, who signed neither report, presented a brief separate report simply announcing that he agreed with the conclusions of the minority.

The answer to the notice of contest was served on contestant either one or two days late. There were also objections to some specifications in the notice of contest, and to some testimony as bearing on points not covered by the notice. On this whole question the committee said:

If, then, we should closely apply to the notice of contest the rule of pleading upon which contestee insists, and should apply to the answer the requirement of the law, we should find contestee without an answer, and would have but to ascertain whether, upon the grounds of contest undoubtedly specified in the notice, contestant has made good his contention that he, and not contestee, was really elected a Representative in Congress from the Second district of Kansas. If we should take this view of the matter our labors would be greatly lessened, a considerable portion of the huge record in the case would be eliminated, and the finding would necessarily be in favor of contestant. We believe, however, that the real question to be determined is not so much whether this or that bit of evidence offered by contestant certainly relates to something clearly specified in his notice of contest as a ground upon which he relies, nor yet whether contestee's answer and countercharge were made in due time, but rather which of the two claimants, according to the record, was really elected and is really entitled to a seat in the House of Representatives.

In Wyandotte County (Kansas City, Kans.), contestee had a plurality of 179 votes. The committee, without giving figures, held that "the true and legal plurality of contestee in said county over contestant is very small, if, in fact, anything." In this county there were two Republican and no Democratic candidates for the State senate, and much bitter feeling was aroused. There was general circumstantial evidence which the committee held tended to show a systematic conspiracy on the part of Republican friends of one of these candidates to stuff the registry with the names of fictitious and fraudulent voters. Canvassers, before and after election, had been sent through the district to verify the registry lists, and had returned long lists of persons who could not be found. Subpoenas had been issued in this case for those in contest in it, and had all been returned as "not found." There

was also evidence that a number of foreigners who had been brought in by Republican workers had received their "first papers" (entitling them, in Kansas, to vote) without sufficient precautions to determine whether they understood what they were doing, and that foreigners of the same class were brought by Republican workers to the polls on election day. In one precinct there was evidence that a negro policeman at the polls on election day so conducted himself as to frighten some voters of his race, but the committee did not reject this poll. In another precinct there had been irregularities in the count, and the county clerk, when called to produce the ballots, testified that he could not find them. Subsequently he produced them, saying that one of his friends had found them on his gate post. The seal was broken and the ballots had evidently been tampered with. The committee said:

There can be no doubt but that the returns from this precinct should be rejected and the whole vote thrown out, if the ends of justice would be promoted by so doing. But the returns, as they are, give contestant 25 more votes than contestee in the precinct; and it is evident that the real difference was much greater, in contestant's favor. Therefore it is the duty of the committee to ascertain, as nearly as may be, the true vote, that the right may prevail, at least approximately, as to the vote of this precinct.

There is nothing in the report, however, to indicate how many votes the committee counted for either candidate, or on what basis they estimated them.

In Allen County, which gave contestee a majority of 93 votes, the county commissioners did not correctly comply with the law in regard to canvassing the precinct returns and signing the county abstract. The law required the board to determine the result of their canvass of the votes, "and such determination shall be reduced to writing, signed by said commissioners and attested by the clerk, and shall be annexed to the abstract of the votes given for such officers." In this case the abstract of votes was merely certified to by the county clerk, who signed the name of the chairman of the board to it, under general instructions, and also signed his own name. The committee rejected the vote of this county on the ground that the returns were unsigned, and there was no other evidence of the vote presented.

A number of votes were attacked on the ground that they were cast by former Confederate soldiers, and that there was no affirmative proof of the passage of any law by the legislature of Kansas removing their disabilities as required by the State constitution. The committee expressed the opinion that "the constitution of Kansas seems to settle it as to persons shown to have served voluntarily in the Confederate army, and whose disabilities are not shown to have been removed by the Kansas legislature," but did not further determine the question, as it would not alter the result.

The minority held that most of the conclusions of the majority were not justified by the weight of evidence. All of the evidence in regard to bribing and repeating was hearsay, and most of it was by professional gamblers, of contestant's own party. The question of fraudulent registration was not covered by the notice of contest; the testimony of the principal witness was not signed, as he had become a fugitive from justice before it was written out; the rest of it was hearsay, and of a negative character. There was no competent evidence that any of the voters attacked voted, or for whom they voted, and if there was any fraud in this district it was committed in the interest of one or the other of the candidates for the State senate. As all the Democrats

voted for Republican candidates for this office, no inferences could be drawn as to the general partisan bearing of the fraud, even if it were committed.

In the precinct in which the ballots disappeared and afterwards turned up mysteriously on a gatepost, the fraud in the "gatepost ballots" was obvious and conceded; but this was nothing against the original count, and as contestee relied on that count, it was inconceivable that the subsequent falsification of the ballots could have been committed in his interest.

On the vote of Allen county the minority said:

It is no ground for the disfranchisement of the voters of a whole county that the returning officers, on a day subsequent to the election, are guilty of an informality in attesting the returns, when the result is not in any way affected by such informality.

The case was very fully debated, and, on August 1, 1894, the substitute resolutions presented by the minority were rejected by votes of 90 to 127 and 31 to 126. On the next day the resolutions presented by the majority were passed by a vote of 147 to 86, and (on August 2, 1894) Mr. Moore was sworn in.

[Report 1164, parts 1 and 2, second session Fifty-third Congress.]

(7) PAGE.

Term and pay of member. Report for claimant. No action by House.

Report by Mr. Hayes.

This is not properly a contested election case, but is included on account of the question of law discussed. Mr. Page had been contestant in the case of Page *vs.* Pirce in the Forty-ninth Congress. (See p. 419, *ante.*) The House had declared the seat vacant, under the Rhode Island law requiring the successful candidate to have a majority over all at the first election. A second election was held and Mr. Page was elected, serving the remainder of the term. He drew pay and allowances only for the portion of the term actually served, and this report was on a resolution to allow him his claim to pay him the remainder of the pay for the full term. The committee reported the resolution favorably, on the ground that, Mr. Pirce having been adjudged by the House not elected, the seat from the Second Congressional district of Rhode Island had never been filled until filled by Mr. Page by virtue of the second election. He was the only member elected from that district to the Forty-ninth Congress, and was, hence, entitled to pay for the full term.

There was no action by the House.

[Report 1645, third session Fifty-third Congress.]

(8) STEWARD *vs.* CHILDS.

Irregularities (under Australian ballot law). Report for contestee. No action by House.

Report by Mr. Brown.

This case grew out of questions arising under the Illinois (Australian) ballot law of 1891, in use for the first time at this election. The plurality of contestee on the returns was 17, but the committee found

that his true plurality was 252. The courts of Illinois had not construed the new law, but the committee said: "It is deemed the duty of the committee to recommend to the House such construction of these laws as will give force and effect to the clear intention of the legislature which enacted them." The conclusions of the committee were:

The committee find it to be the law that ballots on which the voter undertook to express his choice by marks other than the cross placed in the circle or square, as provided by the statute, are not legal and should not be counted; that ballots voted by electors who were assisted in marking their ballots without having first made the affidavit of disability, as provided by said statute, are not legal and should not be counted; that the initials of that one of the judges of election who delivered the ballots to the voters are a part of the "official indorsement" required by the statute, and ballots not bearing such initials are not legal and should not be counted.

The case was reported on February 1, 1895, and notice was given that it would be called up on February 7, but there is no record of any further action in the House. There was no minority report, but in the next Congress Mr. Daniels in debate (see Record, first session Fifty-fourth Congress, p. 5134) called attention to the fact that the members of the minority had never signified their assent to the report (which was presented near the close of the Fifty-third Congress), and that on the question of "assisted voters" the minority report in the case of *O'Neill vs. Joy* showed that they did not agree.

[Report 1741, third session Fifty-third Congress.]

(9) *BELKNAP vs. RICHARDSON.*

(1) *Prima facie case. Conflicting certificates. Seat given to Richardson, and Belknap authorized to contest.*

Report by Mr. Paynter.

This case came before the House on the opening day of the session (August 7, 1893) by the statement of the Clerk that he had received, on December 22, 1892, a certificate of election showing the election of Hon. George F. Richardson from the Fifth district of Michigan, and had then placed Richardson's name on the roll. Exactly similar certificates were filed by the other members-elect from Michigan at various dates up to April 3, 1893. On February 20, 1893, a certificate of election issued to Charles E. Belknap had been received by the Clerk. The certificate was in due form, but was signed by other persons than those signing the certificate of Richardson and the remaining certificates from Michigan. (The State officers had in the meantime been changed.) The Clerk refused to strike Richardson's name from the roll "having already exercised the authority given to him by law." He therefore submitted the matter to the House.

When Mr. Richardson's name was called, on the organization of the House, he was requested, on objection, to stand aside. On the completion of the roll a resolution was offered providing that Mr. Richardson should be sworn in, for which a substitute was offered providing for the swearing in of Mr. Belknap on his *prima facie* case. The matter went over until the next day, when, after extended debate, the House first rejected, by a vote of 128 to 193, a motion to refer the *prima facie* case to a special committee of five to report in ten days, and then rejected the motion to seat Belknap, by a vote of 114 to 199.

The resolution to seat Richardson was then passed without division, and Mr. Richardson was sworn in.

On August 15 a resolution was introduced which on August 29 (the committee having in the meantime been appointed) was referred to the Committee on Elections, granting Mr. Belknap the right to contest the seat under the provisions of the general law, the time to begin with the date of the swearing in of Mr. Richardson. The committee reported the resolution favorably (Report 3, first session Fifty-third Congress) with an amendment to make the time of contest begin with the date of the passage of the resolution, Mr. Paynter saying, in presenting the report, that he had examined all the precedents, and the privilege of contesting had always been given the unsuccessful claimant on a *prima facie* case. The House passed the resolution as recommended, without division, and the contest on the merits (see below) proceeded in the usual manner.

There is no report of any committee discussing the issues of the *prima facie* case, but from the debate in the House it appears that Richardson had received a plurality of 10 votes on the face of the returns as certified by the county canvassers, while Belknap had received a plurality of 19 votes on the returns as certified by the precinct inspectors. The difference was in the returns in the county of Ionia, where the county canvassers had thrown out 54 votes for Belknap and 25 for Richardson. The supreme court of Michigan issued a writ of mandamus to the Ionia County board, commanding them to reconvene and canvass the returns as originally certified to them. The members of the board which conducted the original canvass had gone out of office, but their successors obeyed the writ, and the successors of the State officers who had issued the original certificate to Richardson issued a like certificate to Belknap.

The difference between the two original counts in Ionia County seems to have been due to a recount of the ballots of that county instituted by the first board of canvassers under a State law providing for such recounts. The supreme court decided that this law did not apply to Congressional elections, and therefore issued its mandate that the count should be made on the original precinct returns.

Questions of law were discussed on both sides during the debate, but there is nothing to indicate that the action of the House was referred to any of them with sufficient clearness to constitute a definite precedent.

[Report 3, first session Fifty-third Congress.]

(2) *Case on merits. Soldiers' Home votes; marked ballots. Majority report for contestee; dissenting report for contestant. No action by the House.*

Majority report by Mr. Lockwood; dissenting report by Mr. Thomas.

On the case on the merits the committee found that contestee was elected by a plurality of 150, after eliminating the illegal votes. Contestant had a plurality of 18 on the face of the precinct returns, but the committee found that the votes (152 for contestant and 41 for contestee) cast by inmates of the Soldiers' Home at Grand Rapids were illegal for nonresidence, and that a number of ballots cast under the new Australian ballot law were void, as containing distinguishing marks prohibited by the statute. The supreme court of Michigan had

passed on both of these questions, and the committee followed the rulings of the court on all the points of law. There was no dispute as to the facts.

Mr. Thomas dissented and filed a separate report, dealing entirely with the question of the Soldiers' Home votes. The decision of the supreme court referred to, he said, had been rendered since the election in question, and if it was to be construed as retroactive, the subsequent action of the people of Michigan in amending the State constitution so as to permit the inmates of the Soldiers' Home to vote at the precinct in which the institution was located should also be construed as retroactive and as reversing the decision of the majority of the court and indorsing that of the dissenting judges. The Soldiers' Home is not an eleemosynary institution, but an evidence of the gratitude of the State to the defenders of civil liberty.

These reports were filed on February 27 and 28, 1895, within a few days of the close of the Fifty-third Congress, and there was no action by the House.

[Report 1946, parts 1 and 2, third session Fifty-third Congress.]

(10) GOODE *vs.* EPES.

Returns rejected by county canvassers for irregularities. Majority report for sitting member; minority report for contestant. No action by the House.

Majority report by Mr. Lawson; minority report by Mr. Daniels.

According to the precinct returns, contestant received a majority of 641 votes, but the county commissioners in seven counties threw out the returns from twenty-one precincts, in which contestant received an aggregate plurality of 1,509 votes. Contestee had a majority of 868 on the remaining returns, and received the certificate. Most of the returns appear to have been thrown out because the ballots or poll books were not properly sealed, or the returns were irregular, ambiguous, or not delivered by the proper officials. The committee went over the evidence in detail, and complained that contestant had not, in most instances, produced the best evidence available. The very point at issue was the reason why the county canvassers rejected each return, and in only two of the seven counties were any of these canvassing officers themselves called as witnesses. The committee, however, excluded none of the testimony, and restored to contestant his plurality in those precincts in which it was shown that the vote had been rejected for trivial irregularities. In some cases it appeared that the reason for rejection was sufficient, as in one precinct where the election was held at the wrong place. In a considerable number of other cases the evidence was not sufficient to show clearly on what grounds the county canvassers rejected the returns, or whether their action was justified. In these cases their action was permitted to stand on the presumption of its correctness. The net result was the reduction of the majority of contestee from 868 to 215, but as the evidence as presented was not sufficient to overcome the remainder of his majority, the committee recommended resolutions declaring him elected.

The minority entered into a somewhat more detailed discussion of the evidence in regard to a number of precincts in which the majority found the evidence insufficient, and concluded in most of them that the reasons for the rejection of the returns could be determined from the evidence, and that these reasons were insufficient. They also called attention to the significant character of the general situation, the rejection of nearly one-third of the precinct returns of the district, all but one (which gave 4 plurality for contestee) showing large majorities for contestant, by boards of canvassers politically opposed to him, for trivial and technical irregularities. They found contestant entitled to the seat by at least 442 plurality.

These reports were presented on February 28, 1895, almost the last day of the last session of the Congress, and there was no action by the House.

[Report 1952, parts 1 and 2, third session Fifty-third Congress.]

(11) O'NEILL *vs.* JOY.

Ballots not correctly marked or numbered. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Patterson; minority report by Mr. Daniels.

This case turned on the question of counting certain ballots on which one or both the judges of election had failed to place their initials, as required by the new "Australian" ballot law of Missouri. There were charges of illegal registration, duplicate ballots, and other irregularities, but the result of a decision upon them would not affect the result, and they were not decided. A number of ballots were thrown out because not properly numbered, but as these were nearly equal in number on both sides, they, too, would not affect the result.

Sitting member was returned as elected, by a majority of 67 votes. The committee deducted 607 votes from the poll of contestee and 330 from that of contestant on account of irregularities in the placing of initials or numbers on the ballots, leaving a majority of 210 votes for contestant.

A recount of the ballots of nearly all the precincts in the district had been made a part of the proceedings of taking testimony in the case, but the result of that recount does not seem to have determined the conclusions of either the majority or the minority of the committee, or of the House.

According to the majority of the committee, the statute of Missouri providing for the numbering and initialing of the ballots was mandatory, and all ballots not correctly numbered or initialed were thrown out. According to the minority, the statute was directory, and the obligation to number and initial the ballots, and not to deposit them in the box unless so marked, was on the election officers, not on the voters.

The legal issue turned on the question how much of the former election law of Missouri had been repealed by implication by the enactment of the new Australian ballot law. That law was made, by its enacting clause, a part of chapter 60 of the revised statutes of the State. It repealed explicitly certain sections of the revised statutes, and generally all laws and parts of laws inconsistent with itself.

The only prohibitory clause against the ballots contained in the new enactment was (section 4785):

No judge of election shall deposit any ballot upon which the names or initials of the judges as hereinbefore provided does not appear.

Section 1005 of the revised statutes, which was not among those specifically repealed by the new law, contained the provision:

No ballot not numbered as herein provided shall be counted.

And section 4671, chapter 60, which was also not specifically repealed, contained the provision:

Any ballot not conforming to the provisions of this chapter shall be considered fraudulent and void.

If these provisions were not repealed by implication, but were to be applied to the requirements of the new law, they of course made that law mandatory.

The majority of the committee held that compliance with these provisions was mandatory, and that the requirement was a proper obligation on the voter to prevent fraud.

It is plain that the imposition of fines on officers of election who violate the law by designedly or carelessly omitting its formalities would not make a system such as this effective. The officers elected through a violation of the law would often be able to screen their confederates from punishment. Where the voters and the officers of the election are all interested in understanding and conforming to the law the result will be different. The system can only be made effective by peremptorily declaring that the legality of the ballot shall depend on the observance of the law in vital particulars.

Now these provisions of the law of Missouri are plainly and emphatically mandatory. This is too clear for discussion, and we refrain from citing authorities or quoting decisions in support of a proposition so free from doubt. It may be said that to enforce these statutes according to their plain intent and purpose will work injustice to the voter, and that he ought not to be held responsible for the failure of the distributing judges to write their signatures or initials on the ballot, or the failure of the receiving judges to number it. But it must be borne in mind that no man has the natural or inherent right to vote. The voter is an agency of the State, clothed by the State with the elective franchise, and the same power which prescribes who shall have the franchise can also prescribe the manner of its exercise, and throw such safeguards around the ballot as will protect it from fraud and dishonesty. Again, the voter is presumed to know something of the law which secures to him the elective franchise and prescribes the conditions on which it is to be exercised. * * * But, aside from all this, we have nothing to do with the severity or the hardships of the law. It is plainly mandatory, and precedent and sound public policy alike demand that it should be enforced and obeyed.

The minority held that the new enactment of the Australian ballot law in Missouri, establishing an entirely new system of election machinery, was intended to supersede the old law, and that it repealed by implication the provisions which made the old law mandatory on the voter. Under the old law the voter himself furnished the ballot, and it was obligatory on him to furnish a ballot in accordance with the law or lose his vote. Under the new law the State furnished the ballots, which were in a form not permitted by the old law. No ballots but those printed by the State were permitted to be counted, but the prohibition against depositing these ballots if improperly marked was upon the judges, not on the voters.

And when one system of law is enacted as a substitute for a preceding law the rule of construction is that the preceding law is repealed, although there may be no express declaration of intention contained in the later act. * * * The prohibition, it will

be seen from the language of the section, is directed to the judges themselves, and not to the voter. * * * Cases have frequently arisen where the validity or legality of the ballot has been brought in controversy, but no case has been discovered sanctioning the conclusion that the voter shall be deprived of his vote by the omission of the election officers to discharge a duty imposed upon them by law. It is only when a statute has declared the ballot to be void or forbade it to be counted that the courts have felt obliged to sanction its exclusion. * * *

It is, in the judgment of the minority, an unwarranted construction to go back to the preceding law for the purpose of discovering provisions applicable alone to the superseded system for the forfeiture of the votes of the citizens of this Congressional district.

This case was the occasion of a long contest, but only a brief debate in the House. On March 28, 1894, the substitute resolutions presented by the minority were defeated by a vote of 100 to 147. After many intervening motions the resolutions presented by the committee were passed on April 3, by votes of 156 to 24 and 155 to 28, and on April 3, 1894, Mr. O'Neill was sworn in.

[Report 268, second session Fifty-third Congress.]

FIFTY-FOURTH CONGRESS, 1895-1897.

Under the revision of the rules adopted at the opening of this Congress the usual provision for the appointment of the standing Committee on Elections was amended (on account of the unprecedented large number of election contests) to read as follows:

RULE X.

1. Unless otherwise specially ordered by the House, the Speaker shall appoint at the commencement of each Congress the following standing committees, namely:
On Elections three committees, to consist of nine members each, to be called number one (1), two (2), and three (3), respectively.

This rule was not altered by the House in the Fifty-fifth or Fifty-sixth Congresses, though the number of election cases was much smaller.

Committee on Elections No. 1.

Mr. DANIELS, New York.	Mr. LINNEY, North Carolina.
ROYSE, Indiana.	DINSMORE, Arkansas.
COOKE, Illinois.	BARTLETT, Georgia.
LEONARD, Pennsylvania.	TURNER, Virginia.
Mr. MOODY, Massachusetts.	

Committee on Elections No. 2.

Mr. JOHNSON, Indiana.	Mr. LONG, Kansas.
STRODE, Nebraska.	HARRISON, Alabama.
PRINCE.	MAGUIRE, California.
TAYLER, Ohio.	KYLE, Mississippi.
Mr. MILLER, West Virginia.	

Committee on Elections No. 3.

Mr. McCALL, Massachusetts.	Mr. CODDING, Pennsylvania.
THOMAS, Michigan.	BELL, Texas.
JENKINS, Wisconsin.	DE ARMOND, Missouri.
WALKER, Virginia.	JONES, Virginia.
Mr. OVERSTREET, Indiana.	

*Cases.**Committee No. 1.*

- (1) Hugh R. Belknap *vs.* Lawrence E. McGann, *Illinois*.
- (2) James J. McDonald *vs.* William A. Jones, *Virginia*.
- (3) William F. Aldrich *vs.* Gaston A. Robbins, *Alabama*.
- (4) Albert T. Goodwyn *vs.* James E. Cobb, *Alabama*.

- (5) W. C. Robinson *vs.* George P. Harrison, *Alabama*.
- (6) John I. Rinaker *vs.* Finis E. Downing, *Illinois*.
- (7) Truman H. Aldrich *vs.* Oscar W. Underwood, *Alabama*.
- (8) William H. Felton *vs.* John W. Maddox, *Georgia*.
- (9) George Denny, jr., *vs.* W. C. Owens, *Kentucky*.
- (10) N. T. Hopkins *vs.* Joseph M. Kendall, *Kentucky*.
- (11) Thomas E. Watson *vs.* James C. C. Black, *Georgia*.

Committee No. 2.

- (12) Robert A. Chesebrough *vs.* George B. McClellan, *New York*.
- (13) Timothy J. Campbell *vs.* Henry C. Miner, *New York*.
- (14) Robert T. Van Horn *vs.* John C. Tarsney, *Missouri*.
- (15) H. Dudley Coleman *vs.* Charles F. Buck, *Louisiana*.
- (16) William S. Booze *vs.* Harry Welles Rusk, *Maryland*.
- (17) Alexis Benoit *vs.* Charles J. Boatner (first case), *Louisiana*.
- (18) Cyrus Thompson *vs.* John G. Shaw, *North Carolina*.
- (19) Henry P. Cheatham *vs.* Frederick A. Woodard, *North Carolina*.
- (20) John Murray Mitchell *vs.* James J. Walsh, *New York*.
- (21) Charles H. Martin *vs.* John A. Lockhart, *North Carolina*.
- (22) Alexis Benoit *vs.* Charles J. Boatner (second case), *Louisiana*.
- (23) Taylor Beattie *vs.* Andrew Price, *Louisiana*.

Committee No. 3.

- (24) J. H. Davis *vs.* D. B. Culberson, *Texas*.
- (25) A. J. Rosenthal *vs.* Miles Crowley, *Texas*.
- (26) Robert Moorman *vs.* A. C. Latimer, *South Carolina*.
- (27) James B. Johnston *vs.* J. William Stokes, *South Carolina*.
- (28) George W. Cornett *vs.* Claude A. Swanson, *Virginia*.
- (29) J. Hampton Hoge *vs.* Peter J. Otey, *Virginia*.
- (30) R. T. Thorp *vs.* W. R. McKenney, *Virginia*.
- (31) Giles Otis Pearce *vs.* John C. Bell, *Colorado*.
- (32) A. M. Newman *vs.* J. G. Spencer, *Mississippi*.
- (33) W. P. Ratliff *vs.* J. S. Williams, *Mississippi*.
- (34) John A. Brown *vs.* John M. Allen, *Mississippi*.
- (35) Joshua E. Wilson *vs.* John McLaurin, *South Carolina*.
- (36) George W. Murray *vs.* William Elliott, *South Carolina*.
- (37) J. C. Kearby *vs.* Jo. Abbott, *Texas*.
- (38) Jacob Yost *vs.* H. St. George Tucker, *Virginia*.

(1) BELKNAP *vs.* MCGANN.

Election of contestant conceded. Contestant seated.

Report by Mr. Daniels.

Contestee conceded before the committee that contestant was elected, and the committee presented a report stating this fact and commending the action of contestee. Resolutions declaring contestant elected were adopted by the House without division, and Mr. Belknap, on December 27, 1895, was sworn in.

[Report 5, first session Fifty-fourth Congress.]

(2) McDONALD *vs.* JONES.

Leave to contest denied. Probable cause not shown, and contestant ineligible.

Report by Mr. Turner.

This case came before the committee on an application from James M. McDonald to serve notice of contest on William A. Jones, who was returned as elected. The committee refused the petition on the grounds that with reasonable diligence a notice could have been served within the time, that in the proofs presented it did not appear that there was any substantial ground in fact for the proposed contest, and that the petitioner, being engaged in business in the District of Columbia and having no residence or business in Virginia, was not at or near the time of the election an inhabitant of Virginia, and was, therefore, not eligible.

The resolution denying the application of petitioner was passed by the House without division.

[Report 568, first session Fifty-fourth Congress.]

(3) ALDRICH *vs.* ROBBINS.

Fraud. Majority reports for contestant; minority report for contestee. Contestant seated.

Majority reports by Mr. Daniels and Mr. Royse; minority report by Mr. Dinsmore.

This case turned on the question of fraudulent returns from a large part of the precincts of Dallas County. The district (the Fourth Alabama) consisted of six counties—five “white” counties and one (Dallas) county in the “black belt.” Contestant had a majority of the votes in the five “white” counties, and there were no charges of fraud except at a few scattered precincts in them, but in Dallas County contestee was returned as receiving 5,390 majority, nearly all of which was in the fifteen precincts in regard to which evidence was taken. In each of these precincts the returns showed a very large vote, practically all for contestee. Contestant introduced the testimony of persons who were at the polls all day and kept count or tally of the number of persons who voted or were present where they could have voted. The number in each case was a very small fraction of the vote returned. There was also evidence that many of the names on the poll lists were those of dead, removed, or fictitious persons, and in some precincts a number of those returned as voting testified that they did not vote. It was also shown that there was a general agreement of friends of contestant, at the request of their leaders, not to vote or register in this county, as they had been refused representation on the election boards, and feared that their votes, if cast, would be fraudulently counted for contestee.

Contestee did not call any of the election officers to sustain the returns, but called other persons to testify to their good reputation.

The committee presented three reports, all of which found fraud in Dallas County. The majority presented two reports, one signed by Mr. Daniels and Mr. Cooke, in which contestant was found to be elected by 601 majority, and the other presented by Mr. Royse, in which his election was found by 1,131 majority. The minority pre-

sented a report in which the majority of contestee was reduced from 3,736 to 559, but the testimony was found to be inadequate to overcome the remainder of the majority.

The principal difference between the two majority reports was in counting the votes of the precincts in which the returns were proved fraudulent. The report presented by Mr. Daniels credited to contestee all the votes left after deducting the number specifically proved to be fraudulent; that presented by Mr. Royse rejected the whole of the returns and counted only such votes as were incidentally proved aliunde. The minority also counted only the votes proved aliunde, but found that the proof of fraud was clear enough to overcome the presumption of correctness of the returns in only nine of the precincts.

There were several precincts in other counties in which the returns were impeached by testimony that more voters voted for contestant than were returned for him.

Contestee objected to the sufficiency of the notice of contest, and also to all the testimony taken in Dallas and Calhoun counties before a notary appointed under the laws of Alabama to act in Shelby County. The committee found that the notice, which charged at each precinct that a specified number of votes returned were in fact not cast, was sufficiently specific. As to the competency of the notary, both majority reports said:

It was also objected for the contestee that the notary before whom the evidence was taken was without authority to take that obtained out of the county for which he had been appointed to act under the laws of the State. But he was not acting within the restrictions imposed upon him by the laws of the State of Alabama in taking this evidence. The laws of the United States prescribed a special mode of proceeding for this class of cases, and aside from this authority no evidence in a contested election could be taken before the officers enumerated in the statute.

An object of the statute was to point out the persons who should be empowered to take the evidence, not to exercise their functions as State, city, or county officers, but to execute the full authority created for this purpose by Congress. The notary is one of these officers, selected, however, to act under Federal, not under State, authority, and the power to act has been given to him commensurate with the object to be attained.

By the language of the statute the contestant is empowered to apply for a subpoena to any notary, etc., who may reside within the Congressional district in which the election to be contested was held. The officer is also required to issue subpoenas directed to all such persons as shall be named to him, requiring their attendance at some time and place mentioned in the subpoena. And the only restriction imposed is that the witness shall not be required to attend out of the county of his residence.

As to the power of the officer, he may act anywhere within the Congressional district. His authority has been restricted to no subdivision of it whatever. He may issue subpoenas for all such witnesses as shall be named to him, and the subpoenas must be returnable before himself. As that is the mode of proceeding which has been indicated, any officer mentioned in the statute may act, and in acting has been given complete authority to act wholly and effectually. The law further provides that the witnesses who attend shall be examined on oath by the officer who issued the subpoena, unless he may be absent, etc.

From the generality of these regulations it is clear that a single officer has been empowered to issue all the subpoenas and take all the evidence. They are quite explicit, and create a system in and of themselves in no measure dependent on the laws of the State (U. S. Rev. Stat., 19, 20, secs. 110, 115, 120), and this effect was accorded to the statute in the contest of Washburn against Voorhees (2 Bartlett, 54).

The minority said:

The true test to apply to this question is: If a witness who had been sworn before this notary public were indicted for perjury or false swearing before him in this case where the oath was administered and the testimony given in Dallas or Calhoun counties, could he be convicted? He could not, in either State or Federal court.

On the question of the weight to be given to the returns the minority said:

The return of the election officers, made, as it is, under oath, is *prima facie* evidence of the truth of their contents and must stand as the truth until such facts are proven as to clearly show that it is not true or that they are fraudulent. Wherever it has been conclusively shown by the evidence that fraud was perpetrated upon the part of the election officers sufficient to cast suspicion upon the returns, we have disregarded the returns and have resorted to aliunde proof for the purpose of establishing the votes received by each the contestant and the contestee.

The minority also held that the ballots themselves should have been presented to impeach the returns of the election officers.

It needs only to be stated that the ballots themselves constituted the best and only admissible evidence until explanation was made as to why they were not and could not be introduced.

The case was fully debated in the House, and the substitute resolutions presented by the minority were lost by a vote of 58 to 173. The resolutions presented by the majority were then passed without division, and (on March 13, 1896) Mr. Aldrich was sworn in.

[Report 572, parts 1, 2, and 3, first session Fifty-fourth Congress.]

(4) GOODWYN *vs.* COBB.

Fraud. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Daniels; minority report by Mr. Bartlett.

The general charges and issues in this case were similar to those in the case of Aldrich *vs.* Robbins, above, but contestee in this case took more testimony and there was more conflict of evidence. Contestee received, according to the returns as canvassed, a majority of 748, but the committee states that part of this was due to an error in footing, and that the correct figure was 508. All his majorities were in the "black counties," contestant receiving in the "white counties" aggregate majorities of 3,612 votes. Contestant charged that the votes returned from a number of precincts returned as casting a very large vote, practically all for contestee, were for the most part fictitious, and introduced testimony to show that a much smaller number of votes were cast at each of these precincts than were returned. He also introduced testimony that some of the names on the poll lists were those of dead or absent persons, and called voters who were on the lists as voting but testified that they did not vote. He also showed that at most of these precincts his friends were not represented on the election boards, and that contestee had refused to join with him in a request for such representation.

Contestee called the officers of election to testify to the correctness of the returns and the fairness of the election, and other persons to contradict or explain some of the circumstances testified to by contestant's witnesses. The refusal to allow contestant's friends representation on the board was explained by the fact that contestant was a Populist, and representation was given instead to the Republican and Democratic parties as the two dominant parties.

Technical objections were entered and strongly urged against most of contestant's testimony, and were discussed at length in both reports. The returns, registration and poll lists, and other record evidence were objected to as not properly certified or as certified by officers not having

authority to make such certificates, but the committee overruled most of these objections and cured the rest by procuring other and more perfect certificates. Testimony was also taken before a notary outside of his own county, but within the district. This question had already been decided in the case of *Aldrich vs. Robbins*. Some witnesses were examined outside of the district by an officer residing within the district, but only one of these was objected to at the time, and the committee did not consider his testimony. Contestee further objected that the whole registration law of Alabama was unconstitutional, but the committee called attention to the fact that no vote in this case was shown to be affected by the only point on which the law could be claimed to be unconstitutional.

The minority sustained all these objections to the testimony and emphasized their importance.

On the questions of fact involved the majority and the minority analyzed the testimony in regard to each precinct in detail, and came in most cases to opposite conclusions.

One technical point was brought by the minority before the House in a separate motion. Contestant had taken in his ten days for rebuttal some testimony alleged to be testimony in chief. A motion was made to recommit the case, to allow contestee further time to take testimony in response to this testimony, but the motion was voted down by a vote of 60 to 131.

The case was fully debated, and on April 21, 1896, the resolution declaring contestee not elected was carried by a vote of 119 to 45. The point of no quorum was made, and the resolution went over to the next day, when the resolution declaring contestant elected was passed by 145 to 55, and (on April 22, 1896) Mr. Goodwyn was sworn in.

[Report 1122, parts 1 and 2, first session, Fifty-fourth Congress.]

(5) *ROBINSON vs. HARRISON.*

Fraud, intimidation, and bribery. Report for contestee, who retained the seat.

Report by Mr. Leonard.

According to the returns as canvassed, contestee received a majority of 5,006 votes. The return of one county, in which contestant received a majority of 402 votes, was received too late to be included in the canvass. Contestant claimed that the vote of this county should be counted, and that the votes of a number of precincts should be thrown out for fraud, intimidation, or bribery. If all of his contentions should be sustained, he would have a majority of 470 votes. The committee found the charges sustained in enough cases to reduce the returned majority of contestee from 5,006 to 2,254, but as he was still shown to be elected after eliminating the fraud proved, resolutions declaring him elected were recommended. The minority agreed in this conclusion, but not in the reasoning or statement of facts.

In one precinct there was a disturbance before the opening of the polls, but the election itself was orderly, and there was no intimidation. One of the judges of election bribed 25 voters to vote for contestee, but these could be eliminated without throwing out the whole poll.

In some other precincts the vote returned (practically all for contestee) was very large, while the number of votes cast was proved to have been much smaller, and part of the names on the poll lists were shown to be fraudulent. These returns were rejected. In other cases where the discrepancy was smaller the returns were corrected according to the probable state of the vote. The vote of Geneva County (not canvassed) was counted by the committee.

The resolutions recommended were passed by the House without division, so contestee retained the seat.

[Report 1121, first session Fifty-fourth Congress.]

(6) RINAKER vs. DOWNING.

Irregularities, "assisted voters," unauthorized recount, illegal votes. Majority report for contestant; minority report to order new recount. House sustained minority, and on new recount contestant found elected. Contestant then seated.

Majority report by Mr. Cooke;¹ minority report by Mr. Moody; final report by Mr. Moody.

According to the returns contestee had a plurality of 40 votes. Contestant claimed that this majority would be overcome by deducting from both sides various irregular ballots and illegal votes. He also undertook to have all the ballots recounted, but was restrained by an injunction granted at the instance of contestee. He introduced evidence of a tally privately kept of his vote in some of the precincts during a recount of the votes on certain local offices, and the committee accepted the result of this private recount on the ground that contestee had made it admissible by himself preventing any official recount from being held, and that the evidence showed that it was made with sufficient care to be trustworthy. The committee also counted the ballots of certain voters claimed by contestee to be invalid because the voters, most of whom were shown to be in fact illiterates, had not made the oath of disability required by law before being assisted in marking their ballots. Under these rulings contestant would have a majority of 30 votes. As each of the above two questions (the unauthorized recount and the assisted voters) covered more than 30 votes, either of them was decisive of the case.

The law of Illinois on the subject of recounts was as follows:

In all cases of contested election the parties contesting the same shall have the right to have the package of ballots cast at such election opened, and to have all errors of the judges in counting or refusing to count any ballot corrected by the court or body trying such contest; but such ballots shall be opened only in open court, or in open session of such body, and in the presence of the officer having the custody thereof.

Resting on this statute, contestee sought and obtained an injunction restraining the county clerks of the several counties in the district from opening or permitting to be opened any of the sealed packages of ballots "until the same is ordered to be opened and recounted by a court of competent jurisdiction of the State of Illinois, or of the United States, or by the House of Representatives in Congress of the

¹Through an error of the printer the majority report in this case was printed as being presented by Mr. Daniels. The error was explained in debate.

United States after the 3d day of March, A. D. 1895." In his application for injunction contestee alleged:

That said ballots are the best evidence of his election, and if the same be so taken and opened, as demanded, they will lose their efficacy and virtue as legal evidence of his election, because the said ballots can not legally be opened and recounted except in open court or in open session of the body authorized by law to try said contest.

The committee held that under the Federal law for taking testimony in contested-election cases the notary taking testimony should have had power to require the production of these ballots. The law is:

SEC. 123. The officer shall have the power to require the production of papers; and on the refusal or neglect of any person to produce and deliver up any paper or papers in his possession pertaining to the election, or to produce and deliver up certified or sworn copies of the same in case they may be official papers, such person shall be liable to all the penalties prescribed in section 116. All papers thus produced and all certified or sworn copies of official papers shall be transmitted by the officer, with the testimony of the witnesses, to the Clerk of the House of Representatives.

Discussing this subject, the committee said:

The contestee, by his bill in chancery seeking the injunction, by direct language insists upon such a construction of the statute of Illinois regulating and restraining the opening and counting of the ballots as shall bring that statute in direct conflict with the statute of the United States, and which latter statute plainly and clearly gives to both parties to an election contest over the seat of a member of the House of Representatives the right to select any one of the officers mentioned in the Federal statute before whom to take the testimony, and clothes that officer, when so selected, with the full power to require the production of any paper or papers pertaining to the election, or to produce and deliver up certified or sworn copies of the same in case they may be official papers.

In view of the plenary and clear terms of the Federal statute, it is the opinion of the undersigned that the statute of Illinois should be construed to mean that where the ballots cast at any election for member of the House of Representatives are called for by a subpoena duces tecum issued by a notary public selected under sections 110, 111, and 123 of the act of Congress regulating the contests of seats in the House of Representatives the notary so selected fully represents the House of Representatives and constitutes a tribunal or body for the purpose and with the power of procuring and reducing to written form such evidence as the ballots may contain, so as to comply with the obvious intention of the State statute, inasmuch as it is obviously impossible for the ballots in a contested-election case in the House of Representatives to be opened "in open session of such body, and in the presence of the officer having the custody thereof."

The powers conferred by the Federal statute upon the notary public, or other officers mentioned, to call for and enforce the production of all the papers pertaining to the election, are full and complete and render such officer, to that extent, a "body trying such contest," to the extent of his obtaining and recording the evidence in the case. That is plainly and clearly the meaning and effect of the act of Congress, and the State statute should be construed so as to be in harmony rather than in conflict therewith.

To construe the State statute so as to prohibit the notary or other officers taking the testimony in a Congressional election contest from obtaining the evidence contained in the ballots would be to give to the State statute the effect of repealing or nullifying the Federal law regulating Congressional election contests. Congress has the power to regulate the taking of testimony in case of the contest of the election of any member of the House of Representatives. That power has been exercised by the enactment of the statute above quoted, and when in conflict with its provisions all conflicting State statutes or decisions to the extent to which they do conflict must be held to be nugatory and void. * * *

In the opinion of the undersigned, Congress has by statute made ample provision for an inspection, examination, and recount of the ballots far in advance of the meeting of Congress, and that it is not intended, or to be tolerated, that the time of the members of the Election Committee shall be consumed in the recounting of ballots covering an entire Congressional district, during a session of Congress, when each member has a duty to perform in the everyday course of its proceedings; nor is it to be permitted that a device, such as that of obtaining an injunction, contrary to the act of

Congress, shall operate to prolong a contest practically until near the end of the term for which the member was elected.

The conclusion and finding of the undersigned, therefore, is that the injunction procured by the contestee, prohibiting the opening and counting of the ballots in this case, was illegal and wrongful, and that, as a consequence thereof, the contestant was at liberty to offer such secondary evidence of the contents of the ballots and of the facts shown by the evidence suppressed as would in a court of law be allowed in a case in which one of the parties had concealed or refused to produce legal and material evidence within his possession or control.

In two of the counties in the district there were contests between candidates for local offices, in which the ballots were recounted. During the recount of 25 of the precincts in one county and of 4 in the other county a friend of contestant kept a tally of the losses and gains of the Congressional votes, as observed by him on the ballots. These tallies showed a net gain for contestant of 35 votes in one county and of 4 votes in the other, which, for the reasons outlined above, the committee allowed him.

There were 30 ballots marked with a cross both in the circle at the head of the Republican ticket and at the head of the "Independent Republican" ticket. The latter column contained but one name, that of the independent candidate for a local office, and under a recent decision of the supreme court of Illinois the committee held that there was no "double marking" for the other offices and counted the ballots.

There were also 57 ballots in question for miscellaneous irregularities in marking. The committee discussed the general principles applying to such cases and found that 41 of these ballots were fatally defective, even under the liberal construction of the law recommended.

Of the 65 alleged illegal votes brought in question, the committee found only 6 proved against contestee and 4 against contestant.

The law in regard to the assistance of illiterate or disabled voters was:

Chapter 46, paragraph 311, section 14. Every voter who may declare upon oath that he can not read the English language, or that by reason of any physical disability he is unable to mark his ballot, shall, upon request, be assisted in marking his ballot by two of the election officers of different political parties to be selected from the judges and clerks of the precincts in which they are to act, to be designated by the judges of election of each precinct at the opening of the polls.

A number of voters were assisted by the election officers whose declaration of inability was informal and not on oath. The assistance was not officious, but was asked for by the voters, and the judges knew or believed the voters to be in fact entitled to it. The committee held the law to be directory and counted the votes.

In the opinion of the undersigned, the Illinois statute is directory only, and the Illinois legislature intended not to disfranchise the voter who innocently received assistance without making the statutory oath, by omitting those clauses found in other like statutes which do, or are construed to, prohibit the counting of the ballots of voters so assisted.

The committee quoted approvingly from the minority report in the case of *O'Neill vs. Joy* in the preceding Congress and discussed the case of *Steward vs. Childs* in the same Congress, showing that the precedent in that case did not apply to this and was otherwise not binding.

In Cass and Pike counties the word "Independent" at the head of the "Independent Republican" column was printed in letters only one-eighth of an inch high, the law requiring them to be one-fourth of an inch. The type in the second word of the heading ("Republican")

was of the right size. The section of the ballot law referring to the manner of printing the ballots, unlike the other sections, contained a mandatory clause. The committee, however, concluded that, from the general trend of its decisions on similar questions, the supreme court of Illinois would in a case like this inquire whether any fraud was intended or any harm done. Since there was no such element in this case, they counted the ballots rather than disfranchise the voters of two counties for an oversight of the officials.

The minority discussed only the two questions of the recount and the assisted voters, either of which, as they pointed out, would be decisive. They argued that the position of the Illinois court granting the injunction against opening the ballots was at least defensible; that its effect was not to suppress but to preserve the evidence, and that the recounts in any case were worth less than the original counts. If the House desired to know the state of the ballots it should send for them and have them counted.

On the question of assisted voters the minority held the law to be mandatory. Under the old ballot laws such provisions could be more liberally construed, but—

Under the Australian ballot system secrecy is not merely permitted, it is enforced; it is not solely for the benefit of the voter, but for the benefit of the public as well. A compulsory secrecy unknown to former systems of voting is a fundamental and essential element of this ballot law.

As either of these points would be decisive of the case against contestee, the minority recommended resolutions recommitting the case to the committee, with instructions to recount or have recounted the ballots. The House, as will be seen, adopted this resolution, and in doing so appears to have agreed with the minority on the subject of the recount and with the majority on the subject of assisted voters.

The case was fully debated, and led to a long parliamentary contest, in which many subsidiary motions were voted on. The final vote to recommit the case, as recommended by the minority, was 137 to 13 (33 counted present and not voting to make a quorum).

The ballots were sent for and recounted, and contestant was found to have a plurality of 5 votes, most of the gain (26) being in one precinct. The committee therefore brought in a brief report, stating the figures as shown by the recount and recommending the seating of contestant. The minority still expressed their opinion that the question of "assisted voters" would be decisive of the case for contestee, "yet believe that the House would not adopt their opinion in that respect in the absence of a controlling decision by the court of final resort in the State of Illinois." A motion to recommit the case was lost by a vote of 48 to 165, and the resolution seating contestant was then passed by a vote of 167 to 52. Mr. Downing was then (on June 5, 1896) sworn in.

[Report 1400, parts 1 and 2, first session Fifty-fourth Congress, and report 2247, first session Fifty-fourth Congress.]

(7) ALDRICH *vs.* UNDERWOOD.

Fraud. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Daniels; minority report by Mr. Bartlett.

On the returns as canvassed contestee had a majority of 1,166. Adding some votes not canvassed he had a majority of 1,278. The

committee found that if all the fraud shown by the evidence were eliminated, and the vote corrected in accordance with the proof, contestant would have a majority of 220. Most of the issues in the case were questions of fact, depending on the weighing of conflicting testimony.

The committee added votes to contestant in one precinct in which the voters had been prevented from voting by the intimidation of boisterous election officers and challengers; in another in which many frivolous arrests were made; in one in which most of the ballots had been stolen the night before election, and there was a long delay in procuring other ballots; in one in which the booths and ballot box were in different rooms, so arranged that the law was substantially violated and the voter had no assurance that his own ballot went into the box, and there were other evidences of fraud; and in several in which there was evidence that more votes were cast for contestant and fewer for contestee than the returns showed. In some precincts contestee called a large number of colored voters to testify that they voted for him, but their answers were all alike and evidently "coached," and the committee disregarded them.

The minority went over the evidence from these precincts in detail, showing the contradictions and inconclusiveness of the evidence, but even giving the contestant the benefit of the doubt as to votes claimed by him in some precincts where the testimony was very conflicting, they found that contestee still had a majority of 1,038 votes.

The case was fully debated, and the resolutions proposed by the committee passed by votes of 119 to 98 and 116 to 107. Mr. Aldrich was then (on June 9, 1896) sworn in.

[Report 2006, parts 1 and 2, first session Fifty-fourth Congress.]

(8) FELTON *vs.* MADDOX.

Fraud; irregularities. Report for contestee, who retained the seat.

Report by Mr. Daniels.

Contestee had a returned majority of 1,562 votes. Contestant charged fraud and irregularities to his prejudice in three counties, and contestee made countercharges in three other counties. As the committee found that contestant's charges, so far as sustained by evidence, could not possibly reduce the majority of contestee more than 350 votes, they did not enter into a discussion of the countercharges.

In one county the registration list was verified by only one commissioner, instead of by the board; in another it was written instead of printed, and there were minor irregularities in the third; but the committee found that none of these irregularities were fatal under the Georgia law. The charges of fraud in these counties were not sustained, and the individual cases of wrongful reception or rejection of votes were comparatively few. The committee eliminated the maximum number shown by the testimony.

The resolution confirming sitting member in his seat was passed May 11, 1896, without division.

[Report 1743, first session Fifty-fourth Congress.]

(9) DENNY vs. OWENS.

Irregularities. Report for sitting member, who retained the seat.

Report by Mr. Turner.

According to the returns contestee had a plurality of 101 votes. Contestant charged irregularities to his prejudice in two counties, and both parties proved many irregularities at various precincts, but the committee found that, after all deductions, contestee still had a plurality of 61 votes.

In one county 117 witnesses swore that they were legal voters and were refused registration, and there was other evidence indicating that the number refused might have been 200 or 300, but very few of these appeared at the polls and offered to vote, and there was no evidence that the registration officers required more proof than the law required, or that the applicants for registration offered all the proof required. Proof was required, or permitted to be required, of all persons not personally known to the registration officers.

It is just as important that the registration lists be kept free from the names of persons which are not entitled to be there as it is that every legal voter shall be registered when he makes such application. In order that registration lists be kept pure the officers of registration are required to take the precaution prescribed by these sections, and they can not be charged with wrongdoing if they do this, though it may put legal voters to inconvenience.

In Franklin County the returns were twice canvassed. Contestant claimed that both proceedings were illegal, the first because conducted by the wrong board, and the second because conducted on the wrong day. It was conceded that the first canvass (made also one day too soon) was illegal because the members of the board, being themselves candidates for office, were forbidden by the law to make the canvass. The nearest justices of the peace, who were by law required to take the places of the regular canvassing board when its members were disqualified, met a few days later and correctly canvassed the returns.

It is admitted by both parties that the first board had no authority to canvass the returns of the county.

Contestant, while admitting that the second board was properly constituted, maintains that as its canvass was had on a day not designated by law, it was illegal and void.

We can not agree with him in this contention. We think that the proper board could be compelled to make this canvass by a mandate from any court of competent jurisdiction. If this be true, then the board may do the same thing without the mandate of a court. The mandate does not give the right to canvass the returns, but requires it to be done; because, as a matter of right, it ought to be done. Certainly it would be a good return to the alternative writ if the board were to say they had already done what the court was asking them to do.

Aside from this, we are of the opinion that we would have the right to canvass the returns in this contest and declare the result, though there had never been a canvass.

Very great irregularities and some frauds were found in many of the precincts, but they were committed in the interest of both parties and the votes affected practically balanced each other.

The committee, therefore, reported resolutions confirming contestee in his seat, and on May 19, 1896, the resolutions were passed by the House, without division.

[Report 1877, first session Fifty-fourth Congress.]

(10) HOPKINS vs. KENDALL.

Wrong device on ballot. Majority report for sitting member; minority report for contestant. Contestant seated.

Majority report by Mr. Daniels; minority report by Mr. Royse.

Contestee received a majority of 253 on the face of the returns. Contestant claimed that, through a fraud, to which the county clerk of Clark County was a party, the emblem, "the eagle about to fly," regularly used by the Republican party, was placed over another column containing the names of certain candidates for local offices placed on the ticket by petition, while the emblem of a raccoon was placed over the regular Republican ticket. There seems to have been no question about the facts and no doubt of their fraudulent intent. The petition ticket was the result of a conspiracy intended to injure contestant, and bribery was used to obtain signatures. The ballots were not distributed until the morning of the election, in order, if possible, to conceal the deception. Seventy-nine voters were in fact deceived, and voted the "eagle" ticket, no doubt under the impression that they were voting the Republican ticket.

The committee reported these facts and condemned them, but as the exact extent of the injury done was shown by the 79 votes cast for the fraudulent ticket, they cured the injury by restoring these votes to contestant. No other voters could have been misled by the deception, and there was no definite evidence that any person who intended to vote was deterred from voting. There was evidence, in fact, that contestant received within 42 votes of the full estimated Republican vote of the county.

All but two members of the committee, therefore, joined in a report declaring contestee elected.

Mr. Royse and Mr. Linney signed a report declaring contestant elected. They explained at length the heinous character of the fraud committed, and said:

We do not think that the injuries which flow from a wrong of this kind are capable of anything like an accurate measurement. Such injuries are not capable of being weighed, and if they were we would not feel justified in using apothecary's scales for such purpose. From such a bold and unscrupulous transaction the presumption must flow that a grievous wrong has been done, resulting in serious injury to contestant.

Contestant is the innocent victim of this fraud of the clerk of Clark County. We do not believe it right to throw upon him the burden of making an accurate measurement of the extent of his injuries. Even if we should require him to furnish any evidence upon this subject it should only be slight, and then shift the burden of proof upon him who has received the benefit of this fraud.

But even under the rigid rule of the committee, the minority could not concede that the extent of the injury was measured by the 79 votes actually cast for the fraudulent ticket. The district had always been a Democratic one, but in this election the Democratic majority had been cut down to 203 by contestant making large gains in every county but Clark. It was fair to suppose that the exception in this county was due to the fraudulent ticket. It was a year in which Republicans were making gains everywhere—everywhere but in Clark County, Ky. Moreover, the whole ballot in this county was void in law by reason of this fraudulent petition. There were only 104 signers to the petition, of whom 10 did not give their addresses, thus leaving less than the required 100 legal signatures. This fact, as well as the fraudulent

device, invalidated the whole ticket, and the vote of the county should be thrown out.

During the first session of Congress resolutions were twice presented and passed giving the parties additional time to take testimony in regard to the Clark County election, and the case did not come to a decision until near the close of the second session. The case was fully debated, and the resolutions presented by the *minority* were adopted by a vote of 197 to 91, and on February 18, 1897, Mr. Hopkins was sworn in.

[Report 2809, second session Fifty-fourth Congress, parts 1 and 2.]

(11) *WATSON vs. BLACK.*

Fraudulent registration; bribery and repeating. Report for contestee, who retained the seat.

Report by Mr. Bartlett.

Contestee had a majority of 1,556 votes on the face of the returns. Contestant made charges against the fairness of the registration in every county in the district, and charged fraud, bribery, and repeating in Richmond County and the city of Augusta. The contest was finally narrowed to Richmond County and Augusta, all of the votes of which must be thrown out in order to sustain contestant's claim. He alleged that the registration list had been padded in this county with the names of 2,000 illegal voters, in pursuance of a conspiracy to overcome in this county by fraud any majority he might get in the rest of the district, and that the registrar refused to purge the list of these illegal names, though furnished a list of them. The vote of Augusta was also challenged because more than one ballot box was used in each ward, and charges of bribery and repeating were also made. In regard to the two or more ballot boxes in the Augusta wards, the committee simply referred to the case in the preceding Congress between the same parties in which the same charge was made, and quoted from the report in that case. A careful review of the evidence in regard to registration showed that the charges were not sustained. The law was strictly complied with and there was the utmost fairness. Contestant's party was represented on the board. There was some evidence indicating that a few repeaters voted in Augusta, and a few negroes were given 10 cents apiece for car fare or lunch. But "if there were deducted from contestee's vote in the county of Richmond every vote that has in any way been shown to be illegal, and believed by the witnesses to have been cast for him, his majority still would be large and not overcome."

The committee therefore recommended resolutions declaring contestee elected, which, on March 2, 1897, were adopted by the House without division.

[Report 2892, second session Fifty-fourth Congress.]

(12) *CHESEBROUGH vs. McCLELLAN.*

Contest withdrawn. Contestee confirmed in seat.

Report by Mr. Johnson.

Contestant served notice of contest, alleging illegal votes, and also charging that during the campaign contestee had instigated the pro-

mulgation of a circular by the Metropolitan Association of Cycling Clubs, charging contestant with having signed a petition against the bill granting bicycles equal rights with other vehicles on the highways and in the parks. Contestee denied having instigated any such circular, but asserted that the statements attributed to it were true. Contestant then offered, in writing, to withdraw from the contest if contestee could show or prove the existence of any such petition signed by contestant. Contestee exhibited the petition, signed by contestant eight years before, whereupon contestant formally withdrew from the contest. The committee reported these facts and recommended resolutions confirming contestee in his seat. The resolutions were passed by the House, without division, on January 15, 1896.

[Report 48, first session Fifty-fourth Congress.]

(13) CAMPBELL vs. MINER.

Bribery; wrong name on official ballot; suppression of testimony; petition to reopen case. Petition denied and report made for contestee, who retained the seat.

Report by Mr. Johnson.

Contestee was elected on the face of the returns by a majority of 954. Contestant served notice of contest, charging bribery and intimidation and alleging that contestee had failed to file the statement of election expenses required by the laws of New York. Contestant took some testimony; contestee took none, and no briefs were filed. The committee examined the testimony and found some evidence indicating that there was bribery at one precinct, but not sufficient definitely to establish the fact or to show to what extent it might have affected the result. They therefore reported that contestant had "wholly failed to establish any of the grounds of contest which were set out in his notice in the case."

Contestant made application to the committee, under oath, for leave to reopen the case, to take further testimony on the grounds in the notice, and on the further allegation that he had been deprived of many votes by the arbitrary action of the police commissioners in placing the name of one Simpson on the official ballot as the regular Republican nominee, thus compelling contestant, who claimed to have received the regular Republican nomination, to run as an independent candidate. Simpson received 5,214 votes, all of which contestant claimed would have been cast for himself if his name had been properly placed on the ballot. He alleged that he had been prevented from proving these facts, while taking his testimony, by reason of his arrest for contempt of court, based on certain statements in his own testimony in this case. This arrest, he claimed, had intimidated his witnesses. The committee said:

Your committee show to the House that these facts which the contestant asked leave to prove were not stated and set forth as a ground of contest in his notice in the case. They also show that the testimony in the record utterly fails to disclose the truth of contestant's statement that he lost any time by the conduct of contestee's attorneys; but does clearly show that, without any just excuse or reason therefor, he permitted all but five days of the forty days' time allowed him by law in which to take his testimony in the case to expire before he took any evidence whatever; that he was not arrested for contempt until after the time for taking his testimony had expired, and was not held in custody upon said charge except for a few moments, and that his witnesses were in no wise intimidated from testifying; all as is shown by his own evidence now on file in the case.

The committee, waiving the question as to whether the facts which contestant asked permission to prove would, if proven, constitute a valid ground of contest, declare that the testimony already taken by him shows that it is very doubtful whether he would be able to establish such facts even if the case were opened up for his benefit. Actuated in the matter by the considerations which have been submitted, the committee overruled the said motion of the contestant, and declined to permit him to take additional testimony.

The committee also report that on the final hearing of the case before them the contestant urged that the election law of New York under which said election was held was unconstitutional and void, for the reason that the provision requiring the candidate for Representative in Congress to be nominated for the office by a party convention, or petitioned for by a certain per cent of the voters before his name can be placed upon the ticket to be voted for, constitutes an abridgment of the privileges and immunities of citizens of the United States, and is a denial by the State to persons within its jurisdiction of the equal protection of the laws, as guaranteed in section 1 of Article XIV of the Federal Constitution. For this reason he insisted that the election was a nullity, and that the seat in controversy in this contest should be declared vacant.

This provision of the New York election law, whose unconstitutionality is urged, is a conspicuous feature of what is known as the Australian ballot system, which system has been in force in a number of States of the Union for a considerable period of time, and the constitutionality of this feature has never, to the knowledge of your committee, been questioned in the courts. It is to them incredible that it should have gone so long without having been challenged if it is in contravention of the Constitution. If it is really open to this objection a large per cent of the members now holding seats in this body are not entitled to retain the same. The committee themselves entertain no doubt of the constitutionality of the provision, but do not deem it advisable to prolong this report by giving the arguments in support of their views.

Resolutions confirming contestee in his seat were recommended, and were passed by the House on January 22, 1896, without division.

[Report 106, first session Fifty-fourth Congress.]

(14) VAN HORN *vs.* TARSNEY.

Fraud; application to take additional testimony. Majority report for contestant; minority report to reopen case. Contestant seated.

Majority report by Mr. Johnson; second report by Mr. Tayler; minority report by Mr. Maguire.

It was agreed by all the parties in this case, including contestee, and unanimously reported by the committee, that the existence of a large amount of fraud in four precincts was conclusively established, and that there was not enough evidence in the record to purge these polls of the fraud. If the polls were rejected, contestant would be elected. The majority reported in favor of seating him; the minority reported in favor of reopening the case for taking additional testimony to purge the polls of the fraud, so that the honest votes might be counted, and presented figures to show that there was a probability that contestee would be found still to have a majority of the honest votes. The fraud had been committed in the interest of certain candidates for local offices, and its relation to the Congressional election seems to have been only incidental.

The fraud was the result of a conspiracy put in motion before the election. Gangs of colored men, working on the streets of Kansas City, were taken to the registration office repeatedly and registered over and over again. The officers of election appointed to represent the Republican party were not chosen from the list presented by the committee of that party; they were mainly unknown or disreputable

persons, often having only a technical residence acquired for the purpose in the precincts where they acted; they were not pronounced Republicans, and were in some cases Democrats. The Republican challengers and witnesses were excluded from the polls in violation of the plain provisions of the law and the direct mandate of the court.

In the four precincts discussed in the reports, the fraud was beyond question, and a large number of those who perpetrated it had already been imprisoned or were then under indictment for their connection with it. In each of three precincts the first 200 names on the poll lists were all given as colored persons, and were returned as having voted in alphabetical order. Persons whose names closely followed these 200 testified that they voted early in the morning and were among the first to vote. There was also testimony that many other fraudulent names were added to the poll books during the day, and fraudulent ballots placed in the boxes to correspond with them. The vote at all these precincts was returned as being impossibly large, while the testimony showed that the actual vote was small or moderate. Persons who testified that they did not vote were returned as voting, and many of those (besides the alphabetical 200) returned as voting were shown to be unknown persons, registered from vacant lots, uninhabited houses, or other impossible places. In the one precinct in which the voting was not alphabetical there was direct evidence that the judges of election took out during the day a very large number of straight Republican tickets and substituted Democratic tickets, prepared and marked by themselves, for them.

The committee found all four of these returns (precinct No. 52, Ninth Ward, and precincts Nos. 5, 6, and 7, Second Ward, Kansas City) so tainted with fraud that the returns were worthy of no credence, and as there was no way under the evidence of eliminating the fraud the whole returns were rejected. The fraud was committed in the interest of contestee's party, and contestee had an aggregate plurality of 1,120 in these precincts. Rejecting them, contestant had a plurality of 375 votes in the district.

Contestee applied for a reopening of the case, alleging upon information that an agreement could be shown to have been entered into between certain managers of the campaign for contestant and the perpetrators of these frauds, by reason of which certain of the fraudulent votes were to be counted for contestant in consideration of the exemption of the election officers from attack in a newspaper edited by him. He also alleged that he could show that 100 of the 200 "alphabetical" ballots in one precinct had been "scratched" and counted for Mr. Van Horn.

The committee refused to reopen the case. The affidavit of contestee was very indefinite. It did not state the names of his informants, or their sources of information, or the parties to the alleged agreement.

To open up the case for testimony upon statements so indefinite and insufficient as these would certainly be bad practice and would be setting a dangerous precedent. Undoubtedly a stronger showing should be made by the sitting member, whose term is already half expired, as to the probability of his being able to establish the alleged agreement in order to obtain the delay in the determination of the contest which the granting of his prayer would involve.

The application to show the state of the ballots the committee regarded as made "at a very late day." Even if there was no provi-

sion of the law of Missouri whereby the ballots could be recounted in a Congressional contest, the Federal statute provided such a way.

The Constitution of the United States, however, provides that each House shall be the judge of the elections, returns, and qualifications of its own members, and to enable the House of Representatives the more readily to exercise this prerogative, Congress passed a statute, prescribing the methods to be observed in contests for a seat therein, under which statute this contest was being conducted. The Constitution and this statute, enacted pursuant thereto, are, by the very provisions of the Constitution, the supreme law of the land, and the judges in every State bound thereby, anything in the constitution or the laws of the State to the contrary notwithstanding.

The committee believed that on his application any competent court could and would have accorded Mr. Tarsney an inspection of these ballots if they were proper evidence to be considered in the case.

The 100 ballots in question, moreover, were too few to affect the result, and were, in any case, impeached as evidence by having passed through tainted hands and being now in the custody of the very official who perpetrated the original registration fraud, as well as by some positive evidence that they had actually been tampered with.

The ballots, like the returns, are tainted. They have passed through the hands of fraudulent and corrupt officers of election, and thus their credibility and integrity is destroyed.

This principle is one laid down in all the text-books on the subject, and has found frequent recognition in the determination of contested election cases by the House, some of which authorities have been heretofore cited in this report. Being founded in reason and experience, this principle ought not to be disregarded in this instance.

The committee therefore recommended resolutions declaring contestant elected.

Mr. Tayler presented a report agreeing to the conclusions of the committee on the evidence in the record, but protesting that the application to reopen the case ought to have been granted.

He could "find no testimony in the case which indicates that the ballots now in the custody of the proper officials are not the identical ballots which were fraudulently created. But, having been fraudulently placed in the ballot boxes, they were honestly counted."

We can thus, with reasonable definiteness, appraise the fraud and be relieved from the necessity of invoking the dangerous and mischievous doctrine that a poll, tainted with fraud and not purged, must be entirely disregarded. This drastic method is never to be resorted to except in case of absolute and unavoidable necessity. The disfranchisement of honest voters thereby wrought is too grave a wrong to be permitted if, by any possibility, it can be averted. * * *

I am therefore convinced that, under these circumstances, it was the duty of the committee to take the testimony of the ballots and thereby, if the contestant was honestly elected, to say so with certainty. His title would no longer rest upon conjecture and inference, and the committee and the House would be forever relieved from the imputation of having acted in a partisan spirit.

The doctrine of throwing out entire returns by reason of fraud, while tolerable in theory and sometimes essential in practice, is, nevertheless, most vicious and unhappy in its application.

I doubt if a single instance will be found in a legislative contested election case where a proposition to strike out an entire return, if of the substance of the case, was decided on any other than party lines.

A principle thus fostered and thus abused is not a principle to be invoked, except where the exigencies of the case absolutely demand it.

The minority advocated granting the application of contestee to take further testimony. The fraud was conceded, and contestee's returned plurality in the precincts where it occurred was larger than his total plurality in the district. "The question, therefore, whether these precincts shall be purged or rejected from consideration is the vital

question in the case." There was no evidence that the ballots had been tampered with since the count, and the whole nature of the fraud was such as to make it improbable that they would be altered, as such alteration could only make them cease to agree with the returns. It would now be possible to separate the fraudulent from the legal vote, and count the latter. Mr. Tarsney could not have procured this evidence before, because he could not secure access to the ballots under the laws of Missouri.

In the report of the majority of the committee it is correctly stated that the Constitution of the United States is the supreme law of the land, and that the provision therein that each House of Congress shall be the sole judge of the qualification and election of its own members is binding upon the States, and that no State law can prevent Congress from resorting to any means necessary to the exercise of its constitutional right to judge of the qualification and election of its own members; but we do not agree with the majority that any court in the land has power, in aid of that Congressional prerogative, to compel officers of a State, county, or municipality, contrary to a State law, to exhibit ballots cast at an election held under the laws of such State for local officers and for Representatives in Congress to any officer or commissioner other than a duly authorized representative of either of the Houses of Congress, and we do not believe that Mr. Tarsney was guilty of any laches in failing to appeal to the courts for the purpose of having the legal custodian of the ballots in question deliver them, or exhibit them, to any notary public, or commissioner, or other officer taking testimony in the contested-election case of Van Horn against Tarsney, because such application would have been idle and futile.

Unless it should be shown by the evidence that at least 550 of the fraudulent ballots in the contested precincts were cast for contestee, his majority would not be overcome.

We think the showing made in support of his application is sufficient to justify this House in believing that there is a reasonable probability that he may be able to show that less than 550 of the fraudulent votes cast in those precincts should be taken from him. This reasonable probability is sufficient to warrant the House in granting the application, if, indeed, the circumstances do not make that course the imperative duty of the House in seeking the ends of justice.

The minority therefore recommended resolutions recommitting the case for the taking of additional testimony.

The case was fully debated in the House, and the resolutions presented by the minority were lost by a vote of 110 to 163. The resolutions presented by the committee were then passed, without division, and, on February 27, 1896, Mr. Van Horn was sworn in.

[Report 355, parts 1, 2, and 3, first session Fifty-fourth Congress.]

(15) COLEMAN *vs.* BUCK.

Fraud, violence, and intimidation. Report for contestee, who retained the seat.

Report by Mr. Miller.

Contestee was elected on the face of the returns by a majority of 7,653. Contestant made many charges against the fairness of the election, summarized by the committee as follows:

That the Democratic officials had violated the election law in the appointment of election officers, registrars, and other persons; that many legal voters, who would have voted for contestant, were prevented from registering by acts of violence committed by Democrats; that hundreds of Republicans who were entitled to vote and who would have voted for contestant, were prevented from so doing by intimidation and other unlawful means used by Democrats in the interest of the contestee; that by means of murder, arson, false registration, the issuance of thousands of fraudulent registration certificates, ballot-box stuffing, forged returns, and destruction of ballots voted by Republicans for contestant, the Democrats, in the interest of

contestee, inaugurated and maintained before and at the time of said election such a reign of terror, and committed such acts of lawlessness, with the knowledge and consent of the authorities, that no legal or fair election could be or was held in said district.

The committee found a large part of these charges sustained by evidence, but could not find that enough votes were shown to be affected to overcome the large returned majority of contestee. They threw out the vote of Jefferson Parish and of the First, Second, and Fifth wards of St. Charles Parish. In New Orleans much fraud and violence was proved, but not enough to justify throwing out all the votes, nor to show that the number of votes affected was sufficient to change the result of the election. The committee therefore recommended resolutions declaring contestee elected, which, on March 12, 1896, were passed by the House without division.

[Report 758, first session Fifty-fourth Congress.]

(16) BOOZE *vs.* RUSK.

Recount; rejected votes; illegal votes, fraud. Report for contestee, who retained the seat.

Report by Mr. Prince.

The returned majority of contestee was 518. A recount of the ballots was made, on which contestant gained 131 votes. Forty legal voters who would have voted for him were refused the right to vote on the ground that other persons had already voted on their names. One hundred and sixty-one illegal and fraudulent votes were cast for contestee. The committee deducted these 332 votes from the returned majority of contestee, but they were less than the whole majority. Contestant also asked that several precincts be thrown out entirely for fraud and fatal irregularities, but the committee found the charges against these precincts disproved by the evidence. They therefore reported resolutions declaring contestee elected, which, on March 18, 1896, were passed by the House without division.

[Report 849, first session Fifty-fourth Congress.]

(17) BENOIT *vs.* BOATNER.

FIRST CASE.

Fraud, violence, and intimidation. Majority report to declare seat vacant; minority report for contestee. Seat declared vacant.

Majority report by Mr. Tayler; minority report by Mr. Bailey.

On the face of the returns contestee had a majority of 9,526 votes. Contestant charged that this majority was obtained by widespread fraud, violence, and intimidation in ten of the fifteen parishes of the district. The committee found this charge sustained and held that no valid election had taken place. The minority found that in six of the ten parishes in dispute there was not evidence enough to justify throwing out any polls, and that in two of the others there were only 9 polls to be rejected, leaving only two parishes to be rejected entire. This would still leave contestee a majority of 5,188. If all the polls against which contestant brought any evidence were excluded, contestee would still have 327 majority. The minority therefore held that the election was valid and that contestee was elected.

The committee discussed the evidence and quoted some of it in regard to each of the contested parishes, showing that there was a general sentiment among the white minority in the "black parishes" in favor of controlling the elections without reference to the will of the negro majority; that the registration lists were fraudulently padded; that the vote returned, in many cases, was far in excess of the actual vote, and in some cases of the entire registered vote; that there was a great deal of coercion and quiet intimidation of negro voters and some violence, though less of this than formerly, the violence of the past having now made mere threats quite sufficient in most cases; that the returns were quite generally not signed or not sworn to, the election officers who had considered themselves justified in committing fraud often hesitating to swear to it; that the poll books and tally sheets had nearly all disappeared, and no one could be found who knew anything about them; that the officers of election, so far as possible, avoided testifying, going even to the extent of disobeying subpoenas or refusing to answer questions, on the ground that it might incriminate them, or by resorting to technical subterfuges under the advice of counsel.

The committee did not discuss the testimony by polls, but concluded on the whole case that the election was void.

The minority went over the testimony by parishes and polls. In a large number of cases the evidence was found to be insufficient to sustain the charges. Some polls were thrown out because the returns and tally sheets were not sworn to or signed, and some for proved intimidation or fraud. One whole parish was rejected because the returned vote was shown to exceed the registered vote and another because no part of any of the returns was sworn to. After making all these deductions, contestee still had a majority, as above stated, and the minority recommended resolutions declaring him elected.

The case was very briefly debated in the House, the statement being made that the day of the debate was the last day on which the governor of Louisiana could proclaim a new election on the same day as the general election, and if a new election was to be ordered it was desired to hold it on that day. The resolutions recommended by the minority were lost by a vote of 59 to 132. The resolution recommended by the majority was then passed without division, and on March 20, 1896, the seat was declared vacant. A new election was ordered, which gave rise the next session to another contest (q. v.) between the same parties.

[Report 867, first session Fifty-fourth Congress.]

(18) THOMPSON *vs.* SHAW.

Case not made out Report for contestee, who retained the seat.

Report by Mr. Weller.

On the returns as canvassed contestee had a majority of 994. It was conceded that certain returns rejected by the county commissioners ought to have been canvassed. Counting these, contestee still had a plurality of 877 votes. Charges were made in regard to the election at various precincts, but the nature of the charges was not stated in the report. The case turned on Cross Creek precinct. If this were rejected, contestant would have a majority of not over 524 votes; if it

were counted, contestee would have a majority of at least 581. In regard to this precinct the committee said:

Contestant contends that the whole vote cast at this precinct should be rejected for frauds committed and unlawful acts done by the partisans of contestee.

While the committee believe that there were irregularities in the conduct of said election, and that perhaps there were illegal votes cast and counted for contestee, yet they do not feel warranted upon the facts proved in disregarding the whole of the votes cast at said precinct at said election.

The committee therefore recommended resolutions declaring contestee elected. The House, on May 6, 1896, passed the resolutions without division.

[Report 1635, first session Fifty-fourth Congress.]

(19) CHEATHAM *vs.* WOODARD.

Case not made out. Report for contestee, who retained the seat.

Report by Mr. Prince.

According to the returns, Woodard, the Democratic candidate, received 14,721 votes; Cheatham, Republican, 9,413 votes, and Freeman, Populist, 5,314 votes. Cheatham contested, alleging that the colored voters were in the majority in the district and that the colored vote was solid for him. Neither of these charges, the committee held, was sustained by the evidence. A very bitter factional fight in the Republican party had deprived contestant of much of his party vote. It was further alleged by contestant that the election was not conducted fairly, and that the poll holders were ignorant and corrupt and defrauded him. "This allegation," the committee said, "is not maintained, except in a few instances where the poll holders were shown to be ignorant."

The resolutions recommended by the committee declaring contestee elected were passed by the House May 14, 1896, without division.

[Report 1809, first session Fifty-fourth Congress.]

(20) MITCHELL *vs.* WALSH.

Bribery. Majority report for contestant, minority report for contestee. Contestant seated.

According to the returns contestee had a majority of 367 in the district. Outside of the second assembly district contestant had a majority of 1,328, but in this district (the Bowery lodging-house district of New York City) contestee had a majority of 1,695. Contestant charged, and the committee found, that in this district there was a conspiracy on the part of the Tammany leaders to carry the election by fraud and bribery, and that the conspiracy was carried out. Contestee was the Tammany candidate. His name was not on the regular Democratic ticket, but was on the Tammany ticket and on Tammany "pasters," which were used in large numbers.

The committee quoted from the testimony in regard to the methods of bribery used. The Tammany captain in each district was said to have had a place near the voting booth, ostensibly "to prepare ballots." He gave out "Tammany pasters." Clerks and proprietors of lodging-houses assisted in the "work." The price of votes (paid after voting) was from \$1 to \$2.

After quoting the testimony of witnesses in regard to these frauds, the committee said:

Contestee attempted to discredit the testimony of the above witnesses by showing that they had been entertained by contestant and his attorneys, and for this reason are unworthy of belief.

They were not impeached in any instance, and we believe that, taking into consideration the surrounding circumstances, they are entitled to credence.

Fraud can rarely, if ever, be proved by direct evidence, and the rule is that whenever a sufficient number of circumstances which point to its existence are clearly established a prima facie case of its existence is made, and if this case is not met with explanation or contradictions it becomes conclusive.

In this case contestee did not introduce any of the persons accused of fraud to explain his actions.

Contestee insists that he should only lose those votes where individual instances of bribery are shown. We can not accept this theory of the law when the evidence shows the existence of a conspiracy to corrupt voters by bribery.

Either all the votes, or all the votes for contestee, in the polls where bribery in his interest was shown should be rejected. The committee did not decide which of these two courses was correct. In one case contestant would have a majority of 362, in the other of 76, and the committee therefore recommended resolutions declaring him elected.

Contestee objected to all the testimony taken in New York County before William A. Hoar, one of the notaries in the case. Hoar had been a resident of Kings County and a notary public for that county, with the right to officiate in New York County on filing his certificate in that county (which he had done). Before taking the testimony in this case he had become a resident of New York County, which, under the law, probably vacated his office. No objection to his competency had been entered during the taking of the testimony in chief, but such an objection had been entered during the taking of rebuttal testimony. The committee said:

We are of opinion that the testimony taken before William A. Hoar ought to be considered by the committee and the House, for the reasons following:

1. Because it is too late for the contestee to be permitted to object on this ground. He knew, or, what is the same in legal effect, he was charged with knowledge of the fact, as to whether Hoar was a notary authorized to administer oaths. He knew that the notary was described in the notice as residing in the Eighth Congressional district, and in his signatures to the transcript of testimony as notary of Kings County, with certificate filed in New York County. To say the least, he was put upon inquiry.

The contestee is in the same position as if he and the contestant had agreed that the testimony might be taken before a person who was not, by any law, authorized to administer oaths. It is true that such an agreement might not be recognized by the House of Representatives. It might abrogate that, as it might any other agreement between parties. But it does not lie in the mouth of either party who has, either in fact or constructively, so agreed to object to the validity of testimony so taken.

2. But we are constrained to put our conclusion on still broader grounds. The House of Representatives, with its broad and, indeed, limitless powers respecting the settlement of contested-election cases, is only desirous of arriving at the truth. While it will not depart from wise and well-settled rules of law, it will not hedge itself about with technical rules which do manifest wrong.

In this case it is apparent that the parties to the contest, their attorneys, and every witness who was summoned, supposed that Hoar was a notary public, with full power to administer oaths, and that a prosecution for perjury could as certainly be based upon a false statement before him as upon a false statement made on oath in a court of justice. We have therefore considered the evidence.

The minority were of the opinion that all the testimony taken before Hoar should be excluded.

We can not assent to the proposition that, under any circumstances, unsworn statements of persons called as witnesses can be substituted for evidence taken under oath duly administered as required by laws governing contested elections. Such a course of procedure, whether agreed to by the parties or not, would reduce the taking of testimony in contested election cases to a farce unworthy of a moment's consideration in the determination of an election contest. * * *

We think the acceptance and consideration of testimony so taken without the sanction of an oath would be an exceedingly dangerous precedent in contested election cases. The temptation to perjury, exaggeration, and evasion for partisan purposes, or through more unworthy motives, is already great enough in such cases without adding the encouragement of the assurance that Congress will accept and consider testimony taken by persons not authorized to administer oaths, in the giving of which the witnesses are assured of their absolute immunity from punishment for perjury. If the contestant and his witnesses, knowing, as stated, that Mr. Hoar was a notary public for Kings County, and that he had changed his residence from Kings County to New York County, were ignorant of the legal effect of those facts, it may be a hardship upon him to exclude from consideration the testimony taken on his behalf before Mr. Hoar, but it is a misfortune for which he alone is responsible, and it is a misfortune for which no relief can be given, at this time, without causing a public injury infinitely greater than the private injury which might thereby be avoided.

Contestant had a remedy for his mistake in taking the testimony in question before an unauthorized person to which he might have resorted after discovering Mr. Hoar's incapacity.

He might have applied to the House or to this committee for leave to retake the testimony before an authorized person, and such a request, if made in reasonable time and in apparent good faith, would certainly have been granted.

However, since much of the report of the majority was based on this testimony, the minority discussed it with the rest, calling attention, however, in each case, to the fact of its inadmissibility.

On the issue of fact the minority said:

It is not claimed that the evidence shows a sufficient number of votes procured to be cast for contestee by bribery to overcome his majority as shown by the returns, and to show that a majority of the lawful votes cast were really cast for contestant; but it is claimed that, as a legal result of proof that there was in those districts a general conspiracy to bribe voters in the interest of the contestee and other nominees on the Democratic ticket, and that, pursuant to that conspiracy, some voters were bribed to vote for contestee, and did so cast their ballots as a result of such bribery, the entire vote of each of the precincts in which such bribery is shown to have existed at all should be thrown out and eliminated from the count. The result of this rule applied by the majority of the committee to the alleged facts would give to contestant a plurality of 76 votes in the entire Congressional district. We deny the sufficiency of the evidence to support any of these findings.

The minority discussed the testimony in detail, showing its indefinite and unsatisfactory nature, as well as the evident low character of most of the witnesses, and the suspicious action of contestant's attorney in sending many of these witnesses to be kept at his expense in Harlem, N. Y., and New London, Conn., and in supplying them with liquor in his office.

If a tithe of the money that seems to have been expended in herding and boarding and lodging and clothing and intoxicating these witnesses had been expended in procuring the services of reputable persons to watch the election and the count on election day in those districts, as seems to have been done by the Good Government Club in some of the districts, reliable testimony from credible witnesses might have been produced to establish the truth respecting the matters in issue. It is contestant's misfortune that he has not been able to produce testimony worthy of credit, just as it would be his misfortune if no witnesses at all could have been procured by him to testify to what he believes to have been the facts.

In one election district the minority found enough evidence to establish a *prima facie* showing of bribery committed by three named persons in the interest of the Democratic ticket, of which contestee may have reaped the advantage. At least one of these persons should have been called as a witness to rebut the presumption of fraud, but even if this poll were rejected contestee would still have a majority. In the other polls the minority found no testimony to support the conclusions of the committee.

In the House, after debate, the substitute resolutions proposed by the minority were lost, without division, and the resolutions proposed by the committee were passed by a vote of 162 to 39. Mr. Mitchell was then, on June 2, 1896, sworn in.

[Report 1849, parts 1 and 2, first session Fifty-fourth Congress.]

(21) MARTIN vs. LOCKHART.¹

Fraud; wrongful rejection of votes; ballots in wrong boxes. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Strode; minority report by Mr. Bailey.

On the face of the returns contestee had a majority of 444 votes. Contestant made charges summarized by the committee as follows:

That the contestant, Charles H. Martin, was unlawfully deprived of a large number of votes to which he was entitled; that these votes were fraudulently rejected upon the pretense of irregularities in the registration; that the voters were not in fault with regard to such irregularities, but that they were committed by the election officers; that the votes of a large number of voters who would have voted for contestant were rejected by the poll holders on frivolous challenges; that the poll holders in many voting precincts purposely placed votes cast for contestant in the wrong boxes and afterwards rejected them because they were deposited in the wrong boxes; that poll holders in many voting precincts refused to put the ballots of voters in the ballot boxes, and that many voters who could not read and who cast their votes for contestant were compelled to deposit their own ballots and by mistake deposited them in the wrong boxes, and that they were rejected by the poll holders, when counting the vote, because they were found in the wrong boxes; that ballots for contestant were rejected because they were not printed, the regularly printed tickets of contestant having been stolen; that boxes were not used in some of the precincts as repositories for the ballots, as the law required; that the ballot boxes in some of the precincts were not labeled with roman letters, as the law required; that poll holders in some of the precincts purposely changed the positions of ballot boxes so as to disarrange them in their order, in order to entrap unlettered Republicans and Populists who desired to vote for contestant into putting their tickets in the wrong boxes; that at one voting place the election officers refused to count the ballots or make any returns of the election, where the contestant claims to have received a large majority of the votes cast; that many who were unlawful electors cast their ballots and they were counted for contestee.

In one precinct 70 voters, who testified that they tendered ballots for contestant, were rejected because of alleged irregularities in their registration entries. The irregularity in many of the cases was the absence of any entry on the registration book under the heading "Township or county from whence removed," though the other entries in regard to some of them showed that they were born in the township where they were registered and they had lived there all their lives. Others were rejected for other immaterial irregularities in the entries for which the registering officers were responsible. The committee

¹ The title of this case was printed by mistake at the head of the majority report as "James A. Lockhart vs. Charles H. Martin," the names of contestant and contestee being transposed.

counted all of these 70 votes. The minority said: "While there may be ground of dispute as to all of these, there certainly should be none as to 8 of them, who, under the registration laws of the State, were clearly not entitled to vote," 1 of them not being registered, and the irregularities in the other 7 cases being such as the supreme court had declared fatal.

In another precinct very many votes were rejected for similar irregularities, placed in the registration book by the deliberate policy of the registering officers to write down the answers given by ignorant applicants just as they gave them, though the facts stated were sufficient to enable the clerks, of their own knowledge, to make the entries in correct form. There was also intimidation at this precinct, and some of the other frauds described in the other precincts, affecting an unascertainable number of votes. The committee threw out the precinct. The minority counted it, except a few votes, claiming that the irregularities were the fault of the voters and that the intimidation consisted of groundless rumors.

There were 6 ballot boxes at each of the polls, and each voter was required to vote 6 tickets. The boxes were required to be labeled in plain roman letters, and the vote was required to "be put into the proper box or boxes by said voter, or by the judges at the request of the voter." A great many "Fusionist" (Republican and Populist) votes, but no Democratic ones, were found in the wrong boxes. The Republican or Populist poll holders, where any were appointed, were put in charge of the "constable's box" (there being only one candidate for constable), and the other election officers in charge of the other boxes refused to deposit ballots for voters or were alleged to have deposited them in the wrong boxes. The committee counted the votes, where there was proof of them, or threw out the whole poll where the fraud was such as to vitiate the returns and the true vote was not otherwise ascertainable. The minority held that votes found in wrong boxes should not be counted, arguing that otherwise it would be possible for a voter to cast 6 votes for one candidate for one office by placing a vote for him in each box, and asserting that this was, in fact, done in one precinct.

In one precinct all the printed tickets for contestant had been stolen and written ballots were used. The committee unanimously counted these.

In another case the tally sheet was kept by an unsworn outsider and was the only count of the vote made. The tally keeper did not testify, and two witnesses swore that they watched the tally and that it was 16 votes more than the returns showed. The majority counted and the minority did not count these votes.

In another precinct a large number of tickets were tendered to the judges, who refused to deposit them in the boxes unless they were handed in 1 at a time. The voters refused to separate their tickets, and placed them on the table and left. There were other wrongs which made it impossible for the correct vote of the precinct to be determined, and the committee threw it out. The minority held that the voters should have complied with the not unreasonable request to separate their ballots and hand them in 1 at a time.

In another district the election officers refused to count the vote, alleging threats and violent actions on the part of contestant's friends to force them to leave the building where the election was conducted

to make the count. The committee reported the facts, but made no count of the votes.

Under the findings of the majority contestant had a majority of 330 votes, and they recommended resolutions declaring him elected,

Under the findings of the minority contestee still had a majority of 256 votes, and they recommended a resolution declaring him elected.

The case was fully debated in the House. The resolution presented by the minority was lost by a vote of 67 to 156. A motion to recommit was lost by a vote of 51 to 149. The resolutions recommended by the committee were then passed by a vote (on division) of 113 to 5, and, on June 5, 1896, Mr. Martin was sworn in.

[Report 2002, parts 1 and 2, first session Fifty-fourth Congress.]

(22) *BENOIT vs. BOATNER.*

(SECOND CASE.)

Fraud, violence, and intimidation. Report for contestee, who retained the seat.

Report by Mr. Johnson.

As the result of a contest between the same parties the seat from this district had been declared vacant at the previous session (see first case of *Benoit vs. Boatner*, above) and a special election had been called to fill the vacancy. At this election Boatner was returned as elected by a majority of 4,568. Benoit contested, charging wholesale frauds, violence, and intimidation, of the same character as at the previous election. The committee found that the charges were sustained to a large extent, but not enough to overcome the returned majority of contestee or to make the whole election invalid.

The committee called attention to the fact that contestant carried the "white" or hill parishes, and that contestee, the Democratic candidate, obtained his greatest majorities in the river parishes, where the colored voters were overwhelmingly in the majority. In general the returns showed that contestant's strength was greatest in the white neighborhoods and contestee's was greatest in black neighborhoods. The election in the former neighborhoods was usually fair; in the latter fraud and intimidation were generally charged.

Going over the testimony by polls and parishes, the committee found that the vote of one parish should be changed from 758 to 64 for contestee, and that the vote of two parishes should be rejected. This, however, would still leave a majority of 802 for contestee.

While the evidence establishes the fact that flagrant frauds were perpetrated in all of Tensas Parish, and in a portion of Catahoula Parish, and that intimidation prevailed generally throughout the parish of Ouachita, still the committee do not feel justified in recommending that the election be held void and the seat declared vacant, for the reason that these three parishes constitute only one-fifth of the total parishes of the district, and their entire rejected vote does not amount to one-third of the vote cast therein at the election.

The committee are not sure that the fraud and intimidation were so extensive and general throughout the district as to render it certain that there was not a free and fair expression by the great body of the electors, however strongly they may suspect this to have been the case.

Resolutions declaring contestee elected were therefore recommended. On the general question of intimidation the committee said:

In passing upon this question of intimidation the committee have had in mind certain propositions which seemed to them to be sound, and in the light of which they have reached the conclusion above announced.

They recognized the fact that coercive measures do not operate alike upon all voters. That which would have no effect whatever upon one class might, nevertheless, exert an irresistible influence upon another class.

It is therefore believed that in determining whether or not intimidation exists in any case, due regard should always be had to the mental and physical organization of the particular electors upon whom the wrong is charged to have been inflicted, their relation to the alleged wrongdoers, their condition of dependence or independence, and, indeed, to their whole environment as well as to the character and disposition of the wrongdoers themselves. Nor is it, in the opinion of the committee, either a logical or a just doctrine that the oppressive acts which will avoid an election must necessarily be of such a character as to overpower the will of voters of reasonable courage and intelligence. Such a principle as this would, in its practical operations, result in the disfranchisement of the weak and the ignorant electors, who should ever be the object of the law's solicitude, and in the arrogation of political power into the hands of the electors who are strong and well informed.

It is evident, too, that physical violence against the person of the elector is not the sole criterion by which the existence or nonexistence of intimidation is to be determined, since some electors might be beaten without being at all terrorized, while other electors might be put in great fear without the striking of a single blow. Nor do the committee believe that in passing upon the question as to whether intimidation prevailed the examination should be limited to the unlawful acts committed against the voters at the very time of the election in contest. It is often the case that preceding occurrences, although somewhat remote in point of time, give great significance and momentum to recent acts of oppression and thus become very proper subjects for examination and consideration.

On January 14, 1897, the Clerk of the House addressed a letter to the Speaker calling attention to the fact that the usual course of filing briefs, etc., under the general law would carry the preliminary stages of this case beyond the date of adjournment. The case was therefore referred to the committee at once, and on January 15 a resolution was passed instructing the committee to go on with the case. The report of the committee was made on February 5, Mr. Bailey stating in the House that he agreed to the conclusions, but that he might wish to put in a minority report. No such report appears, however, to have been filed.

On February 15, 1897, the resolutions recommended were passed by the House without division.

[Report 2808, second session Fifty-fourth Congress.]

(23) BEATTIE vs. PRICE.

Fraud, violence, and intimidation. Majority report for contestee; minority report to declare seat vacant. Contestee retained the seat.

Majority report by Mr. T ayl er; minority report by Mr. Johnson.

Contestee was returned as elected by a majority of 5,766. Contestant charged fraud, violence, and intimidation, which resulted in a practical disfranchisement of the colored voters of the district, who were said to be adherents of contestant. The committee found that the colored voters were not, in general, supporters of contestant, and that the fraud and intimidation shown were not sufficient to overcome the returned majority of contestee or to invalidate the election.

Contestant was the nominee of a convention of white men, mostly former Democrats, calling themselves "New Republicans," who undertook to organize a white Republican party in Louisiana. The position of the new party on the race question was thus stated by the chairman of the convention:

That we had gone into this for the purpose of organizing a white man's Republican party in the State of Louisiana; that we proposed that the policy of the party lately

organized should be dominated by white men; that this party would be controlled by white men, and that, while we did not reject the vote of any American citizen, white or black, the negro must recognize that the white men would dominate and control, and that he could follow and we would lead.

Commenting on this situation, the committee report used the following language:

In view of these facts, it is difficult to understand how any considerable number of such voters were disfranchised. It is inconceivable that any considerable number of such voters could have any desire to vote for the contestant. It is quite true that he ran on the Republican ticket and that the negro's loyalty to the Republican ticket is beyond question; but whatever incapacity may be charged against the negro of Louisiana, however he may incline to follow the Republican banner wherever it leads, he has not yet fallen to that depth of pusillanimous ignorance and stupidity where he will voluntarily indorse a party whose battle cry is white supremacy, however meritorious may be the other principles to which it adheres. The predicate of the contestant's claim is the suppression of the negro vote; but the negro vote in the campaign of 1894 was not his, and by no stretch of imagination can be conceived to have been his. The negro might possibly support the Republican ticket and a Republican platform in which the question of the negro's civil and political rights were relegated to the background, but we submit that it is impossible that he could support a Republican ticket standing on a platform which affirmatively declared, in the language of the chairman of the committee of that kind of a Republican party, as follows: [Quoting the statement above.]

On the question of fraud and intimidation, the committee repeated the statement of the law quoted in the case of *Benoit vs. Boatner*, as follows:

If fraud, violence, and intimidation have been so extensive and general as to render it certain that there was no free and fair expression by the great body of the electors, then the election must be set aside, notwithstanding the fact that in some of the precincts and parishes there was a peaceable and fair election.

The evidence was not sufficient to bring this case under the rule.

There is nothing in this case to justify the claim that there was "no free and fair expression by the great body of the electors."

So far as the testimony shows, there was a "peaceable and fair election" in not only "some of the precincts and parishes," but in most of them.

There are 166 polling places in the district, and as to more than three-fourths of them there is not a syllable of testimony showing fraud, violence, or intimidation.

There was violence in some parts of the district, and two murders were committed just before the election, one at least of which appeared to have been political. But the number of votes affected was in any case too small to affect the result.

Messrs. Johnson, Long, and Strode signed a minority report, holding that the election should be declared void. They said:

We are unable to agree with the committee in their view of this case.

The reading of the report naturally leaves the impression that the white Republicans of the district spurned the colored voters with contempt and made no effort whatever to secure their votes, and that this conduct was resented by the colored voters so strongly that they had no desire to vote for Beattie, and, for this reason, did not do so.

We have read the evidence with great care, and we deny that it warrants any such conclusion. Upon the contrary, it shows clearly that, while there was manifested by the white Republicans a determined disposition to lead in the canvass, and to establish a new Republican organization committed to the doctrine of white supremacy and a protective tariff, yet, with rare exceptions, they recognized the right of the colored electors to vote, and made earnest efforts in many parts of the district to secure their suffrages.

The evidence shows, too, beyond question that the colored electors were very generally desirous of voting for Beattie.

We particularly dissent from the statement made in the report of the committee that "There is nothing in this case to justify the claim that there was no free and fair expression by the great body of the electors. So far as the testimony shows,

there was a peaceable and fair election in not only some of the precincts and parishes, but in most of them."

With all deference to the committee, we insist that this declaration is incorrect.

In our opinion the record discloses widespread intimidation of the colored voters by the supporters of Price—intimidation practiced in a majority of the parishes of the district—the effect of which was to deter great numbers of them from attending the election and casting their ballots for Beattie.

For instance, the killing of Tally Whitehurst, a prominent colored Republican, and a supporter of Beattie, who resided in the parish of Lafourche, is clearly shown by the evidence to have been a cold-blooded and premeditated murder, perpetrated by some of the white friends and supporters of Price, a few days before the election, solely for political purposes, and to intimidate the colored voters.

It appears that this murder had the desired effect, not only in Lafourche, but also in one or two of the adjoining parishes.

We concur in the opinion of the committee that Beattie is not entitled to be seated, but disagree with their conclusion that Price is entitled to the seat.

We are convinced that fraud and intimidation prevailed so extensively and generally throughout the district as to prevent a free and fair expression by the great body of the electors, and we believe, therefore, that the election should be declared void and the seat left vacant.

There was no debate in the House, and the resolutions presented by the majority were passed without division.

[Report 2812, second session Fifty-fourth Congress.]

(24) DAVIS *vs.* CULBERSON.

Case abandoned. Contestee confirmed in seat.

Report by Mr. McCall.

Contestant served notice of contest, but appears to have taken no further steps. The committee recommended resolutions declaring contestee elected, which, on January 30, 1896, passed the House without division.

[Report 180, first session Fifty-fourth Congress.]

(25) ROSENTHAL *vs.* CROWLEY.

Delayed and irregular returns. Report for contestee. Contestee retained the seat.

Reports by Mr. Jenkins.

On the face of the returns as canvassed contestee had a majority of 1,303. The county canvassers in one county did not canvass certain returns, which contestant claimed should be counted, and in another county canvassed returns which contestant claimed should not have been counted. Counting the returns in question from the former county and excluding those of the latter would give contestant a majority of 120, but the committee reported that part of the rejected precincts in the one county were excluded on the same ground as that on which contestant now asked that the precincts from the second county should be excluded—that the returns were not filed with the county commissioners within the legal time. Contestee would be elected if the rule were applied either way to both counties alike, and the committee therefore recommended resolutions declaring him elected.

Contestant had not included all the precincts asked to be considered in his notice of contest, and applied for leave to amend the notice so as to cover them, but as the committee had considered all the evidence as if the notice had covered it, and had still found contestant's case not made out, they reported adversely the resolution to amend.

The resolutions recommended were passed by the House on January 31, 1896, without division.

[Reports 177 and 197, first session Fifty-fourth Congress.]

(26) *MOORMAN vs. LATIMER.*

Rejected votes. Report for contestee. Contestee retained the seat.

Report by Mr. Bell.

In the whole district contestee received, according to the returns, 5,778 votes, contestant 985, and another candidate 342—a plurality for contestee of 4,793 votes. Contestant claimed that all the ballots of contestee were invalid, and also that from 6,000 to 7,000 Republican voters were refused the right to vote because they did not have registration certificates, as was required by the laws of South Carolina, which laws, he contended, were unconstitutional, because in conflict with the Constitution of the United States and of South Carolina. He claimed also that a number of properly registered voters were refused the right to vote by the election officers on various pretexts.

All the ballots voted for contestee were printed "Representative in Congress, Third district, A. C. Latimer," and contestant claimed that they were deficient in that they did not specify that they were voted for a candidate for the Third district of the State of South Carolina nor for a Representative to the Fifty-fourth Congress. The committee, referring to the case of Blair *vs.* Barrett, in which a ballot headed "For Congress, Francis P. Blair," had been held to be sufficient, expressed the opinion that the ballots in this case were clearly sufficient and had been properly counted for contestee.

Adopting the most favorable construction on all the other issues, the evidence of contestant still failed to overcome the returned majority of contestee. Supposing that the registration law were unconstitutional, that all the persons rejected had a right to vote, and that they would all have voted for contestant, the number was still 215 short of the returned majority of contestee. Even these figures would require the support of contestant's claims at several precincts where the evidence was wholly insufficient to establish anything. The committee therefore recommended resolutions declaring contestee elected, which, on April 15, 1896, were passed by the House without division.

[Report 626, first session Fifty-fourth Congress.]

(27) *JOHNSTON vs. STOKES.*

Rejected votes. Majority report for contestee; report by Mr. McCall to declare seat vacant; minority report for contestant. Seat declared vacant.

Majority report by Mr. Jenkins; second report by Mr. McCall; minority report by Mr. Overstreet.

On the face of the returns as canvassed contestee had a plurality of 4,702 votes. Counting some returns not canvassed and correcting other minor errors, this plurality would be reduced, according to the majority report, to 4,204, or, according to the minority report, to 4,275. The case turned on a large number of rejected votes refused by the officers of election chiefly on the ground of nonregistration. It was claimed that there was evidence showing by name 7,336 of these votes,

much more than enough to overcome the returned plurality of contestee. Five members of the committee held that, under the evidence, contestee was elected; Mr. McCall held that neither party was elected, and Messrs. Overstreet, Walker, and Thomas held that contestant was elected. The House agreed with Mr. McCall.

Contestant claimed that the election law of South Carolina was unconstitutional, being in violation both of the Constitution of the United States and of the State of South Carolina. The minority quoted authorities on this point. The majority simply said:

The contestant insists that the registration law of South Carolina, under which this election was held, is unconstitutional, being in violation of the constitution of that State and of the Constitution of the United States.

The committee do not agree with the contestant as to the latter claim, and while there is a difference of opinion as to the extent of its unconstitutionality, the committee agree that a part of the law is unconstitutional, being in violation of the constitution of the State of South Carolina. But the committee find that the election was held throughout the State on the basis of such registration, the electors acquiesced in and conformed to the law, and the committee, being unable to find from the evidence that electors sufficient in number to change the result were prevented from voting by reason of the registration law, hold the election valid.

The brief report of Mr. McCall discussing this point, and also the issue of fact from the point of view finally adopted by the House is, in full, as follows:

I concur in the conclusion of the majority of the committee that the contestant was not elected. The testimony, in my opinion, does not show such a tender of votes on the part of the excluded voters, such as the authorities require, as will justify the counting of a sufficient number of them to overcome the adverse plurality. But while the testimony is not sufficient for such a purpose, it does show a wholesale exclusion of voters and an unfair application of the registration law.

The law only provides one registration place in each county, and only one day for registration each month from December to June, inclusive. Although the constitution provides that a male person otherwise qualified shall have the right to vote who has resided in the precinct sixty days before the election, the registration law, in fact, denied him registration, and, consequently, the right to vote unless he had resided in the precinct on the 1st day of July preceding the election. This provision is clearly repugnant to the constitution of South Carolina, which, under the pretense of regulating suffrage, imposes a new qualification upon it and is, therefore, unconstitutional. I may add that the chief justice of South Carolina and the judge of the United States court for that circuit each rendered an opinion that the law was unconstitutional, and although their associates held in each of the cases presented that the court did not have jurisdiction, that fact does not detract from the weight of the opinions.

The testimony shows that many voters, some of them coming 30 or 40 miles, appeared regularly at the places of registration from month to month, and were denied registration by means of a systematic obstruction. It shows further that many thousand men who had the constitutional qualification, but were not registered, and who therefore had the right to vote if the registration laws were unconstitutional, expressed their desire to vote by going to the polls. Doubtless many thousands more unregistered voters remained at home who would have come had they not known that a rule requiring registration certificates was in force and that they would be excluded if they came.

"If the officers conducting an election adopt and enforce an erroneous rule as to the qualification of voters which prevents certain legal voters who offer to vote from giving in their votes, and being made known prevents other legal voters similarly situated from offering to vote, the election may be set aside, especially if it appear that such votes if offered and received would have changed, or rendered doubtful, the result. After a decision has been made by the election officers affecting the right of a class of voters to vote and that decision becomes known, it is not necessary that every voter belonging to such class should offer his vote and have it formally rejected." (McCreary on Elections, third edition, section 241; Scranton borough election case, Brightly's Election Cases, 455.)

The colored race is enormously in the majority in this district, and it appears that as a rule the voters of that race in that district were Republicans. Believing that the registration law of South Carolina was unconstitutional, I am constrained to find from the evidence in this case that if said law had not been applied at all, or even fairly applied, the result would probably have been different, and I am therefore not able to give my assent to the conclusions of the majority of my colleagues that the contestee was elected.

The minority referred to the case of *Miller vs. Elliott* in the Fifty-first Congress, in which this law was declared unconstitutional, and also to the cases of *Mills vs. Green* (67 Federal Reporter, 818), and of *Butler vs. Ellerbe and Bates* (22 S. E. Reports, 425, 437), mentioned by Mr. McCall above, quoting from the opinion in the former case.

All the committee agreed that lawful votes, lawfully tendered and unlawfully refused, should be counted on sufficient proof being made. The majority said:

It has been held that lawful votes tendered but not received can not be made available by either party. (State ex rel. Spence, 13 Ala., 805; Webster vs. Byrnes, 34 Cal., 273; Hart vs. Harvey, 19 How. Pr., 245; Newcum vs. Kirtley, 13 B. Munroe, Ky., 515; Biddle and Richard vs. Wing, first session Nineteenth Congress.)

No doubt it is the safer and better rule, when the evidence will warrant it, and as this House has done in many instances since the Nineteenth Congress, to count lawful votes, lawfully tendered and unlawfully refused, when the number is sufficient to change the result and it is known for what candidate the elector intended to vote. But before the vote can be counted, it ought to appear by competent evidence that qualified electors, sufficient in number to change the result, had lawfully tendered their votes and were unlawfully rejected, and for whom the rejected electors would have voted if they had been permitted to vote.

But the majority held that the declarations of the voters could not be received to establish these facts, and that in most of the cases in the present contest even the declarations of the voters as a part of the *res gestæ* were not established by evidence. They said:

If the declaration of the elector who was denied the right to vote can not be received, certainly the headings of the petition can not be admitted as evidence for a declaration.

No doubt a few votes can be counted, but not enough to make mention of; but independent of that there is no evidence to show declarations of electors as to their qualifications, intentions, or efforts to vote.

It is elementary that hearsay evidence is not admissible in election cases. The same rules of law apply in election cases as in all other cases, and while the power of the House is very great in election cases, yet its actions should be governed by law and evidence. It is not only just, but safe.

If the House, uninfluenced by partisan feeling, decide election cases according to the established principles of law and rules of evidence, it will come nearer doing exact and equal justice; and it will be establishing a dangerous precedent to admit what is offered in this case to impeach the title to a seat in this House.

It was argued upon the part of the contestant that these lists, etc., might be received as a part of the *res gestæ*. It certainly is no part of the *res gestæ*, for anything said or done after the vote was rejected and the elector had gone away from the polls would have no connection whatever with the principal fact, which in this case was what was said and done by the elector at the polls when offering to vote. But even this position would fail from the fact that no declarations were made, if correct as a proposition of law.

Owing to the large number of rejected votes in question, contestant attempted to show their names and number by the testimony of list keepers, who were stationed at the polls, took the signatures or wrote the names at the request of the voters to a petition addressed to the House of Representatives, reciting that the petitioners were lawful voters who attended at the election, undertook to vote, and were refused, and that they would, if permitted, have voted for contestant.

The majority claimed that the actual testimony in most cases fell short in one or more respects of this description. They said:

This so-called testimony is further weakened by the fact that it can not even be called hearsay testimony. There are 1,820 so-called votes where the witness through whom it is sought to count the same did not keep the lists, but in each case testifies that some one else, not called, kept the list. There are also 1,221 votes where the witness kept the lists in part only, the other list keepers not being called; 877 votes are not on original lists, but on copies, and even if the original would be competent evidence, the copies are not made evidence.

There are 4,554 votes, by actual count, where the lists were not offered in evidence and made part of the deposition according to any practice. This shows the danger of not being governed by rules of evidence, and to sustain the claim of the contestant in this case would be laying down a more dangerous precedent than was ever established by this House.

The minority argued elaborately in favor of the admissibility of this class of "list evidence," under circumstances which render the resort to better evidence impracticable, and quoted many authorities in support of this contention. They said:

No doubt it is true, as a general proposition, that the party offering evidence is required to produce the best evidence of which the case in its nature is susceptible, but it will be observed that the nature of the case is to be considered. Here a class of men numbering thousands was denied the right to vote because of the nature, as well as the administration, of the registration law of South Carolina. To have examined each of these witnesses concerning each and all of the facts establishing his right to registration and to vote, proving the incidents of the attempt or failure to exercise the right of suffrage and subjecting the witnesses to lengthy cross-examinations by contestee's attorneys, would have required more time than the law grants for the taking of testimony and have caused a miscarriage of justice. And so it became incumbent upon the contestant to offer the best evidence that he could command within the limitations and conditions existing, and he did that by furnishing the written declarations of these men as to their qualifications, efforts, and purposes, supplemented by the testimony of men who knew them, to the effect that they were entitled to but were denied the right of suffrage. Where there is no substitution of evidence, but only a selection of weaker instead of stronger proofs, or an omission to supply all the proofs capable of being produced, the rule concerning the production of the best evidence is not infringed. (1 Greenleaf on Evidence, 14 ed., sec. 82.) We submit that the contestant's evidence was a selection of weaker instead of stronger proofs, and for the very best of reasons, considering reasons from the standpoint of existing conditions and not of theory.

The admissibility of the declarations of voters, made at the time of voting, as a part of the *res gestæ*, is established by a long line of precedents in the House of Representatives and elsewhere. The committee quoted from the New Jersey case (1 Bart., 19, 25, 26); Vallandigham *vs.* Campbell (1 Bart., 223, 230-236); Bell *vs.* Snyder (Smith, 247, 250-255); Wallace *vs.* McKinley (Mobley, 185); Smith *vs.* Jackson (Rowell, 13). On the question of the admissibility of lists, they referred to McDuffie *vs.* Turpin, Fifty-first Congress (Rowell, 257, 275-285). The conclusions of the minority were summed up as follows:

The principle underlying the Congressional cases above cited is this: That the declaration of a voter, or one entitled to vote at a given election, made at or in the vicinity of the voting place immediately following his effort to vote, concerning his own acts and qualifications or disqualifications, are parts of the *res gestæ* and are admissible in evidence. In voting or in attempting to vote, or in being present at the polls with the desire to vote, the voter is discharging, or attempting to discharge, or desiring to discharge, one of the most solemn and momentous duties of citizenship, and to us it seems clear that his every act and word calculated to show in any degree what his purposes or qualifications were are clearly admissible in evidence as a part of the *res gestæ*. This evidence may be furnished by the depositions of others, or by the written statements of others, made at the time, preserving and exhibiting the statements or declarations or admissions, either oral or written, made by the voter

or the nonvoter, as the case may be, as is clearly established by the preceding authorities. * * *

These authorities and the reasoning upon which they are predicated clearly show that the declarations of those who were deprived of the privilege of voting on election day are competent evidence in support of the allegation that they were lawful voters, intended to vote, were deprived of that privilege, and would have voted for contestant. These declarations were made at the time of holding the election, and to persons in or near the voting places. They related to the subject-matter of the election, formed a part of the history of the transactions of the election, and were in the highest and truest sense parts of the *res gestæ*.

Acting on this principle, the minority considered the evidence in regard to each precinct in dispute, and said:

We do not contend that the evidence is sufficient to count all of the lists under the rules of law, which we above affirm, but we do believe that the evidence is sufficient to count for the contestant in the various counties of the district 4,523 votes, the same being a sufficient number, when added to the return vote of the contestant, to entitle him to a seat in Congress.

The case was fully debated in the House, attention being called to the fact that the question of the constitutionality of the South Carolina registration law was also involved in the cases of *Moorman vs. Latimer*, *Wilson vs. McLaurin*, and *Murray vs. Elliott*. On May 29, 1896, the resolution proposed by the minority, declaring contestant elected, was lost by a vote of 95 to 105. The reverse resolution, declaring contestant was not elected, was then carried by a vote of 103 to 99. The House then adjourned, and on June 1 voted without division to reconsider both these votes. Mr. McCall then moved, as an amendment to the minority resolution, a resolution declaring that no valid election had been held and vacating the seat. This was carried by a vote of 130 to 125, so on June 1, 1896, the seat was declared vacant.

[Report 1229, first session, Fifty-fourth Congress.]

(28) CORNETT *vs.* SWANSON.

Constitutionality of Virginia ballot law. Majority report for contestee; minority report to declare seat vacant. Contestee retained the seat.

Majority report by Mr. Jones; minority report by Mr. Thomas.

Contestee received a majority of 2,333 on the face of the returns. Contestant took testimony in regard to 12 precincts in the district, only 5 of which were mentioned in his notice of contest. If all that he claimed in all 12 precincts were conceded him, contestee would still have a majority. There were 144 precincts in the district. The case therefore turned wholly on the charge that the new Australian ballot law of Virginia, known as the "Walton election law," was unconstitutional. Since the election the supreme court of Virginia had unanimously held that the law was constitutional, and the majority of the committee therefore reported resolutions declaring contestee elected. The committee said:

But it is not deemed necessary, for the reason stated, to enter upon any extended discussion of these legal and constitutional questions, or to inquire to what extent the decisions of a State court should be regarded by the House of Representatives or by this committee. It would not necessarily follow, in the opinion of the committee, were it conceded that the Walton election law was unconstitutional, and therefore inoperative as to the particular features of that law here assailed, that no valid election had been held in the Fifth Congressional district of Virginia. The sections which are assailed by reason of their alleged unconstitutionality are not so essential to the

operation of the law under which this election was held, or so inseparably connected with its other provisions and requirements, that even should they be thought to be inoperative this committee would be justified upon that ground in declaring that there had been no legal election.

Messrs. Thomas, Walker, and Overstreet signed a minority report arguing that the election should be vacated. On the legal question they said:

As to the right of the House of Representatives to inquire into the validity of the election law of Virginia.—The House of Representatives having original jurisdiction as to the right of a person to a seat in its Chamber, and being a tribunal of last resort, it undoubtedly has the power to pass upon any question that it deems relevant to the issue. It has never been claimed by any political party in the history of the Republic that the power to act carries with it the right to act. On the other hand, it has been the uniform practice of the House of Representatives to base its action in all cases upon certain fundamental principles, and those principles have, and ought to have, the binding force of law. Among those principles is this:

That the decision of the supreme court of a State ought to govern in all cases, unless the constitutional rights of the citizen are clearly invaded. And it may be said that in all cases where the question is local to the State and relates purely to its domestic affairs the House of Representatives will always abide by the decision of its court of last resort. But it is clear that questions might arise in which not only the rights of the citizen but the interests of the nation at large would be involved, and in such case the House of Representatives would most certainly exercise its original jurisdiction.

For instance, suppose a State should by its constitution give to all illiterate persons over 21 years of age the right to vote; and suppose the legislature should provide that no elector should be permitted to know, by all customary means, the contents of his ballot (and that after it was handed to him no man should come near him, and that if anyone gave him any information, either by word, or sign, or signal, it would be a crime), and that thereby all illiterate electors were disfranchised; and suppose the supreme court of the State should decide that such a law was constitutional, it would not, we think, be denied by anyone that it would be the duty of the House of Representatives to declare such an election void, and to refuse to seat the man who had been elected by those only who could read their ballots. This would be a case of disfranchisement where an appeal would lie, so to speak, from the supreme court of a State to the House of Representatives.

The minority, therefore, examined the case cited, first, to ascertain whether the supreme court of Virginia had legally passed upon the question, and, second, whether the question was of such vital national interest as to challenge the attention of the House of Representatives.

The decision in question they found to be pure dictum, uttered in a collusive case, of which the court itself decided that it had no jurisdiction. The plaintiff in the case had brought an action in chancery to collect wages due him from a county, for which he had a plain remedy in law. The court below promptly threw out the case on the ground of want of equity jurisdiction. The defendant county took no part in the case in any of its stages. Plaintiff, instead of bringing action in law, then appealed the case to the supreme court, and in his brief made an incidental reference to the election law. The supreme court took up this reference, issued its dictum on the election law, and then proceeded to sustain the court below on the only point at issue and throw out the whole case for want of jurisdiction. Such a decision is never regarded as a precedent.

The charge against the election law was that it deprived all illiterate voters of the secrecy of the ballot by forbidding public knowledge in advance of the order of the names on the ballot, by requiring the voter to mark his own ballot, on a complex system, in a secret booth, 40 feet from any other person, in two and one-half minutes, and by permitting him, if illiterate, to get no help except from the special

constable appointed for the purpose, who was always a member of the party controlling the election machinery.

There were 110,000 illiterate voters in Virginia.

Your committee is of the opinion that, in view of the magnitude of the question, involving the political rights of more than 100,000 of the voters of Virginia, the irregular character of the suit, the strange and one-sided manner in which it was conducted and the suddenness with which it was abandoned, the irrelevancy of the Walton law to the controversy, and because the constitutional rights of American citizens are directly involved, the House of Representatives may inquire into the validity of the Walton election law of Virginia in this case.

The minority discussed the law and the manner of its operation in detail, and summed up the objections to it as follows:

It is the policy of this Republic to extend and encourage the use of the elective franchise. Any law that deters, discourages, and hinders its use is destructive of the democratic principles of government. The Walton law, by clothing an officer of election with arbitrary power, by destroying the secrecy of the ballot, and by establishing a qualification in contravention of the constitution of the State, can not be upheld and enforced without the most serious consequences to our free institutions. A law which enables an officer to mislead voters, to falsely prepare ballots, to change the vote of a whole precinct, and to know the contents of ballots before they are cast is too dangerous to be upheld and too destructive to constitutional rights to be tolerated in American statute books (p. 13).

Your committee is therefore of the opinion that this law is unreasonable, and therefore unconstitutional, because it withholds from the voter a timely and necessary knowledge of the arrangement of the names of candidates on a mixed and consolidated ballot. It is void because it withholds from the voter all ordinary and customary means of knowledge (p. 15).

1. Having adopted the Australian consolidated ticket, this law adds to its complexity and enigmatical character by providing that any number of men, on their own motion, may have their names placed on the ticket as candidates. Thus the illiterate voter may be confused with a hundred useless names. In other States, such as Pennsylvania, New York, Ohio, Massachusetts, New Hampshire, Kentucky, Vermont, and Maryland, the law provides wholesome restraints against the confusion attending a long list of needless candidates.

2. Under this law the election officers may all belong to the same party. Other States require that each political party shall be represented.

3. Under this law the judges may, in secret, open the ballot boxes and empty them of their contents. In other States it must be done in the presence of the public.

4. Under this law every voter is prevented from knowing what is on the ballot until a moment (two and one-half minutes) before he must deposit it. In other States the official ballot is published in newspapers and posted in public places before the election for the purpose of instructing the voters.

5. Under this law the names may be printed in different type and in different order, on different tickets, at the same precinct. In other States they must be in the same order and in the same type in all precincts.

6. Under this law the electoral board may have but one booth for hundreds of voters. In other States booths must be prepared for every hundred voters, and, in some States, for every fifty.

7. Under this law the voter can not avail himself of the assistance of a friend, of a neighbor, or of an educated son or daughter or relative, or any person in whom he has confidence. In other States all the avenues of knowledge are open to him.

8. Under this law he can not be satisfied that his vote will be counted as he directs, and he is deterred from voting at all. In other States he can satisfy his judgment and his conscience that his ballot will express his choice, and he is encouraged to cast his vote.

9. Under this law the voter can be compelled to disclose his ballot to a political enemy, and be made to rely upon him as to the character of the ballot he casts. In other States he need not reveal anything to a political foe and need not seek advice or counsel outside the circle of his trusted friends.

10. Under this law the ballot is dishonored, the illiterate voter disfranchised, manhood and suffrage brought into disrepute, and American citizens repelled from the ballot box. In other States the ballot is honored, the illiterate voter is aided and encouraged, the elective franchise held in universal esteem, and American citizens encouraged to perform their political duty.

11. Under this law only those electors can cast a secret ballot who can read. But the Virginia constitution enfranchised those who can not read. Therefore the Walton law defeats the constitution by disfranchising those who can not read.

Such is the perversion of the Australian ballot system by the Walton law of Virginia. A beneficent system, originating forty years ago in South Australia, and since largely adopted throughout the civilized world, designed to protect the secrecy and freedom of the ballot and to secure an honest count, is stripped of every safeguard and mutilated and deformed beyond recognition by the legislature of Virginia and ironically called the Australian system (pp. 19, 20).

The minority therefore recommended a resolution declaring the seat vacant.

In the debate in the House, Mr. McCall called attention to the fact that the House had already seated two members in contests from Virginia under the same law and that the remainder of the Virginia members, who held their seats uncontested, were elected under the same law.

After some further debate the resolutions reported by the majority were (on February 3, 1897) passed without division; so contestee retained the seat.

[Report 1473, parts 1 and 2, first session Fifty-fourth Congress.]

(29) HOGE *vs.* OTEY.

Case not made out. Application for further time to take testimony refused. Contestee retained the seat.

Report by Mr. De Armond.

The body of the brief committee report is as follows:

According to the returns, contestee received 2,346 more votes than contestant.

The record contains but a few pages of testimony, and it would be impossible to give to such testimony any effect by which the seat in controversy could be awarded to the contestant or could be taken from the contestee.

Contestant has asked that the case be opened for the taking of further testimony, but he has failed to show any sufficient reason for such course. Not only is there no apparent reason for making an exception in this case to a fair and long-established statutory rule, fixing the time for the taking of testimony in contested election cases, but, from contestant's own showing, it appears that if the case were opened the result of the contest would not be different.

The resolutions recommended were passed on May 15, 1896, without division; so contestee retained the seat.

[Report 1530, first session Fifty-fourth Congress.]

(30) THORP *vs.* McKENNEY.

Partisan appointment of election boards; fraud. Both reports for contestant. Contestant seated.

Majority report by Mr. Walker; minority report by Mr. De Armond.

According to the canvassed returns contestee had a majority of 864. Adding one uncanvassed return, his majority was 785. Contestant charged fraud and irregularities and the partisan appointment of election officials. Contestee replied to the notice of contest, but took no testimony, so the case came before the committee on the testimony of contestant alone. All the committee agreed that contestant was elected, but the minority did not subscribe to the strictures of the majority on the motives of the electoral boards in failing to appoint Republican judges of elections.

The law of Virginia required the electoral boards of each county to appoint three judges of election in each precinct who "shall be chosen for each voting place from persons known to belong to different political parties, each of whom shall be able to read and write." This provision for nonpartisan election officers was generally violated. All the county electoral boards and all the canvassing boards were unanimously Democratic. At least two of the judges of election in each precinct and practically all the clerks, constables, and other election officials were Democrats, and in a number of precincts the Republicans were denied any representation at all, there being either no Republican judge, or a pretended Republican, who was not trusted by the Republicans, could not read, or was physically disabled. There were 11 precincts, giving contestee a returned plurality of 1,356 votes, at which the Republicans had no representation, and 8 others, giving contestee a returned majority of 523, at which the Republican judge was illiterate or physically incompetent, or was not regarded as a Republican. The failure to appoint Republicans in these precincts was not due to oversight or to the difficulty of finding competent men, for the electoral boards had their attention expressly directed to the matter by requests from the Republican chairmen, giving the names of competent Republicans in each district who were trusted by their party. If all these 18¹ precincts should be rejected, contestant would be elected by a plurality of 1,184. The committee, however, rejected only the 11 at which there was no Republican representation, at each of which (or at 10 of them, see footnote) there was direct and circumstantial evidence of fraud. This would show a majority for contestant of 571 (or 401, see footnote) votes. The committee added, however, "Several other precincts, in the opinion of the committee, ought to be rejected, but it is not necessary to set them out here, as by doing so we would only increase the contestant's majority."

In regard to these partisan appointments the committee said:

The provision of law requiring judges of election to be able to read and write and selected from voters known to belong to different political parties is wise and salutary, as evidenced by its being recognized and incorporated in the election laws of all the States which claim to have honest election laws. It is a provision intended as a safeguard against fraud, and is in Virginia especially important to that end, because in this State the judges of election, after the polls are closed, and before any representatives of opposing candidates are admitted into the election room, open the ballot boxes, count the ballots to see whether they correspond with the number of names on the poll books, and if they exceed the number of electors on the poll books, withdraw enough ballots to reduce the number of ballots to the number of electors, which affords to partisan and unscrupulous judges the opportunity to substitute false ballots for true ballots.

This provision might ordinarily be considered as mandatory—it is such an important safeguard against fraud—but the Virginia statute further provides that "no election shall be deemed invalid when the judges shall not belong to different political parties, or who shall not possess the above qualifications;" i. e., as we understand it, an election fairly conducted without any charge or taint of fraud shall be valid though the judges do not belong to different political parties, etc. It was intended to

¹ It will be noted that the committee makes 11 and 8 equal 18. There are several other apparent discrepancies in the arithmetic of the report which do not, however, affect the result. The committee, for instance, give a list of 10 precincts rejected of the above first list of 11, and then deduct the vote of the entire 11. The second list of 8 above is evidently only 7, 1 return being counted twice under two heads. The second error is of no importance, as the committee did not reject the return under either name. The first error, if the inclusion of the vote of the First Ward of Petersburg in the rejected figures and its omission from the rejected list was unintentional, would, if corrected, reduce the contestant's majority, as found, from 571 to 401.

cover the cases of a few isolated precincts where, by accident or otherwise, all the judges happened to belong to the same political party or a judge happened to be appointed who did not possess the necessary qualifications, but the will of the voter was nevertheless fairly expressed and correctly and honestly returned. In such a case, there being no bad faith or intentional wrong on the part of the appointing power or the judges, the election ought to stand and the return be accepted.

But this statute was not intended to apply to a case like the one before the committee. It never was intended as a shield for fraud.

The charge here is that the election held at these 18 precincts by judges all of the same party were dishonestly conducted, and the returns made by these judges are false and utterly unreliable as evidence of what was the true vote cast.

The Virginia statute does not say that the returns of an election, where the judges do not belong to different political parties, etc., shall be accepted, nor does it say what weight shall be given to this failure to appoint such judges in considering the question of fraud; but the report of the committee in the case of *McDuffie vs. Turpin* (Fifty-first Congress), quoted in the brief, does say that in itself it raises a strong suspicion, if it does not fully prove, a conspiracy to falsify the returns.

The failure to comply with the law in this respect was not in a few isolated precincts.

Under the Virginia election law the custodians of the official ballots were forbidden to disclose their contents or arrangement, and the voter was required to prepare his ballot alone or, if illiterate or disabled, with the assistance of the special constable appointed for the purpose. In the city of Petersburg and five of the counties of this district the names on the ballots were "alternated;" that is, not printed in the same order on the whole bundle of tickets for the precinct, but in several different orders, tickets of the different sorts being alternated in the bundle, so that it would be impossible for an illiterate voter who could count to identify a name on his ballot by being told its number as ascertained on his own ballot by some preceding voter who could read. Script type, and various sizes and styles of type were also used, tickets with different arrangements of type for different names being alternated in the same confusing manner. This plan had been determined on at a secret meeting, after the ballots had already been once printed in uniform style. The committee took this fact, and the various circumstances described below, as evidence of a general conspiracy to defraud contestant of votes justly his.

The district was a recognized Republican district. The party support of contestant was harmonious and enthusiastic; that of contestee was divided and apathetic. The precincts at which the Republicans were denied representation were strong Republican precincts and were returned as giving large Democratic majorities. The Democratic officers of election were, in several cases, not those regularly appointed, and there were serious informalities in their procedure. The returns in most cases showed a discrepancy of several votes between the total vote, minus the rejected ballots, and the vote for Congress, which "alone and unexplained is sufficient to discredit the returns." Republican tally keepers were appointed at each poll, who presented lists of known Republicans who were seen to vote and who stated that they voted the Republican ticket, showing a number considerably in excess of the returned vote of contestant. These tally keepers were interfered with in their work, and in some cases driven away, by the election officers, and in several cases there was direct proof of fraud. In one precinct a judge was seen to substitute a ballot from his pocket for the one handed him by the voter. In some precincts intelligent voters in excess of the number returned for contestant testified that they prepared their own ballots for him and voted them. In some cases the

entire list of voters was returned as voting for one or the other candidates for the State legislature, though a number of intelligent voters testified that they did not vote for either candidate for the legislature, and that there was a general agreement among Republicans not to so vote, and in some precincts the special constables refused to assist illiterate voters unless they would vote the Democratic ticket. The committee analyzed the testimony showing these facts at each of these precincts and concluded:

It is unnecessary to cite law or authorities further than has already been done to show the right of the contestant to a seat in the Fifty-fourth Congress.

The refusal of the electoral boards in the several counties and cities in this district to appoint Republican judges at precincts where it was possible to do so; the alteration of the names of the candidates upon the tickets, printing them in unusual type and in type of different sizes and styles; the appointment of Democratic officeholders as judges, constables, and clerks at many precincts; the appointment of illiterate, incompetent Republican judges at other precincts; the refusal of the special constables to assist illiterate voters, as the law required them to do; the illegal and arbitrary action of the judges and officers of election in driving away Republican tally keepers from the vicinity of the polls with threats of violence and imprisonment; refusing to permit a Republican to be present at the counting of the votes, and placing the name of an illiterate and obscure negro upon the tickets as a pretended candidate for Congress furnish conclusive evidence of a conspiracy on the part of the election officers to defraud the voters, which destroys the integrity of their act and taints the returns so as to render them wholly unreliable, and devolves upon the contestee the duty of proving what was the true state of the poll, which, as we have seen, he has not attempted to do.

Add to these evidences of fraud and conspiracy the many proofs of error, fraud, and irregularity at the various precincts, as above set forth in this report, and it is clear that the contestant was duly elected by a majority of the legal votes cast at said election, and that the contestee was not elected.

The minority presented a report concurring in the conclusion that contestant was elected, and saying that they regretted the failure of the electoral boards to appoint Republican judges in the precincts in question, but that it had been done by reason of a mistaken view of the law and not with the intention of defrauding anybody.

The resolutions presented were passed without debate or division, and, on May 2, 1896, Mr. Thorp was sworn in.

[Report 1531, parts 1 and 2, first session Fifty-fourth Congress.]

(31) PEARCE vs. BELL.

Case abandoned. Report for contestee, who retained the seat.

Report by Mr. Walker.

The body of the brief report is as follows:

In this case the contestant gave no notice of contest, as required by law, and has taken no evidence to sustain the allegations of fraud and intimidation claimed by him to have been committed.

The official returns show that the contestee received 47,703 votes, that Thomas M. Bowen received 42,369 votes, that W. A. Rice received 2,032 votes, and the contestant received 157 votes.

The committee therefore presented resolutions declaring contestee elected, which, on April 29, 1896, were passed by the House without debate or division.

[Report 1529, first session Fifty-fourth Congress.]

(32) NEWMAN vs. SPENCER.

(33) RATLIFF vs. WILLIAMS.

(34) BROWN vs. ALLEN.

Validity of constitution of Mississippi. Reports for contestees, who retained seats.

Reports by Mr. McCall.

These three cases involved the same question, and the three reports are in substantially the same language. The body of the report in the case of Newman *vs.* Spencer is as follows:

In this case no testimony has been presented to the committee. It is alleged that some was taken, but nothing has been filed with the Clerk of the House. The contestant, however, contends that section 241 of article 12 of the constitution of the State of Mississippi, adopted in 1892, is in contravention of the Constitution of the United States and of the act of Congress of February 23, 1870, entitled "An act to admit Mississippi to representation in the Congress of the United States," and has filed a brief in support of his contention. He claims that the above-named section of the State constitution is void, and that therefore no valid election was, or could be, held in the Seventh Congressional district of the State of Mississippi.

As the committee is of the opinion that a decision that the constitution of the State of Mississippi was invalid would not necessarily deprive the State of representation in Congress, it does not attempt to decide that question, and in absence of any testimony on behalf of the contestant it recommends the adoption of the following resolutions.

The resolutions recommended in all three cases were adopted without debate or division on April 30, 1896.

[Reports 1536; 1537, and 1538, first session Fifty-fourth Congress.]

(35) WILSON *vs.* McLAURIN.

Illegal rejection of votes. Report for contestee, who retained the seat.

Report by Mr. Coddington.

This case turned (like the other South Carolina cases in this Congress) on the question of counting a large number of votes offered by otherwise qualified electors but rejected by the election officers on the ground of nonregistration. The committee found that the number of these rejected votes clearly proved in this case was less than the contestee's returned majority of 5,716, and therefore presented resolutions declaring contestee elected.

Contestee demurred to the notice of contest. The committee said:

It is admitted that the notice was in writing and was addressed by registered mail to the contestee, one copy to his "home office" at Bennettsville, S. C., and the other copy to Washington, D. C. It is not denied that both copies were received by Mr. McLaurin within the statutory thirty days, nor is it alleged that he has been placed at any disadvantage by the manner of service. That the notice was in writing and that it reached the proper party are sufficient for this committee to hold the contestee to the necessity of his answer and proofs. In all such cases the rules as to service may naturally be somewhat flexible, according to the circumstances, provided that no clear right be thereby denied or infringed. An intelligent and intelligible notice in writing, actually in the hands of a contestee within the thirty days established by statute ought to be sufficient.

On the question of the constitutionality of the registration law of South Carolina the committee said:

A casual examination of the testimony discloses the fact that if the contestant is to overcome the majority returned against him his chief reliance must rest in being allowed to reverse the results of the registration law of 1882 and to ally with his certified vote the aggregate of such votes as were rejected under that law.

In taking up this question some surprise is not unnatural that during its career of more than twelve years the constitutionality of this law has not been urged to a decision before the highest tribunals. Disfranchising, it is alleged, many thousands of voters, the law appears before this House for construction at a period when it is approaching, or has reached through other legislation, a practical death in the State

of its adoption. Under these circumstances no labored or extended argument will be attempted in this report. That law, by its specific terms, extended the period of residence required by the constitution of South Carolina. It placed in the hands of a supervisor of registration, an official holding by executive appointment a power practically absolute of judging the rights of voters, and the testimony is abundant that the power was unsparingly used for the exclusion of at least one class. It is equally true that the same power so molded the details of many registration certificates that officers conducting elections were able, or assumed to be, to reject many voters on account of trivial or pretended defects in their certificates. Against the sweeping disfranchisement of this law the average voter was powerless when he tendered his ballot. Under color of law his exclusion was complete.

A majority of this committee has reached the conclusion that the voters of the district now in consideration who were qualified under the constitution of South Carolina and who were rejected under color of the enforcement of the registration law are entitled to be heard in this contest.

In this conclusion no violence is done to the doctrine that "where the proper authorities of a State have given a construction to their own statutes that construction will be followed by the Federal authorities." While the supreme court of South Carolina has not passed decisively upon the statute in question the people themselves, the highest authority in that State, have decreed its disappearance from the statute book.

From this standpoint we look for the course to be followed. Shall the election be set aside and the seat in question vacated? Under the authorities we think not.

Beyond doubt the usual formalities of an election were for the most part observed. No substantial miscount of votes actually cast is alleged. There are no charges of violence or intimidation seriously affecting the result which have been verified. If fraud be alleged, under sanction of legislative enactment, it was a general fraud, and the returns are in general unchallenged for correctness. The votes actually cast are not in controversy; the votes not cast are the ones presented for computation.

Quoting McCrary, sections 483, 489, and Waddill *vs.* Wise (Rowell, 224), the committee said:

It is a matter of serious import and precedent to introduce into an election the count of a large disfranchised class. But if the principle is good as to 4 or 40 or 400 it should certainly be no less available for a larger number; or, briefly, the number is immaterial if capable of correct computation.

The contestant claimed to be allowed the votes of several thousand alleged voters, whose names were given, but whose qualifications rested on varying testimony. The names of the voters appeared in lists executed in most of the election precincts on the day of the election, signed by the parties or by authorization, and were in most cases appended to a form of petition addressed to Congress, reciting that the subscribers were qualified to register and vote and had "made every reasonable effort to become qualified to vote according to the registration law of this State, but have been denied an equal chance and the same opportunity to register as are accorded to others," and had presented themselves at the election, intending and desiring to vote for contestant, and were denied the right to vote. The committee said:

These petitions are not usually verified by affidavit, but are generally supplemented by testimony of those who had them in charge, with such explanations and corroborations as the witnesses could give.

It is considered by a majority of this committee that these lists are not per se evidence in the pending contest. They are declarations, important parts of which should be proven in accordance with usual legal forms. It is not impossible so to do, and consequently we think it is necessary for reaching trustworthy results.

Under the authority of Vallandigham *vs.* Campbell (1 Bartlett, p. 31) these declarations might serve a use beyond a mere list for verification, for it was there held "the law is settled that the declaration of a voter as to how he voted or intended to vote, made at the time, is competent testimony on the point."

We propose to compute the ballots of those who were entitled to cast them, and there is ample support in a line of authorities and precedents. A few only are selected.

Delano vs. Morgan (2 Bartlett, 170), *Hogan vs. Pile* (2 Bartlett, 285), *Niblack vs. Walls* (Forty-second Congress, 104, January, 1873), *Bell vs. Snyder* (Smith's Rep., 251), are uniformly for "the rule, which is well settled, that where a legal voter offers to vote for a particular candidate, and uses due diligence in endeavoring to do so, and is prevented by fraud, violence, or intimidation from depositing his ballot, his vote shall be counted."

In *Bisbee, jr., vs. Finley* (Forty-seventh Congress) it was stated, "as a question of law we do not understand it to be controverted that a vote offered by an elector and illegally rejected should be counted as if cast."

In *Waddill vs. Wise* (*supra*) the same doctrine was elaborately discussed and a further step taken by holding "that the ability to reach the window and actually tender the ticket to the judges is not essential in all cases to constitute a good offer to vote."

Referring to the evidence given in connection with the lists in this record it seems proper to adopt some general principles as a standard for the examination, and the following have been used as suitable and in accord with the precedents quoted:

First. The evidence should establish that the persons named in the lists as excluded voters were voters according to the requisites of the constitution of South Carolina.

Second. The proof should show that said persons were present at or near the Congressional voting place of their respective precincts, for the purpose of voting, and would have voted but for unlawful rejection or obstruction.

Third. That said excluded voters would have voted for the contestant.

Applying these principles to the testimony in detail the committee found 3,124 votes, 501 of which, however, were included "for argument's sake," being from places at which no polls were opened. By either computation the number was insufficient to overcome the returned majority of contestee.

There was no minority report, and when the case was presented to the House it was stated that the "resolutions in the report represent the unanimous sense of the committee," but most of the points of law, as above quoted, are expressly stated in the report to be the opinion of "a majority" of the committee.

The resolutions presented were adopted without division on May 1, 1896, and contestee retained the seat.

[Report 1566, first session Fifty-fourth Congress.]

(36) MURRAY *vs.* ELLIOTT.

Illegal rejection of votes. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Overstreet; minority report by Mr. Jones.

This case turned on the charges of unlawful rejection of votes by the election officers in the city of Charleston, S. C. According to the returns, contestee had a majority of 1,637. It was admitted that contestant should be credited with 217 votes cast at Haut Gap, Berkeley County, where the Federal polls were not opened by reason of the failure of the managers to act, but the electors, under the law, improvised an election board and cast their votes. This would reduce the returned majority of contestee to 1,420. His returned majority in the city of Charleston was 2,414. The committee called attention to the history of this district in Congressional contests and to the fact that contestee in this case had been the contestee in two previous contests. In the city of Charleston the number of colored men of voting age was 8,437; that of whites was 6,492. The colored voters were, as a whole, Republicans, and were actively interested in the election, attending in large crowds, both at the registering offices and at the polls, and yet the returned vote was, Elliott, 2,811 votes and Murray 397 votes. Contestee received 43 per cent of the white vote and contestant 4 per cent

of the colored vote, the white minority thus outvoting the colored majority nearly 10 to 1. The committee said:

In the absence of some reasonable explanation it would, indeed, be strange that in a city of 65,000 population, with 8,000 colored voters and 6,000 white voters, the proportion of white voters to colored voters should be as 10 to 1.

But a study of the record discloses a reasonable explanation; and that is that the board of supervisors fraudulently impeded and prevented the registration of colored voters, and committed intentional errors in the execution of registration certificates for illiterate voters, and that challengers, unauthorized by law, and by the sanction of the managers at the various precincts, arbitrarily passed upon the qualifications of colored voters and directed who should vote and who should not, and that in some of the precincts the dead and absent were recorded as having voted.

The board of supervisors for the city of Charleston consisted of three men, to whom each voter was required to apply for a certificate of registration. This board was an arbitrary court, before which illiterate and ignorant voters were compelled to go and in which they had a right to place full confidence. If errors were made upon the certificates the illiterate voters would not be able to discover them and if an error proved fatal to his certificate the voter was helpless.

A common excuse for rejection of ballots was that certificates held by the voter failed to give the number of the precinct, or the correct number of the ward in which the voter lived, or the proper number of his residence. The fact that these errors appeared always with certificates held by colored voters is significant. That the voters holding such certificates were illiterate was sufficient excuse for their ignorance of the condition of the certificates, and plainly shows that the errors were made by the supervisor of registration, and whether intentional or not should not operate against the voter. The common character of the apparent mistakes, and their frequency, strongly and conclusively indicate that they were intentional, and made for the purpose of depriving the holders of the certificates of their ballots.

The evidence strongly shows that the supervisors of registration in Charleston threw every possible obstacle in the way of a full and fair registration. By delay in the issuing of certificates, by seeming investigations, by excuses, by favoritism, and by discrimination against the colored voters, unquestionably many hundreds were prevented from registering. This state of facts is shown to have existed in almost every precinct in the city. To show the character of this testimony, and that the condition was almost universal, the following extracts from the evidence taken from the record are given:

The committee quoted a large amount of testimony and added:

THE DEMOCRATIC CHALLENGERS.

The law of South Carolina makes no provision for any such officer as a challenger; neither does it recognize or favor party representation in the formation of the different boards. And yet in every precinct in the city of Charleston a Democratic challenger was on duty, and in nearly every instance a privileged character within the polling place, while at each precinct the officers of election were all Democrats.

In many instances the challenger was the authority of the board upon the question of qualification, and in no case where the challenge was exercised was the voter allowed a hearing or permitted to vote.

The familiarity of the challengers with the registration books and the kind of certificates held by the voters evidenced their preparation for their part in the plan, which was to point out the defects in the certificates of registration because of which the election managers rejected the ballots.

THE ELECTION MANAGERS.

The election managers in each precinct in the city of Charleston were Democrats. No other party was recognized upon the boards. And while the law of the State is silent as to party representation, all sense of justice and right, equity and fairness, would demand such recognition. It is, of course, possible for a board composed wholly of men of one party to properly and honestly discharge the duties of such board, and the law presumes their duties were so discharged; but in this case the managers of election became the third side in the triangle of fraud that controlled the election in the city of Charleston. By their treatment of the Democratic challenger, whereby he was made the authority upon the qualification of voters, by their refusal in many cases to expose the inside of the box before voting began, and the

conduct of a private count at the close, and in some cases by the personal misconduct of the members of the board, the presumption of law in their favor is overthrown; and, construing their action in the light of the conduct of the supervisors of registration and Democratic challengers, a conspiracy, involving them all, to defraud the colored voters of their ballots in the interest of the contestee is reasonably inferred.

To show the character of this testimony, and that it was common throughout the city of Charleston, the following extracts from the evidence taken from the record are given:

The committee here quoted a large amount of testimony bearing on these points, and also on instances of fraudulent voting of dead or absent persons. They summed up the case as follows:

These instances strengthen the claim that the entire election in the city of Charleston was tainted with fraud, and that gross irregularities occurred at nearly every precinct.

The conduct of the supervisors of registration and the managers of election, and the practice of swelling poll lists with the names of the dead and absent voters, was such as to cloud the result with uncertainty and doubt.

The presence of the challenger and his conduct, although unauthorized by law, would not in itself be sufficient to invalidate the election where such officer acted, but, considered as a circumstance in connection with the known misconduct of the supervisors of registration and the managers of election and the swelling of poll lists, it becomes of great importance in determining whether or not the will of the majority of the voters at such precincts is expressed by the returns. Fraud in the conduct of an election may be shown by circumstantial evidence. (McCreary on Elections, 3d ed., sec. 540; English vs. Peelle, Forty-eighth Congress.)

It is not necessary, in order to set aside a return for fraud, that the officers of election participated in the fraud. But if the unlawful acts of third persons are connived at by the officers the effect is the same. (McCreary on Elections, 3d ed., sec. 543.)

It is the opinion of the committee that the conduct of these officers was such as to bear the badge of fraud at each of the election precincts of Charleston, except Nos. 1 in Ward 2, 1 and 2 in Ward 6, and 1 in Ward 10, and the question then arises whether the returns shall be purged or rejected.

The authorities are clear and complete that where fraud taints a return it can not be purged, but must be rejected; but a return can be purged only by rejecting ballots illegally cast or wrongfully counted. While in this case legal ballots were unquestionably kept from the box by the illegal and wrongful acts of persons connected with the machinery of the election, it is impossible to determine the number of these ballots, and the only logical and equitable result is to reject such returns.

The committee therefore rejected all but four precincts in the city of Charleston.

Making the corrections and deductions indicated, contestant would have a majority of 434 votes, and the committee therefore presented resolutions declaring him elected.

The minority disagreed on nearly every point. They said:

The undersigned, not being able to agree to the report of the committee or its conclusions, feel constrained not only to dissent therefrom, but to assail it as failing to present the case fully and properly for the determination of the House.

There was no dissent in regard to counting the Haut Gap votes. The issue was on the 20 precincts (out of 24) in the city of Charleston. This city, the minority noted, was never in the old Seventh district, to whose history the majority had referred. The new district was a sea-coast district, of contiguous territory and similar interests. The minority quoted testimony showing that contestant was unpopular with his own party. He had been accused of getting his nomination by unfair means, and was not a resident of the district. Contestee was shown by the returns to have received large majorities at many strong colored precincts against which there was no evidence of fraud. The registration board of Charleston had thrice moved its office, so as

to give everybody a convenient chance to register, and had taken three months to do its work. There was no evidence against the character of its members. All the charges in the testimony against registration officers either related to a former or subsequent board or no time was fixed by the witness. The testimony quoted in the majority report on the general manner of conducting the election was contradicted by much other testimony not quoted. The minority quoted some of it by precincts.

Taking all the testimony given about persons rejected at the polls who were registered, we find that the names of 118 persons are testified to as having registered and were not allowed to vote; that of this number only 36 themselves swore that they were registered, and that Supervisor L. E. Williams proves that of the remainder 77 never had been registered. Deducting these 77 from the 118, there remain 41 persons as to whom it has been testified that they were rejected as voters although registered. So that, taking the most extreme case against the contestee, there were not in the entire city of Charleston more than 41 registered voters who were refused the right to vote. * * * A careful scrutiny of the whole evidence in this case convinces us that the contestee received a substantial majority of the votes cast for Representative in Congress, and that if every vote of those who offered to vote, with or without certificates of registration, in the city of Charleston should be counted for the contestant the majority of the contestee would not be materially reduced. * * *

Unless the presumption is indulged that every man who has a dark skin is a Republican and votes the Republican ticket at all times and under all conditions and circumstances, even when he swears that he voted otherwise, it will be impossible to give the contestant the seat which he claims.

The minority therefore recommended resolutions declaring contestee elected.

The case was fully debated in the House, and the resolutions presented by the minority were lost by a vote of 48 to 144. The resolutions presented by the majority were then passed by a vote of 153 to 33, and on June 4, 1896, Mr. Murray was sworn in.

[Report 1567, parts 1 and 2, first session Fifty-fourth Congress.]

(37) KEARBY *vs.* ABBOTT.

Rejected ballots; recount; informal returns. Report for contestee, who retained the seat.

According to the returns contestee received a plurality of 344 votes. Contestant alleged that several hundred votes in the various precincts of Dallas County, Texas, were cast and not included in the returns, and that they were all cast for him; that in another county there were no precinct returns, but only tally sheets, which the county commissioners had no right to count, and that his party was denied representation at polls in another county. Sundry minor irregularities were also alleged. A recount of the votes in Dallas County and of one precinct in another county showed, according to contestant's claim, a net gain for him of 144 votes. The committee said:

Many questions arise as to the various ballots concerning which there is a controversy between the contestant and contestee, but for the purpose of the decision in this case it is unnecessary to consider them, and the case may be disposed of on the theory that the contention of the contestant is correct, and that the 144 votes which he claims to have gained should be credited to him.

The charges of nonrepresentation of contestant's (the Populist) party were disproved. The case must then turn on the rejection of the tally-sheet returns counted by the county commissioners. The committee said:

It will be seen, therefore, that the contestant asks to be awarded a seat to which he was not elected, on the ground that the officers at certain election precincts

neglected to comply with the statutory requirement—that they should make out and deliver to the county judge returns showing the vote polled at the precincts of which they were the managers of the election. * * *

The contestee took the testimony of one or more officers of each of the election precincts from which no returns were made, and it was proved that the failure to make the returns in each instance was occasioned by the fact that no blanks upon which returns should have been made were furnished; but as to each precinct proof was made from the tally sheet and from the memory of the officers of election exactly what the vote actually polled for each candidate was.

It was not contended by the contestant and no effort was made to prove that the vote was in any instance different from that shown by the tally sheet and as testified to by the witnesses. But he contends that it was necessary that there should have been a recount of the ballots cast at each of the voting precincts. Upon this point the committee are agreed that if the contestant had alleged that the vote at any of the precincts from which there were no formal returns was different from that shown by the tally sheet, or if he had charged that there was any fraud on the part of the election officers, it would have been necessary for the ballots cast at such precincts to have been recounted, as they were in the precincts concerning which he made such charges, but it is to be observed that no such contention was made by the contestant, and no suspicion was raised as to the correctness of the vote as estimated by the commissioner's courts of the different counties and as proved by the contestee.

The resolutions recommended, declaring contestee elected, passed the House May 4, 1896, without division.

(38) YOST *vs.* TUCKER.

Illegally rejected ballots; irregularities. Majority report for contestee; minority report for contestant. Contestee retained the seat.

Majority report by Mr. McCall; minority report by Mr. Walker.

According to the returns, contestee had a plurality of the ballots counted of 892. The officers of election at the various precincts of the district threw out 3,797 ballots as improperly or imperfectly marked (under the Walton Australian ballot law of Virginia). Of these rejected ballots, 1,021 were destroyed by the election officers, and 2,776 were preserved and included in the subsequent recount of all the ballots in the district.

Contestant claimed that the ballots rejected by the election officers were nearly all marked with sufficient accuracy to disclose the intention of the voter, and that the imperfections of the ballots were due to a partisan administration of the law in the interest of contestee. A recount of all the ballots preserved was held, and a description of the character of all the rejected ballots preserved was thus in the record. Testimony was taken showing the nature of the irregularities of some of the ballots destroyed on the night of the election, and this testimony, so far as it was clear enough to establish the facts, was also considered by the committee. The sections of the law describing the ballot and the method of voting were as follows:

SEC. 2. Each person offering to vote shall deliver a single ballot to one of the judges of election in the presence of at least one of the other two judges.

SEC. 3. The ballot shall be a white paper ticket containing the names of the persons who have complied with the provisions of this act, as hereinafter provided, and the title of the office printed or written as hereinafter provided. None other shall be a legal ballot.

SEC. 5. It shall be the duty of the electoral boards of the several counties and cities within the State, within thirty days preceding each election, to cause to be printed a number of ballots equal to twice the entire registered vote of the said county or city. These ballots shall contain the names of all candidates complying with the provisions as above required, printed in black ink, immediately below the office for which they have so announced their candidacy.

Sec. 11. Every elector qualified to vote at a precinct shall, when he so demands, be furnished with an official ballot by one of the judges of election selected for that duty by a majority of the judges present. The said elector shall then take the said official ballot and retire to said voting booth. He shall then draw a line with a pen or pencil through the names of the candidates he does not wish to vote for, leaving the name or names of the candidate or candidates he does wish to vote for unscratched. No name shall be considered scratched unless the pen or pencil mark extend through three-fourths of the length of said name; and no ballot save an official ballot above provided for shall be counted for any person. When, as to any office, more than one name remains unscratched, the ballot for that particular office shall be void, but the ballot as to any other office for which only one name remains unscratched shall be valid. He shall fold said ballot with the names of the candidates on the inside and hand the same to the judge of election, who shall place the same in the ballot box without any inspection further than to assure himself that the ballot is a genuine ballot, for which purpose he may, without looking at the printed inside of said ballot, inspect the official seal upon the back thereof: *Provided*, It shall be lawful for any voter to erase any or all names printed upon said official ballot and substitute therein in writing the name of any person or persons for any office for which he may desire to vote.

The result of the recount showed 12,126 perfect ballots cast for contestee and 10,512 for contestant. It was agreed that a large number of more or less imperfect ballots should be added to these figures. According to the majority, the added ballots would reduce the majority of contestee (892 on the returns or 1,614 on the perfect ballots) to 221 or 161 votes; according to the minority, the majority of contestee would be overcome and a majority for contestant of 62 votes shown, which would be further increased to 736 by wholly rejecting two counties and three precincts where the whole conduct of the election was tainted by fraudulent conspiracy.

Upon 1,169 ballots cast for contestant and 114 cast for contestee the only irregularity was that the caption of the ticket as well as the names of the candidates not voted for was "scratched." These "caption-marked" tickets were counted by both the majority and the minority. The majority said:

The general rule, doubtless, is to count those ballots which clearly express the intention of the voter, but the intention must be expressed as provided by law. We do not suppose it would be contended, in view of the requirement of this statute for an official ballot and an express prohibition against counting any other ballot, that a ballot provided by the voter himself and deposited by him should be counted, although it expressed his intention beyond all doubt. The question here is not one which rests on a supposed ambiguity of the ballot, but it is a question of what the laws of Virginia require.

The intention of the voter, if it can be clearly ascertained from the ballot, will generally be given effect to, and when it is not expressed according to the strict requirements of a statute, such requirements will often be regarded as merely directory, unless a failure to comply with them is declared to be fatal to the ballot. But where the statute itself provides that a certain thing shall be done by the voter or his vote shall not be counted, then there can be no question that a provision of that character is mandatory and that a failure to comply with it is fatal to the ballot.

In the present case there is no question of the intention of the voter. There was only one office to be filled, and it is hardly conceivable that more than 1,200 voters in this district should have left their homes, gone to the polls, entered the booths, and gone through the act of voting with the intention of voting to fill no office whatever. This was the first election at which the Walton law was applied in Virginia, and undoubtedly the caption was marked out by reason of the failure on the part of the voter to understand this novel system. Unless clearly required to reject these ballots by the Virginia laws, the committee believes they should be counted.

The words "none other shall be a legal ballot" in section 3 refer to the Australian ballot provided for at the public expense, and the words in section 11 of the act, "no ballot save an official ballot above provided for shall be counted for any person," were in the opinion of the committee intended only as a prohibition of the counting of any other than the ballot provided for by the first sections of the act. The erasure

of the caption did not destroy the character of the ballot as an official ballot, and since there could be no ambiguity or doubt as to what office the voter intended his candidate to fill, since only one office was named on the ticket, the committee is of the opinion that these so-called "caption-marked" ballots—114 for Tucker and 1,169 for Yost—should be counted.

There were 54 ballots for contestant and 14 for contestee described as "blotted or blurred"—that is, correctly marked by the voter, in ink, and then folded before the ink was dry, so that a blot or mark was left on the unscratched name. The committee counted these, saying:

As to the "blotted or blurred" ballots, the most difficult question would be one of fact, as to whether they were "scratched" or "blotted." This question is settled by agreement of the contestant and contestee. It is conceded that they were all properly marked, and in folding them before the ink was dry an impression was made on the names not marked. This is purely accidental and not to be deemed the marking or scratching contemplated by the statute, which is to be done by drawing a line "with a pen or pencil" through the names of the candidates for whom the voter does not wish to vote. The contestant's notice of contest contends that similar ballots cast for the contestee should not be counted and does not claim that such ballots should be counted for himself. The committee are of opinion, however, that they should be counted—14 for Tucker and 54 for Yost—as appears by the record.

There were also 454 ballots for contestant and 271 for contestee described as "imperfectly marked." The principal difference between the majority and minority of the committee was on these ballots, the majority rejecting and the minority counting them. The majority said:

The "imperfectly marked" ballots are admitted to be ballots which were not marked as provided in section 11 of the Walton act. It is provided in that section, quoted above, that after the voter has retired to the booth he shall draw a line with pen or pencil through the names of the candidates for whom he does not wish to vote, leaving the name of the candidate for whom he does wish to vote unscratched. It then says:

"No name shall be considered scratched unless the pen or pencil mark extends through three-fourths of the length of said name. * * * When, as to any office, more than one name remains unscratched, the ballot for that particular office shall be void, but the ballot as to any other office for which only one name remains unscratched shall be valid."

It appears very clear that unless a name is marked through three-fourths of its length it is not, within the meaning of the law, to be considered as scratched at all, and therefore more than one name in the so-called "imperfectly marked" ballots remains unscratched upon the ticket, and the law expressly provides that in such a case the ballot shall be void. It is not for the committee to decide whether the provision as to the marking of the ballot is a wise or reasonable one or not. The voter has failed to express his will by the so-called "imperfectly marked" ballot, according to the requirement of the statute, and, failing in that, the statute declares that the ballot is void. In the judgment of the committee, therefore, these "imperfectly marked" ballots can not be counted.

The 1,021 destroyed ballots belonged, in general, to the same classes as the above, and the committee counted such of them (naturally only a small part) as were ascertainable by evidence. They said, in general:

With reference to these ballots, generally, it may be said, in most instances, that the Republican judges at the precincts where they were cast concurred with the other judges in treating them as absolutely void and agreed that they should be burned or otherwise destroyed. At a few precincts the Republican or Populist judges objected to their destruction, but the record shows that in almost every case these judges agreed to the count and concurred in the conclusion of the other judges that these ballots were not marked as required by the statute and could not be counted.

While the committee is of the opinion that in no case should the defective ballots have been destroyed, yet it is of their opinion that in nearly all of the precincts their destruction was made in entire good faith and that such destruction in most of the

precincts does not prove an intention to commit fraud on the part of the election judges. The contestant attempts to prove that some of these ballots were intended for him, and as by their destruction he was prevented from having a recount of them, it is clearly his right to prove by the testimony of the judges, or of any witness, the exact condition of the ballots, and he is entitled to the benefit of any that he can show were cast for him.

The testimony in regard to each precinct was then discussed in detail, to show the exact result arrived at by the application of this principle. The number of ballots proved by sufficient evidence to have been improperly rejected was found to be insufficient to overcome the remainder of the returned majority of contestee.

Contestant also claimed that the vote of two counties should be thrown out on the ground that the names on the ballots were "alternated" and printed in Old English, German, or script type for the purpose of confusing and misleading illiterate voters. The committee condemned these practices, but as they were committed by the county and not by the precinct officials, they did not reject the returns. They said:

The statute does not provide the precise order in which the names upon the ballot should be printed nor the kind of type that should be used, but apparently assumed that the officers charged with this duty would be governed by the principles of common honesty and fairness and would not provide a type which was unusual nor juggle with the names for the purpose of confusing the illiterate voter.

Whether this alternation of names indicated a fraudulent design on the part of the electoral board or an excess of partisan zeal which would hesitate at nothing not positively forbidden by law, it was a trick which can not be defended, and it is incredible that the public officers of one of the great and historic Commonwealths of the Union should be guilty of such an unequal and partial administration of the law. * * * The great object of the Australian ballot is to secure the advantages of secret voting. It renders the workman independent of his employer and operates as a bar to bribery, because whatever corrupt contracts have been made for the purchase of votes the bribe giver can not know that the vote which he has bought has been delivered. This secrecy is rendered more certain by giving the voter every facility for learning what the ballot contains.

It is a usual provision in States having this system to require copies of the official ballot to be posted in the polling places, so that each voter may study it for himself, ascertain the exact location of the names of the candidates for whom he wishes to vote, and prepare his own ballot without the aid of the assisting officers, who are, at best, but a necessary evil. While it is a weakness of the Virginia statute that it does not contain such a provision, it is incredible that it should have a provision so antagonistic to that system of voting, as well as to the fundamental principles of a free government, as to make it a crime for the voters to discuss freely with each other the make-up and the contents of the ballot they voted. Only a positive and clear declaration would bear such a construction. * * *

If the officers guilty of such conduct had charge of the making up of the returns in the various precincts they would need to be scrutinized with the gravest suspicion, and they certainly would not be entitled to that weight and effect as evidence which are due to uncontaminated returns. But the elections were in charge of the election judges at the different precincts, and while the fact that these judges were appointed by the county electoral boards is a circumstance which would invite the most careful scrutiny of their conduct, it would be a daring conclusion to infer that the credibility of the returns at all the precincts in this county was destroyed and that all the voters should be disfranchised because the precinct officers had been appointed by a central county board which alternated the names on the ballot. Such a wholesale exclusion of votes would not be warranted, but the evidence of each precinct should be considered separately, as it has been by the committee in the preceding portions of this report.

The committee is also under the necessity of considering whether and how much the contestant's vote suffered on account of this method of printing. There were 349 defective ballots in Amherst County out of a total of 2,705 (p. 124 of the record), a percentage not materially greater than the percentage of defective ballots throughout the whole district, and the relative strength of the parties, as shown at previous elections, appears to have been fairly maintained in this election.

Substantially the same observations may be made as to Appomattox County, where there were 153 defective ballots out of a total of 1,431 (p. 160 of the record), and the contestee received a plurality of 49. The committee is of the opinion that the evidence will not warrant the rejection of the votes of these two counties.

The committee summed up the case as follows:

In the consideration of this case the committee has been mindful of the fact that this was the first application in Virginia of a new and complicated method of voting. The statute on many points was far from clear and explicit. It had to be construed and enforced in the first instance at the polls by men who were not constitutional lawyers, and who came direct from the ordinary pursuits of life. It was to be expected that there would be contradictory constructions under these circumstances upon the meaning of the law.

The committee believes that many of the things that appear to have been done contrary to the statute were done in good faith. The great number of defective ballots was due largely to the novelty of the system, to carelessness in marking by voters who could read and write, and to some extent by attempts made by illiterate voters to mark their own ballots without asking assistance. If those who could read and write would mark their ballots strictly as the law provides and those who can not would demand the requisite assistance of the constables, any defective ballots would be evidence of fraud on the part of those officers. But the condition of things at the election of November, 1894, will not warrant such a conclusion in the pending case.

Since the result of all these conclusions still left a majority for contestee, the committee recommended resolutions declaring him elected.

The minority held that all the defective ballots on which the intention of the voter was plain should be counted.

It is not disputed that upon each of these ballots the intention of the voter is clearly and unmistakably stamped. The sole question in reference to them is whether or not a ballot technically defective shall be counted. Were equity to be considered, there would be no disagreement on this point. The will of the elector was honestly expressed and is clearly shown. But it is insisted that simple honesty and plain intention shall not prevail where there has been failure to comply with merely technical requirements of the statute—that the very foundation principle upon which our representative system is based shall be uprooted because of some immaterial imperfection in the superstructure.

No rule of law which would deprive a legal elector of his ballot, where his right to vote is unquestioned and his intention to vote for a particular candidate is clearly made out, will be favored by any court or any tribunal, and no mere technical construction of the law will be adopted or even tolerated which will produce such wrong and work such injustice.

The imperfections on these ballots consisted, generally, of the failure on the part of the voter to erase all the names not voted for by a horizontal line touching at least three-fourths of the letters of the name. In some cases the names were scratched with a series of vertical or oblique dashes; in others the line extended the full length of the name, but actually touched only the capitals and extended letters, being too high to cut the smaller letters; in others the line curved up or down, so as to miss over one-fourth of the letters. If all these were counted, in addition to those counted in the majority report, contestant would have a majority of 22.

After counting all these, there would still remain 2,711 ballots either burned and not proved, or preserved or proved and shown to be too defective to show the intention of the voter. The minority showed that this large proportion of failures was due to a partisan conspiracy and the violation of law on the part of supporters of contestee. This conspiracy went so far as to invalidate the returns from certain counties and precincts for fraud and to make it morally certain that contestant's actual majority of the votes of legal electors honestly attempted to be cast for him was much larger than the computed

majority based on specific evidence. The minority discussed the evidence in detail, counted the destroyed ballots in several precincts in which the majority had not considered the evidence clear enough, and rejected the vote where the ballots had been printed in German or script letters, the names alternated, and the conduct of the judges of election and special constables, in violation of the law, was such as to show and consummate a conspiracy to deceive and defraud the illiterate voters. The minority summed up the case as follows:

In order to deprive this contestant of the seat to which he was honestly and legally elected, this House must absolutely disregard a cardinal rule of law, founded on equity and firmly established by the highest judicial tribunals of the land.

It must decide that where, by an inspection of the ballot, a voter's honest intention is plainly shown beyond the possibility of a doubt, the ballot shall be declared invalid.

It must decide that where a fraudulent conspiracy is entered into by election officers, and thousands of legal voters are thereby disfranchised, the few who escape the effect of the conspiracy must be deprived of their rights under the strictest technical construction of statutes.

It must decide that the decision of the supreme court of Virginia respecting the duties of special constables is a nullity, and that instructions to those constables from partisan officials for partisan purposes are binding.

It must decide that partisan officials have a perfect right to disfranchise legal voters opposed to them, and to this end may print ballots in any way and in any language.

The minority report was signed by Mr. Walker and Mr. Thomas.

The case was fully debated and closely contested in the House. On January 21, 1897, the substitute recommended by the minority, declaring contestant elected, was lost by a vote of 119 to 127. A motion to reconsider was laid on the table by a vote of 120 to 104, and the resolutions presented by the majority were then passed by a vote of 118 to 47 (190 not voting; 14 counted present and not voting, to make a quorum). So contestee retained the seat.

[Report 1636, parts 1 and 2, first session Fifty-fourth Congress.]

FIFTY-FIFTH CONGRESS, 1897-1899.*Committee on Elections No. 1.*

Mr. TAYLER, Ohio.	Mr. DAVENPORT, Pennsylvania.
ROYSE, Indiana.	BARTLETT, Georgia.
LINNEY, North Carolina.	Fox, Mississippi.
MANN, Illinois.	SETTLE, Kentucky.
Mr. HAMILTON, Michigan.	

(On December 18, 1897, Mr. ROYSE became chairman of Committee No. 2, and Mr. LAWRENCE, of Massachusetts, took his place.)

Committee on Elections No. 2.

Mr. JOHNSON, Indiana.	Mr. BELFORD, New York.
CLARKE, New Hampshire.	MAGUIRE, California.
WEAVER, Ohio.	ROBINSON, Indiana.
OLMSTED, Pennsylvania.	GAINES, Tennessee.
Mr. DAVISON, Kentucky.	

(On December 18, 1897, Mr. JOHNSON, of Indiana, at his own request, was excused, and Mr. ROYSE, of Indiana, was appointed chairman.)

Committee on Elections No. 3.

Mr. WALKER, Virginia.	Mr. COCHRANE, New York.
CODDING, Pennsylvania.	MIERS, Indiana.
MESICK, Michigan.	BURKE, Texas.
KIRKPATRICK, Pennsylvania.	BRUNDIDGE, Arkansas.
Mr. CRUMPACKER, Indiana.	

(On December 18, 1897, Mr. CODDING was excused and Mr. BOUTELL, of Illinois, was appointed in his place.)

(The committees were not appointed until the legislative day July 22, actual day July 24, 1897.)

*Cases.**Committee No. 1.*

- (1) Thomas H. Clark *vs.* Jesse F. Stallings, *Alabama.*
- (2) G. L. Comer *vs.* Henry D. Clayton, *Alabama.*
- (3) William F. Aldrich *vs.* Thomas S. Plowman, *Alabama.*
- (4) Grattan B. Crowe *vs.* Oscar W. Underwood, *Alabama.*
- (5) Jonathan S. Willis *vs.* L. Irving Handy, *Delaware.*
- (6) W. Godfrey Hunter *vs.* John S. Rhea, *Kentucky.*

Committee No. 2.

- (7) Samuel E. Hudson *vs.* William McAleer, *Pennsylvania.*
- (8) W. S. Vanderburg *vs.* Thomas H. Tongue, *Oregon.*
- (9) Ben L. Fairchild *vs.* William L. Ward, *New York.*

- (10) William E. Ryan *vs.* Henry C. Brewster, *New York.*
- (11) Armand Romain *vs.* Adolph Meyer, *Louisiana.*
- (12) Joseph Gazin *vs.* Adolph Meyer, *Louisiana.*

Committee No. 3.

- (13) R. T. Thorp *vs.* Sydney P. Epes, *Virginia.*
- (14) Richard A. Wise *vs.* William A. Young, *Virginia.*
- (15) Josiah Patterson *vs.* E. W. Carmack, *Tennessee.*
- (16) John R. Brown *vs.* Claude A. Swanson, *Virginia.*

(1) CLARK *vs.* STALLINGS.

Case abandoned. Contestee retained seat.

Report by Mr. Tayler.

The body of the brief report is as follows:

The Committee on Elections No. 1, to whom was referred the contested election case of Thomas H. Clark *v.* Jesse F. Stallings, from the Second Congressional district of Alabama, respectfully report that the contestant took no steps after filing his notice of contest, and appeared before the committee on January 14, 1898, and stated that he had no desire to further press his contest.

The resolutions recommended were passed on January 18, 1898, without division.

[Report 188, second session Fifty-fifth Congress.]

(2) COMER *vs.* CLAYTON.

Case abandoned. Contestee retained seat.

Report by Mr. Linney.

After the taking of testimony in this case had proceeded for some time, contestant formally abandoned the case and filed a statement to that effect with the papers in the case. The committee reported these facts and recommended resolutions declaring contestee elected, which, on January 19, 1898, were passed without division.

[Report 195, second session Fifty-fifth Congress.]

(3) ALDRICH *vs.* PLOWMAN.

Fraud. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Tayler; minority report by Mr. Bartlett.

According to the returns, contestee had a majority of 2,967, all of which was in the two counties brought in contest, and nearly all of which was in Dallas County. Contestant carried the "white counties." The committee held that in Dallas County there was a conspiracy to carry the election for contestee by fraud and that there were certain fraudulent precincts in one other county. Under the law inspectors of election were required to be of opposite political parties, and there were required to be two "markers" of opposite parties to assist illiterate or physically disabled voters. In regard to the inspectors and "markers" the provision was:

Clerks and markers must be appointed from a list of persons, not less than six nor more than ten in any one beat, who may be suggested for that purpose by the duly constituted authorities, respectively, of the opposing political parties having candi-

dates to be voted for at the election. Every illiterate or physically disabled elector shall be permitted to have the assistance of a marker, who may be selected by him from the number of markers who have been appointed by the inspectors. Any inspector who may refuse to appoint markers from the opposing parties, so as to give every illiterate and physically disabled elector the opportunity to select a marker of his own political party, shall be guilty of a misdemeanor, and must, on conviction, be fined not less than one hundred dollars nor more than five hundred dollars. It is the sense of this section that the opposing political parties shall each have the right to suggest a list of names, not less than six or more than ten persons, to act as markers and clerks. If no lists are furnished, the inspectors shall appoint clerks and markers from opposing political parties.

The committee found that this law had been violated throughout Dallas County. They said:

In Dallas County the appointing officers were all Democrats. Notwithstanding the statutory requirements, they did not appoint a single Republican or Populist inspector of election. Lists were submitted to them of suitable men in each precinct—one by the so-called regular Republican nominee for Congress, and one joined in by the chairman of the People's Party of Dallas County, the chairman of the Republican party of Dallas County, the chairman of the Aldrich campaign committee, the member of the Republican executive committee for the Fourth district, and Mr. Aldrich himself.

Except in two or three instances, where by mistake a Democrat's name was given in a list of three or four, not a single person was appointed inspector out of about two hundred names thus proposed by the opposition to Democracy. At the opening of the polls, the friends of contestant at the several polling places submitted, in accordance with the law, names of suitable persons for markers and clerks. In a few instances a marker was appointed, and in one precinct a clerk.

Some pretense was made, here and there, of appointing opposition inspectors, clerks, and markers by naming persons recommended by one Crocheron, a venal negro who admitted his depravity, and worked for Plowman, or by appointing so-called representatives of the Gold Democratic candidate, but as only 111 votes were polled for other candidates than Plowman and Aldrich the pretense is apparent.

The fact is, and is constantly in evidence, that the machinery of election in practically every precinct of Dallas County was organized against the Republicans and Populists, and was so organized in pursuance of a conspiracy to absolutely control the casting, counting, and returns of the votes. It was successful.

The committee analyzed the testimony in regard to eight of the precincts in Dallas County. In some of the precincts the entire registry list was returned on the poll book as voting, all but the first part (covering the number shown by other testimony to have voted) being in the exact order of the poll list, including alphabetical parts, or in some simple and systematic rearrangement of it. In others it was shown by the testimony of the markers or the voters that more votes were cast for contestant than were returned for him, or that the returns showed more votes than were actually cast. The committee summed up its conclusions as to this county as follows:

The result of our investigation is the conclusion that every precinct in Dallas County in which a contest is made is so fatally tainted with fraud that the returns therefrom must be entirely disregarded, and that we can count only such votes as the testimony in the case shows were actually cast. In doing so we considered as proved only those which were shown by direct testimony to have been cast, as when the voter himself, or a marker, testified. We have counted none which depend upon hearsay testimony or conjecture. The tabulated statement, showing the result of our recount, appears later in this report.

It is not necessary to cite authorities in support of the above proposition of law involved in this conclusion. It is axiomatic and elementary.

In Talladega County there was no general conspiracy shown, but the returns from 3 precincts were tainted with frauds similar to those found in Dallas County, and the committee counted only the votes proved aliunde.

The committee then presented a tabular statement (covering also the precincts in Dallas County not discussed in detail), showing a majority for contestant on the uncontested returns and the proved votes of the contested returns of 542 votes.

The minority agreed to the rejection of 3 of the 8 discussed polls in Dallas County, but found the evidence insufficient or contradictory as to the other 5, and proof of more votes aliunde in the 3 than were counted by the majority. As to the other 23 precincts, they held that there was no reason to reject them, and no justification of the conclusion of general conspiracy in charges of fraud covering only a small part of the precincts. They said:

The demand of the majority report that, because the testimony concerning 8 of the precincts in Dallas County would seem to them to justify the exclusion or rejection of the returns therefrom as unreliable, but leaving all of the remaining 23 precincts unchallenged, the returns as a whole from Dallas County must be rejected, is absolutely untenable and unprecedented. There are no charges, nor is there any evidence, tending to show anything that would indicate that the returns from the 23 uncontested precincts are not entitled to full confidence and all the *prima facies* given them by the law. The official returns of Dallas County, therefore, should not and ought not to be rejected as a whole, but each precinct should be judged by its own acts and stand upon its own merits. Such an act is unwarranted by law, and such is not the course of procedure justified by the authorities or by the precedents in Congressional cases. The only just and proper course in this case is to deal with the returns by precincts; and where it is shown by competent and sufficient evidence that the returns from a precinct are overturned by proof of fraud, then the correct rule is to permit proof aliunde of the vote cast. * * *

The pretense of the contestant, which seems to have received a quasi sanction by the majority report, that there was a conspiracy extending over the Congressional district to defraud the contestant in various ways and by various methods, is hardly worthy of notice by us. If there is any testimony in the record justifying the belief that there were uniform or universal fraudulent practices or improper methods even in the precincts above named—which is all that can be claimed for the contestant—we are not able to find it. The very fact that such methods or fraudulent practices, if any, were confined to those 8 designated precincts destroys the theory of a conspiracy. It is evident that any such conspiracy would have and must have extended either to all the precincts in a single county or to a large majority of the precincts in the district; but it is admitted by the majority report, and by the contestant, that in the county of Dallas only 8 precincts are affected by it, and only 3 in Talladega County, and none in any of the other counties or precincts of the district.

It is idle and improper, therefore, to claim, or ask the House to infer, that there was any conspiracy whatever, and we shall pass that branch of the case without further comment, as being unworthy of our notice.

The minority found, further, that there was in fact a fair division of the election officers between the two parties in nearly all the precincts in Dallas County. Contestant was not the regular Republican nominee, and was a Populist. It was not surprising, therefore, that he should claim that some of the Republicans appointed did not represent him personally.

The minority went over the precincts discussed in the majority report in detail, reaching the conclusions above indicated, and showed that in one county all the election officers were Populists, which would at least balance contestant's claim as to Dallas County, and that in one precinct there was fraud in the interest of contestant.

According to the findings of the minority, the contestee was elected by a majority of 2,828.

The case was fully debated in the House, and the substitute resolution presented by the minority was lost by a vote of 124 to 144. The majority resolution declaring contestee not elected was passed by a vote (on division) of 129 to 114, and the resolution declaring contestant

elected by a vote of 142 to 112. Mr. Aldrich was then sworn in, on February 9, 1898.

[Report 284, second session Fifty-fifth Congress.]

(4) CROWE *vs.* UNDERWOOD.

Fraud. Report for contestee, who retained seat.

According to the returns, contestee had a majority¹ of 5,565 and a plurality of 7,811 votes. Contestant charged fraud in a large number of counties and precincts, and the committee found it proved in some, but not in enough to change the result. They therefore recommended resolutions declaring contestee elected. The minority agreed to the conclusion, but not to the statements of fact.

The resolutions recommended, confirming contestee in his seat, were passed on March 2, 1898, without division.

[Report 597, second session Fifty-fifth Congress.]

(5) WILLIS *vs.* HANDY.

Case abandoned. Contestee retained seat.

Report by Mr. Tayler.

The body of the brief report is as follows:

The contestee, by the official returns, received 15,407 votes and the contestant 11,159. A notice of contest was served on the contestee, but the contestant took no further formal action. He appeared before your committee and declared his opinion that the contestee's seat could not be successfully attacked and that he had abandoned the contest.

The resolutions recommended, confirming contestee in his seat, were passed without division on April 30, 1898.

[Report 1239, second session Fifty-fifth Congress.]

(6) HUNTER *vs.* RHEA.

Case abandoned. Contestee retained seat.

Report by Mr. Davenport.

The body of the brief report is as follows:

By the official returns the contestee was given a majority of 337; the contestant claimed, on his theory of the case, to be elected by a majority of 468.

The issues relate chiefly to questions involving the qualifications of certain voters, upon which differences of opinion naturally arise among honest judges of election and good lawyers.

The testimony in the case was printed and briefs were filed with the committee. Before the case was set for hearing, the contestant appeared before the committee and declared that he no longer desired to prosecute his contest; that since he began the same he had been appointed by the President minister of the United States to Guatemala. He has entered upon and is now discharging the duties of that office.

Your committee is of opinion that it does not lose jurisdiction of the case by reason of this announced purpose of contestant to desist from the contest, but can proceed, if it so desires, to hear and report upon it as in other cases.

¹ It should be explained that the word "majority" is frequently used throughout this digest in its popular sense, as equivalent to "plurality," except where, as in the present case, the difference is large, or, as in the Rhode Island cases, the distinction is important.

But in the absence of any suggestion of collusion between the parties, in view of the character of the issues raised, and aided by the facts already recited, we do not deem it necessary to examine in detail the voluminous record in the case, and deem it our duty to confirm contestee's title to the seat he now holds.

The resolution recommended was adopted by the House on May 17, 1898, without division.

[Report 1356, second session Fifty-fifth Congress.]

(7) HUDSON *vs.* McALEER.

Case not made out. Leave to take further testimony denied. Contestee retained seat.

Report by Mr. Royse.

Contestant was an independent candidate and received a very small minority of the votes in the district. He did not claim the election for himself, but alleged that he could have proved that contestee was not elected if he had not been stopped in taking testimony by the riotous and violent conduct of certain citizens of the district. He therefore asked for further time to take testimony, and requested that a subcommittee be sent to the district to take the testimony. He filed his own affidavit in support of the motion. The committee said:

It is nowhere averred in the affidavit that these facts and the evidence to sustain them have been discovered since the time provided by the statute for taking testimony has expired. On the contrary, the affidavit carries upon its face a very strong inference that all these facts were known to the contestant at the time he filed his notice of contest, and that all his evidence tending to support the same was then known and accessible to him.

As we understand contestant's application, it is not based upon the ground that the evidence he now desires leave to take has been discovered since the time expired, but upon the reason that he made every possible effort to procure it, but was prevented by the riotous and violent behavior of certain citizens of the district at the place where he was compelled to take the same.

If such a case were made out, we would have no hesitancy in recommending that contestant's application be granted. The honest election of each member of this House is a matter of the highest importance, both to this body and to the people at large. When a question is raised as to the election of one of its members, this House should stand ready to make a thorough investigation, and promptly expel the member whose seat was obtained by fraudulent or dishonest methods. No one should be permitted to prevent or impede such investigation. Any attempt of this kind should be promptly and vigorously rebuked. It can not be assumed that such an investigation has been hindered or prevented. Until the contrary appears it must be presumed that the authority of Congress and the agencies provided to make such inquiry have been respected and obeyed.

If contestant has been prevented by riot and violence from procuring his testimony, such fact should be shown in some satisfactory way, and that the contestant was in no way to blame for it. Upon this subject the affidavit is entirely silent. We are furnished no proof of this but the unsworn statement of contestant's counsel, which is denied by counsel for contestee; and we do not feel that this is sufficient. We therefore recommend that the application to take further testimony be denied. Contestant admitted before the committee that he was not elected to the Fifty-fifth Congress from this district. The utmost of his contention was that contestee also was not elected. It is not insisted by contestant that this is shown by the evidence already taken; and even if it were we could not agree with him.

The resolutions recommended, confirming contestee in his seat, were passed by the House on February 5, 1898, without division.

[Report 354, second session Fifty-fifth Congress.]

(8) VANDERBURG *vs.* TONGUE.

Irregularities; illegal votes; leave to take further testimony denied. Contestee retained the seat.

Report by Mr. Royse.

The returns from the district were not in evidence, but it was admitted that contestee was elected on the face of the returns. Contestee admitted the charges of irregularities in most of the precincts of one county, but as the committee did not have the vote of that county before them, they could not tell what effect the irregularities had on the vote. There was also evidence as to one precinct in another county, showing that some persons, not over 25, voted illegally, and that there were other irregularities. Contestant asked for leave to take further testimony, but as he failed to show that he had been reasonably diligent in procuring testimony within the statutory time, the committee recommended that the application be denied.

The resolutions recommended, declaring contestee elected, were passed by the House on February 14, 1898, without division.

[Report 437, second session Fifty-fifth Congress.]

(9) FAIRCHILD *vs.* WARD.

Wrong name on official ballot in party column. Majority report for contestee; report by Mr. Gaines for contestant. Contestee retained the seat.

Majority report by Mr. Royse; dissenting report by Mr. Gaines.

Contestant and contestee were both Republican candidates, nominated by conventions professing to be the regular Republican conventions. Contestant had represented the district in the previous Congress. There was a dispute as to which name should be placed in the party column on the official ballot. Contestee's name was placed in the regular column and contestant's in an independent column, and at the election contestee received 30,709 votes and contestant 770. Contestant alleged that he was in fact the regular nominee, and that his name should have been placed in the regular column, and charged that contestee had wrongfully and fraudulently procured his name to be placed in the Republican column by tricks, devices, and abuse of the process of the courts. He maintained, first, that the votes cast and counted for the contestee under the Republican emblem be counted for him, and that he be therefore given the seat; or, second, that if the votes could not be so counted, then the election should be declared void. Several of the committee seem to have been of the opinion that Mr. Fairchild was in fact the regular nominee, but all but Mr. Gaines subscribed to the report, holding that Mr. Ward, having actually received the majority of the votes, was elected and entitled to retain the seat.

There had been two Republican committees appointed in the district, one in 1894 and the other, claiming to succeed it in authority, in 1896. Both committees called conventions, and contestant was nominated by the convention called by the 1894 committee and contestee by the convention called by the 1896 committee. Both candidates filed with the secretary of state certificates of nomination. The secretary of state decided in favor of contestant. Contestee then brought proceedings before Judge Edwards, a justice of the supreme court of the third

judicial district, to review the decision of the secretary of state. The review was heard, a question of jurisdiction being heard and overruled, and the decision of the secretary of state was reversed and contestee declared the regular nominee. Contestant appealed to the appellate division of the supreme court of the third judicial department, which affirmed the decision of Justice Edwards. The secretary of state then directed that the name of contestee be placed on the official ballots, and the election was held, with the result above stated. Subsequently an appeal to the court of appeals was heard and the decision of the courts below was reversed on the question of jurisdiction, the court holding that as the parties to the case resided and the district was situated in the second judicial district the proceedings should have been brought in this instead of the third district. The court, however, on account of the possible importance of the issue at subsequent elections, went on to consider the merits of the case, and held that contestant was the regular nominee and should have been placed as such on the official ballot.

The committee stated contestant's alternate claims, to have the regular Republican votes counted for himself or to declare the election void, and said:

Both these propositions assume, it must be remembered, that contestant was the regular nominee of the Republican party and entitled to have his name go on the ballot as such, and that he was deprived of that right wrongfully, and that, too, by a void decision. It will not be seriously contended that if he was deprived of this right by a decision that was simply erroneous, but not void, it would authorize us to transfer to him the votes counted for contestee, or that it would invalidate the election.

It is by no means clear from the evidence that contestant was the regular nominee of the Republican party. The evidence on this point is in an irreconcilable conflict. There is much to support the claims of each of these parties. Your committee is unable to agree as to which one was entitled to have his name placed upon the ballot as the Republican candidate.

Contestant insists that the decision of the court of appeals practically settles the whole controversy in his favor. While admitting that an opinion of a court of such high standing is entitled to great respect, yet we do not feel that it has all the effect which contestant thinks should be attached to it. When this court held that Justice Edwards had no jurisdiction of the proceedings to review, it ousted its own jurisdiction to render an opinion upon the merits of the case which would be conclusive upon the parties. Whatever it said upon that subject was clearly obiter dictum.

It is clear to us that the court did not contemplate that its decision should in any manner affect the election already held.

And in any case the committee could not alter the result of the election.

If we were to assume that contestant was the regular nominee of his party, and that he had been deprived of the right to have his name go upon the official ballot in the Republican column by a decision that was void, because of the want of jurisdiction in the justice of the supreme court who made the same, still we do not believe that we would be authorized to count for him the votes cast for Mr. Ward; nor do we think we could declare the election void.

Contestant had himself advised Republicans to vote the straight Republican ticket, with contestee's name on it, and all the circumstances were generally known and understood.

There was no deception practiced upon the Republican electors in the district. There is no proof but that all that had been done with reference to the printing of the ballot was fully known to all of them. The means of obtaining this information was ample and within their reach.

It must therefore be presumed, in the absence of evidence to the contrary, that when they went into the polling places to vote they knew Mr. Ward's name was on

the ballot as the regular nominee of the Republican party, and that if they voted the straight Republican ticket their votes would be counted for him. The evidence of several of these voters is in the record. They all say that, while they would have preferred to vote for Mr. Fairchild, yet they knew that Mr. Ward's name was on the ballot in the Republican column; that they supposed that the decision of Justice Edwards and the supreme court had settled that Mr. Ward was the regular nominee of the Republican party, and they voted for him accordingly. * * *

It is clear that the electors who voted the Republican ticket never intended that their votes should be counted for any other person as Representative in the Fifty-fifth Congress than Mr. Ward. They could only make known their choice through the ballot they voted. There is no other lawful method of ascertaining the wishes of the electors. In the absence of deception by means of which the elector is made to unwittingly vote for some one he never intended to vote for he can not be heard to say that this ballot does not express his choice. This rule is essential to the maintenance of the ballot system, and must be adhered to so long as we use this method of registering the wishes of the elector.

The electors acquiesced in the decision of Justice Edwards and the action of the secretary of state, and voted the ballot thus prepared for them with a clear understanding of what they were doing. When they placed their cross in the circle at the head of the Republican column they thereby said that William L. Ward is the person whom we desire shall represent us in the Fifty-fifth Congress. Now, upon what authority can we say that the voter did not intend all that his ballot expresses? To do this we would be obliged to go outside of his ballot and ascertain his choice by means other than through his ballot. This is contrary, not only to the law of the State wherein this election was held, but the law of the United States. The voters of this district did not say through the ballot that it was their wish that contestant should represent them in the Fifty-fifth Congress; hence it would be a clear violation of law to declare him elected.

Regard must also be had to the Republican electors who actually desired the election of contestee.

The committee, moreover, were of the opinion that Justice Edwards did have jurisdiction to review the decision of the secretary of state.

But we can not agree with the court of appeals that Justice Edwards did not have jurisdiction of the proceedings to review the decision of the secretary of state. By the express terms of the statute jurisdiction of the subject-matter was conferred upon every justice of the supreme court—and Judge Edwards was a justice of that court. The only question left in doubt was in what judicial district the proceedings should be brought.

Upon this subject the statute is uncertain. It was by means of construction and a balancing of the considerations which in its opinion must have governed the legislative mind that the court reached the conclusion that the proceedings should be brought in the district where the contestant and contestee resided. It was of opinion that the legislature did not intend that the parties substantially interested in the controversy should be compelled to travel long distances outside of the districts where they resided in order to litigate such questions.

As the proceedings in the case in hand were not brought in the judicial district where contestant and contestee resided, it therefore held that Justice Edwards had no jurisdiction. It will readily be seen that all this reasoning has reference only to jurisdiction over the real parties to the controversy and has no application to the jurisdiction of the supreme court over the subject-matter. So far as the controversy is concerned, it could be heard in one district as well as in another.

The reasoning by which the court of appeals reached the conclusion that Justice Edwards did not have jurisdiction looks only to the convenience of the real parties to the controversy. The right to have the proceedings brought in the district where these parties resided is one they can insist upon or not, as best suits their pleasure. It can be waived by them if they so desire, and, when it is so waived, the jurisdiction over their persons is just as complete and the judgment the court renders just as binding as if the proceedings had been brought in the district of their residence. The want of jurisdiction over the parties must be taken advantage of at the first opportunity, and if this is not done it is deemed to have been waived. After it has once been waived it can not afterwards be called in question. These rules are elementary and so well established and are so familiar as to require no citations of authority. When they are applied to the case as it stood before Justice Edwards there is no doubt about his jurisdiction.

Mr. Ward, by the act of bringing the proceedings, had submitted his person to the jurisdiction of Justice Edwards. He could not thereafter complain of a jurisdiction which he himself had invoked. The secretary of state did not object to the assumed jurisdiction of Justice Edwards over his person. He thereby waived his right to question it.

It has been seen that Mr. Fairchild on his own motion was made a party to the proceedings. He thereby submitted his person to the jurisdiction of Justice Edwards. He could not have been made a party without doing this. His application to be made a party was without any reservation. He can not come into the case by his own free will and then be permitted to say that he is wrongfully in. He was not a party to the proceedings until made so at his own request. In the first instance Justice Edwards was not attempting to exercise any jurisdiction over his person. It is true that after he was admitted as a party to the proceedings he did question the jurisdiction of Justice Edwards, but it was then too late to take advantage of that fault. He had waived his right to insist upon this by becoming a party to the suit at his own request. He was then within the jurisdiction of Justice Edwards. * * * We therefore think that Justice Edwards had jurisdiction over the proceedings to review, and over all the parties thereto, and possessed full power and authority to make the order issued by him. It must follow that the order so made was binding on the contestant, the contestee, and the secretary of state.

The order was at least in force when the election was held, and a reversal of it afterwards could not affect the election. All proceedings under the law were required to be summary, and to be complete before a certain date preceding the election. It was evidently distinctly contemplated that even an erroneous decision, unless reviewed by this date, must stand. The legislature—

knew, of course, that such erroneous decisions were possible, but it felt that greater good would result from abiding by them than by overturning an election because of such mistaken decision. Any other course would involve the results of an election in uncertainty.

But even if Justice Edwards did not have jurisdiction of the proceeding before him the invalidity of his order would not render the election void unless it should further appear that the decision was erroneous and that a number of voters equal to contestee's plurality were deceived thereby.

The committee therefore recommended resolutions declaring contestee elected.

Mr. Gaines presented an elaborate dissenting report, signed only by himself, arguing that in a State like New York, where the names of candidates are printed in party columns and it is provided that the voter can vote a straight ticket by making a single mark at the head of the column, the right to be placed in the correct column is an important legal right of candidates, and the right to vote for their party nominee as such, and not as an independent candidate, is an important legal right of the voter. Contestant had been deprived of this right by the arbitrary conduct of contestee and the misuse of the processes of law. He would unquestionably have been elected if his name had been correctly placed, and the evident intention of the voters who voted the straight Republican ticket should be carried out, by counting their votes for the candidate who was in fact the legal nominee.

The case was fully debated in the House, and the resolution that contestant was not elected was passed by a vote of 162 to 30. The resolution declaring contestee elected was then (on April 11, 1898) passed by a vote of 138 to 42.

[Report 798, second session Fifty-fifth Congress.]

(10) RYAN *vs.* BREWSTER.

Ballot machine used. Contestee retained the seat.

Report by Mr. Maguire.

The only substantial allegation in the case was that the voting in the city of Rochester was done by a device known as the "Myers ballot machine," instead of by written or printed ballots. There was no charge or evidence that anyone was deprived of his vote or otherwise injured by the use of the machine. There were ballots provided which anyone could have used if he chose to do so (but none did). Contestee also had a large majority in the district outside of Rochester. "The views above expressed render it unnecessary to pass upon the legality of the Myers ballot machine."

The committee therefore presented resolutions declaring contestee elected, which on March 30, 1898, passed the House without division. [Report 892, second session Fifty-fifth Congress.]

(11) ROMAIN *vs.* MEYER.

Fraud; illegal voting. Report for contestee, who retained the seat.

Report by Mr. Olmsted.

Contestee, who was the Democratic candidate, received 10,776 votes. There were two Republican candidates—Livaudais, the regular nominee (who had practically withdrawn), who received 401 votes, and contestant, independent Republican, nominated on petition, who received 4,022. Contestant claimed that he had been given no representation at the polls in the parish of Orleans. Under the law, all parties casting as much as 10 per cent of the vote at the previous election were to be given a representative, to be selected from lists "furnished by each of the several political parties and nominating bodies." The chairman of the executive committee of the Republican party had submitted the legal lists and the Republican appointments were made from them. Contestant had also submitted a "list of citizens of Republican faith," but the committee found that the 100 voters who signed contestant's nominating petition were not a political party that had cast 10 per cent of the votes at the preceding election. If they were, they and not contestant would have been authorized to submit a list, and the list would have had to be a list representing themselves, not, as proposed, a list representing the Republican party. The regular Republican candidate was not seeking the election, and was favorable to contestant, but he had not legally withdrawn or his name would not have been on the official ballots. The law contemplated party and not personal representation on the election boards.

Contestant also claimed that some of the election commissioners were not appointed the required thirty days before the election, but the evidence showed that most of them were, and explained the slight delay in appointing the rest. "Delay in appointing commissioners or inspectors does not vitiate an election held by them, otherwise it would be in the power of the board of supervisors to defeat every election by delaying such appointments."

A new law had gone into effect in the city of New Orleans, requiring the redistricting of the city into many small precincts, of not over 200 votes each, "the boundaries and precincts to be fixed as above not

to be changed within three months prior to any general election." The first redistricting was not entirely accomplished until within one month prior to this election, but the committee held that the three months' limit of the law did not apply to the first establishment of the districts. Some inconvenience was doubtless caused, but there was no evidence how much, or that it could have changed the result.

There were some irregularities in the sealing and delivery of the packages of official ballots, but nothing which the committee regarded as essential. There was also proof that one official ballot was in unauthorized hands before the election, and evidence that some others may have been, but there was no indication that any harm was done. In a few precincts the official cards of instruction may not have been posted, but there was no showing that any votes were lost.

The principal contention of contestant was that 14,000 votes were cast in the city of New Orleans on fraudulent registration certificates, and as about half the city was in this district he asked that 7,000 votes be deducted from the vote of contestee. The registration of Louisiana was a permanent one, but the law provided for the purging of the registry lists by a joint canvass made by accredited representatives of opposing parties. The names erased were required to be published three days in the newspapers, and opportunity was given the parties to show cause for correction. Even on election day a voter possessing a valid registration certificate, though struck off the list, could vote on making proper proof of identity and residence. Early in the year of this election there was a joint canvass, and 13,000 or 14,000 names were stricken from the list of the whole city. On the day of the election the registrar of voters, under a mistaken view of the law, issued instructions to election officers not to receive votes on the presentation of certificates and affidavits, but to send voters to him for registry. Later in the day the mistake was corrected and votes were received on affidavit. It was not shown that any legal voters were prevented from voting, and there were certainly not enough to affect the result.

Contestant claimed that there was a conspiracy to use these 14,000 names and the outstanding certificates corresponding to them as the basis of illegal votes, and that the first step in this conspiracy to receive such votes was the above-mentioned letter of instruction not to receive them. The committee held that the letter would have the opposite effect, if any. There was no evidence that a single obsolete certificate was used, or attempted to be used, and the committee held that it was too much to presume without evidence that 14,000 of them were used, backed by 14,000 perjured affidavits and supported by 28,000 perjured witnesses, and that 7,000 of these were used in the First district, all in the interest of contestee. Unless this claim (which, it was also noted, was not made in the notice of contest) were allowed, contestant's case could not be sustained, and the committee therefore reported resolutions declaring contestee elected, which, on June 6, 1898, passed the House without division.

[Report 1521, second session Fifty-fifth Congress.]

(12) GAZIN *vs.* MEYER.

Votes not counted. Contestee retained seat.

Report by Mr. Olmsted.

This was another case, brought against the contestee in the preceding case, growing out of the same election. On the returns con-

testee received 10,776 and contestant 113 votes. Contestant served notice of contest, consisting of the following specifications:

First. That the votes cast for me at various precincts in the city of New Orleans were not counted and returned by the commissioners of election as cast.

Second. That the commissioners of election, in violation of their oath of office, counted votes in your favor that were cast for me.

Testimony was taken only on the first specification, and consisted of the depositions of 31 persons, who testified that they voted for contestant, or attempted to do so. Half of these either voted at precincts where as many votes were returned for contestant as were proved for him or did not remember where they voted.

Fifteen witnesses in different parts of the city testified that they voted for Mr. Gazin, while the returns from the several precincts fail to show any votes counted for him. There is evidence that in the precincts in which some of these persons voted a few votes were thrown out because improperly marked, the voter having stamped too many candidates for the same office, or in some other way failed to indicate his choice of candidates in the manner provided by the act of assembly. It is impossible to say whether any of the ballots so thrown out were those in which the voter had attempted or intended to vote for the contestant.

The few votes covered by the testimony were all that contestant could possibly claim, and the committee reported a resolution declaring him not elected, which, on June 6, 1898, was passed by the House without division.

[Report 1520, second session Fifty-fifth Congress.]

(13) THORP vs. EPES.

Partisan appointment of election officers; obstruction of voting; fraud. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Walker; minority report by Mr. Miers.

According to the returns contestee had a plurality of 2,621 votes. There were also 491 votes cast for one J. L. Thorp, an obscure person, a supporter of contestee, and not a bona fide candidate, which were doubtless intended for contestant, but the committee did not discuss the question of counting them for him.

Contestant claimed that he should be allowed the votes of voters who were at the polls endeavoring to vote for him, but at the close of the polls were still unable to vote. They made statements of their intention to vote at the time and signed or authorized the signature of their names to tally lists. A large part of them were also called as witnesses. Contestant also claimed that the vote of a large number of precincts where there were no Republican election officers, or no competent ones, and where fraud, such as this situation would make easy, was shown, should be excluded.

The committee counted 623 of the excluded votes, being the ones sworn to by the voters themselves. They also rejected 19 polls where there was no Republican representation, and 6 where the Republican representative was educationally unfit, or was not recognized by the party as a Republican, stating also that frauds were proved at all these precincts. Rejecting all these, and counting the excluded votes, and 133 other votes conceded by contestee, the committee found a majority of 812 for contestant. They also presented a table to show that if no polls were excluded, but the evidence of the lists and tallies was taken

for the full numbers shown on these lists, contestant would still have a plurality of 307.

The excluded voters were in line when the polls closed and had been endeavoring to vote for many hours without success. Circumstances were shown by the testimony, which the committee discussed by precincts, showing that the slowness of voting was unnecessary and was sometimes deliberately promoted by such devices as alternating white and black votes, to the disadvantage of the more numerous race, and the like. The committee also discussed, by precincts, the evidence in regard to the polls rejected for fraud.

On the general character and history of the district, the committee said:

Before considering in detail the facts developed by the record bearing upon this particular case, attention is invited to the location of the district, the character of its population, and the political affiliations of the voters as shown by the results of former elections, and the testimony of prominent citizens whose testimony appears in the record. The Fourth district of Virginia is located in the heart of what is known as the black belt of the State, so called because of the large preponderance of the colored over the white population. That in redistricting the State by the Democratic legislature, it was designedly made a Republican district by grouping counties having Republican majorities can hardly be questioned when it is remembered that at the time every county, including the city of Petersburg, was under the control of the Republicans. For more than a quarter of a century the district has been represented in Congress but once by a Democrat whose seat was not contested. Only three times before this has a Democrat been returned as elected, and twice has the election been impeached successfully for frauds practiced by election officers. Elections held in this section of the State have become notoriously corrupt, false, and untrustworthy because of the bad character and fraudulent practices of election officers appointed by partisan Democratic electoral boards, which in many instances flagrantly, willfully, and defiantly disregard the salutary provision of the law requiring judges to be selected from competent voters known to belong to different political parties, selecting as such judges only partisan Democrats in many cases, or, often when the law is pretendedly observed, selecting as a representative of the Republican party ignorant colored men not recognized as morally or politically fit to represent that party. * * *

This fair statement of the previous history of the district and its political condition would in itself be sufficient to cast suspicion upon the honesty and fairness of returns which gave contestee a plurality of 2,621 over contestant, who was the regular Republican nominee, and the only Republican candidate for Congress.

The committee also called attention to the fact that the failure to appoint Republican election officers was in the face of the decision of the House in the case of Thorp *vs.* McKenney, in the preceding Congress:

In that case great stress was laid, both in the argument and the report, upon the failure of the electoral board to comply with this very provision of the law at these same precincts in this same county; the committee going so far as to say, following numerous decisions, that the failure to observe this requirement was in itself *prima facie* evidence of fraud.

In answer to contestee's claim that contestant should have introduced the registration books to show that the excluded voters claimed by him were legally registered, the committee said:

This objection is based upon the idea that the registration book is primary evidence as to whether a voter is registered or not, and that no other proof of that fact can be received.

The registration books in Virginia are not public records to which verity can be attached. In fact, they are only *prima facie* evidence that a man is a voter and may be attacked by parole evidence in many ways. It is true they are the best evidence as to whether a voter's name is on the registration book, but the fact that it is on the book is not conclusive evidence that he is a registered voter, and the fact that his name is not on the book is not conclusive evidence that he is not a registered voter.

The question in this case is whether the excluded person is a legally qualified voter at the precinct at which he offers to vote, and not the question whether his name is on the registration list or not.

As to the importance of giving both parties representation on the boards, the committee said:

There is no more important provision of the law for the preservation of the purity of elections anywhere than the giving of opposing parties representation among the election officers, and nowhere is such a provision more important than in Virginia, where representatives of opposing parties are not admitted into the polling room until after the ballot box has been opened and the ballots handled and counted by the election officers. It can not be contended that the electoral boards failed by inadvertence to comply with this law, for their attention was called to its importance both by the report in the last-named case (*Thorp vs. McKenney*) and by the Republican county chairman.

We are constrained, therefore, to conclude that it was designedly done for the sole purpose of enabling partisan election officers to defeat the will of the voters as declared at the polls. If any doubt existed as to this design it would disappear before the evidence in this case, which, as before shown, discloses that frauds, illegalities, and irregularities were perpetrated by these Democratic election officers at every precinct where this law was disregarded.

All that is here said with reference to the refusal of the Democratic electoral boards to comply with the law requiring the selection of judges known to belong to different political parties applies with as much force to those precincts where these boards, in pretending to comply with the law, selected as representatives of the Republican party men who were not recognized by that party as Republicans, or were educationally or morally unfit to be judges of election.

The minority disagreed upon nearly all of these points. As to the general statements and findings of the majority report, they said:

If the recommendation of the majority is adopted by the House, a gross outrage will be perpetrated, not only upon the contestant, but upon the country and upon the House itself; a precedent will be set and a rule of action adopted which will be most dangerous.

The report of the majority of the committee disregards the plainest principles of law; it misstates and garbles evidence; it disfranchises the entire city of Petersburg and the county of Lunenburg and eleven other precincts in the district, because by no other method was it possible to award to the contestant a seat upon the floor of this House. This wholesale slaughter of the election franchise is not justified by any evidence in the record nor sanctioned by any law.

This report contains what is called by the majority a "fair statement of the previous history of the district and its political condition." This so-called "fair statement" is full of misstatements, and is based upon no evidence in the record or out of it. It is not true that when the State was redistricted every county, including the city of Petersburg, was under the control of the Republicans. The State was redistricted by the legislature of 1891-92. There were 16 members in that legislature from the Fourth Virginia district; 14 of these members were Democrats, 1 was a Populist, and 1 was a Republican. In 1890 James F. Epes was elected to Congress as a Democrat, and his seat was not contested; in 1892 he was reelected, his seat was contested, and he retained his seat. In 1894 W. R. McKenney was returned as a Democrat; his seat was contested by R. T. Thorp, and McKenney was unseated, but he took not a line of evidence, was unable by reason of sickness to defend the case, and permitted it to go by default.

The statement in the report of the majority that the elections in this section of the State have become notoriously corrupt, false, and untrustworthy, etc., is unsupported by evidence; on the contrary, the evidence in this case shows just the contrary. It is a matter of surprise that such wholesale slanders of an entire section of a State should find place in the deliberate conclusions of a judicial tribunal, such as a Committee on Elections should be.

On the counting of the "excluded votes" they said:

Votes not cast can not be counted as a matter of law generally. No contrary opinion can be cited from the adjudged cases of the ordinary courts of any of the States of this Union. This was a uniform rule of the House of Representatives until 1873, some time after the adoption of section 2007, et seq., Revised Statutes of the United States (adopted May 31, 1870). This section was repealed by act of February 8, 1894, and whatever influence it may have had is thereby removed.

The minority cited the cases of *Biddle and Richard vs. Wing, Whyte vs. Harris, and Norris vs. Handley* in support of the doctrine, and *Niblack vs. Walls, Frost vs. Metcalf, Bradley vs. Slemons, Bisbee vs. Finley, Sessinghaus vs. Frost, and Waddill vs. Wise* as illustrating that the newer cases all counted the votes, if at all, on a much stronger showing of facts than was made in the present case. Moreover, all of these cases were decided before the adoption of the Australian ballot system, which requires of the voter not only a clear expression of his intention, but an expression in a certain manner, and disregards an expression, even if equally clear, made in any other manner. "A counting of votes not cast under any form of the Australian ballot law is to admit parol testimony as to the intention of voters in regard to an act that is by no means altogether dependent on such intention."

The minority said:

In view of the experience of other voters, and apart from the overwhelming legal objections to this character of testimony, what possible assurance can the intention, honestly expressed, of such persons furnish of the unachieved result? To count votes not cast, under the Virginia law or any form of the Australian system, is to insure the voter in cases similar to this against possible mistake in the preparation of his ballot.

Certainly one who has not voted can not hope to be in a better situation than one who has placed his ballot in the ballot box. Yet it is settled law under the Australian system that the intention of the voter can not be considered where the ballot itself does not evidence such intention in the mode prescribed by law, particularly where the statute itself prescribes the consequence of such failure to evidence the intention. * * *

If, therefore, under the Australian system we can not in such cases resort to the intention of an actual voter, what possible justification can there be in accepting the intentions of individuals as to whom we have no evidence or means of knowing how they intended to express their subsequently declared intentions?

The minority held, further, that there was no legal evidence that these rejected voters were registered, the registry lists not being produced.

Legal registration is an essential prerequisite for voting in Virginia. (Code, 125.)

By express statute the officers of election themselves can not take parol evidence of this fact, but the name must be found on the registration books. (Idem.)

This circumstance of legal qualification is essential to the doctrine stated above, and in contested elections the party desiring to invoke its application should furnish proof of equal dignity with that which the officers of election must have required. The registration books are the best evidence of the qualification of a voter, and, being in existence, are the only competent evidence on this subject.

As to the rejected precincts, there was no proof of fraud, and if they were to be rejected at all it must be on the ground of partisan appointments. The minority cited testimony as to each precinct, showing that the charges of fraud were not made out.

The record does not sustain the charge that the officers of election were all of one political party. But even if that were true it would be without precedent to disfranchise whole communities merely upon suspicion of possible partisanship of the officers of election. Fraud must be proved, not supposed as a preliminary hypothesis. While it is doubtless true that irregularities of procedure are shown by the evidence to have been present in various precincts of the district, none of such irregularities amount to an intentional breach even of the directory provisions of the statutes, and the subscribers have been struck with the uniformly regular and upright conduct of the election machinery, in some cases entirely within the control of the prevailing party.

The proposal to throw out whole returns for this reason alone was especially unjustifiable in Virginia, where such a proceeding was

expressly prohibited by law. The concluding clause of the very section requiring nonpartisan appointments was (Code, 1887, sec. 117):

But no election shall be deemed invalid when the judges shall not belong to different political parties or who shall not possess the above qualifications.

No case could be found, even on much stronger showings of facts and under laws without this expressly directory clause, where polls were thrown out on this ground alone.

The minority also called attention to the differences between this case and the case of Thorp *vs.* McKenney in the preceding Congress. In that case contestee had taken no testimony, and was forced by sickness to let the case go substantially by default. Testimony such as in that case had been taken as undisputed was in this case contradicted or explained. There was, further, in this case no charge of "alternation" of names or of the use of strange and illegible or misleading forms of type: The authorities referred to in that case were analyzed, and the committee said:

From the foregoing analysis of the authorities relied on in Thorp *vs.* McKenney, it will be seen that there is little weight of authority to sustain an imputation against the verity of sworn returns by reason of the simple fact that officers of election are all of the same political party. It will be recollected also, in addition, that the legislature of Virginia has added to the directory provisions of the statute the mandatory clause:

"But no election shall be deemed invalid when the judges shall not belong to different political parties or who shall not possess the above qualifications."

On all the findings the minority found that contestee's plurality should be counted as 2,448, and they recommended resolutions declaring him elected.

The case was fully debated in the House, and the substitute resolutions presented by the minority were lost by a vote of 131 to 151. The resolutions presented by the majority were then adopted by a vote of 151 to 130, and on March 23, 1898, Mr. Thorp was sworn in.

[Report 428, parts 1 and 2, second session Fifty-fifth Congress.]

(14) WISE *vs.* YOUNG.

Fraud; obstruction of voting. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Mesick; minority report by Mr. Burke.

According to the returns contestee had a majority of 2,399 of the ballots counted. Exclusive of the county of Norfolk, for which no figures were given in the report, there were 9,515 ballots deposited in 88 precincts that were not counted for any candidate for Presidential electors, and 6,844 ballots in the same precincts not counted for any candidate for Congress. Thus nearly one-sixth of the entire vote for Congressman and one-fourth of the entire vote for Presidential electors was thrown out for defects in marking the tickets. Contestant claimed to have proved that a large part of these defective ballots were so marked by the election officers themselves, who subsequently threw them out, and claimed this as one of the circumstances pointing to fraud on the part of these election officers.

Many thousands of witnesses were called, whose testimony filled nearly 4,000 printed pages. The committee classified the testimony for contestant thus:

1. Evidence taken at a number of precincts to show that the contestant received a larger number of votes than was returned for him.

2. Evidence taken at a number of precincts to show such fraud on the part of the election officers as compels the committee to throw out the returns altogether.
3. Evidence taken at a number of precincts to show that a large number of voters who were qualified, present, and using every effort to exercise their right of franchise, were hindered, delayed, and prevented from doing so.
4. Evidence touching a number of precincts showing fraud on the part of the election officers in that their respective returns for contestant were less in each instance than the ballots which they had been called upon to prepare for voters for contestant.
5. Frauds and irregularities at a number of precincts which do not fall under these other classifications.

Contestee's defense was of three classes:

1. Testimony directed toward the manner of the contestant's candidacy and some alleged defection from him within the ranks of the Republican party.
2. To the testimony of the impeached judges and clerks to their own honesty, followed up in some instances by testimony as to their general good character.
3. By some testimony which is intended to affect the returns from Norfolk County. This is not on the ground of any alleged fraud in the ballot of the county of Norfolk, but on account of an irregularity in the action of the electoral board of that county in the manner in which the tickets were printed.

The election was held under the Walton election law, which has been described in connection with other cases from Virginia, with an amendment abolishing the office of special constable and imposing the duty of marking ballots for illiterates on one of the judges. The committee quoted from the decision of the Virginia court of appeals, in which the constitutionality of the law was sustained, and said:

The court of appeals in sustaining the law declined either to regard the measure as an unworthy device of its coordinate branch of the government to effect a concealed purpose, or to anticipate that judges and clerks with duties so plainly defined and oaths so solemnly administered would disregard these obligations, both human and divine. At the time this opinion was rendered the act was already a year old. It is creditable to the court of appeals of the State of Virginia that it had such faith in human nature. The experience of two more years of this law seems hardly to sustain their hopeful view of the ability of the judges to withstand temptation.

The committee threw out the vote of 24 precincts, giving an analysis of the testimony in regard to 10 of them, of which they said "the evidence of fraud is so overwhelming that we hesitate not for a moment to throw out the returns." The election officers were all Democrats, or there was an incapable Republican judge, and there were circumstances indicating fraud, aside from the direct evidence of the falsity of the returns. Individual voters were called in each case in excess of the number returned for contestant who testified that the judges prepared their ballots for them, and that they requested them to prepare them for contestant. The number of names remaining on the poll books in excess of the number whose votes were thus proved was less than the returned vote of contestee, showing that ballots had not merely been imperfectly prepared, but had been fraudulently marked or counted for contestee. In 9 of these precincts, where contestant's returned vote was 425, he called 805 witnesses who swore that they voted for him. All these polls were rejected, and the 1,517 votes returned for contestee from them were deducted from his vote, as he had made no effort to show his vote aliunde. Contestant was given the votes he proved.

In 14 other precincts, set forth in a tabular statement but not discussed in detail, a similar state of facts was shown, and the same action was taken. In 44 precincts, including these 24, contestant was returned as receiving 3,729 votes, and he introduced 4,891 witnesses who swore that they voted for him. The lists of certificates given by the voters

to tally keepers on the day of election, if admitted as part of the *res gestæ*, would show that the actual total vote was 6,086. The committee allowed the extra votes proved in the 20 precincts not rejected.

The committee referred to the cases of *Wallace vs. McKinley*, *Sullivan vs. Felton*, *Smith vs. Jackson*, and *McDuffie vs. Turpin* (Fifty-first Congress) as authority for the admissibility of statements of voters made at the time, or lists embodying such statements, and said:

We are disposed, on the authorities above cited and upon the facts proved in this case, to admit these certificates and the evidence of these tally keepers.

The testimony shows that the Republican managers had no confidence in the Democratic judges; that this distrust was communicated everywhere to the Republican voters; that they were instructed not to attempt, where ignorant, to fix their own ballots. The danger of their attempting to fix their ballots was foreseen. They were supplied with yellow slips which they took to the judges, in writing, requesting them to prepare the ballots for them. They were also supplied with these printed certificates as to how they had voted, which, immediately after voting, they voluntarily took to the tally keepers of the election and gave to them. That the Democrats understood what they were doing, and why they were doing it, is amply proved, and in many precincts the attempt was made to intimidate the voters from presenting the printed slips asking the assistance of the judges, and to drive away the representatives of the contestant who were there to take the statements of the Republican voters and the certificates of how they had voted.

When a voter, thus suspecting the integrity of the election judges, seeks to protect himself by a contemporaneous statement to a competent and unimpeached representative of his party, we believe that the unimpeached testimony of the representative is admissible evidence concerning the vote. The transaction was certainly part of the *res gestæ*, and after the poll has been impeached, the evidence of such a tally keeper and such certificates is the best evidence obtainable; for the judges of election are no longer credible, and the voters are in many instances inaccessible. We therefore think that the contestant is entitled to the excess of votes proved at these precincts, not only by the testimony of the voters themselves, but by the proofs of these certificates and these tally lists, and so we add to the poll of contestant 2,357 votes at these 43 precincts, that being the number proved in excess of the return for him.

The contestee's counsel argued that we ought not to count these votes, because even if we believe the statements of the witnesses that they voted, non constat that the ballots were correctly made out. We can not consent to this. On the evidence it is clear that if the judges had done their duty by these illiterates the returns would not have been so easily impeached. But they are impeached, and the contestant is trying to establish his vote by evidence aliunde. When witnesses swear that they voted for him the presumption is that the ballots were correctly made out. The burden in every such case would be on the other party to show that it was not. If we err in admitting it we err on the side of an expression of the popular will untrammelled by technicalities.

Again, the contestee has raised the point that some of these witnesses ought not to be counted because of their own statements in their testimony. That is probably true, but the per cent is too small to be considered where the result would not be affected by particularizing such instances and deducting them from the contestant's proofs. We think that the contestant, upon his proofs, should have added to his returns 2,357 votes from the 44 precincts above named.

There were also 1,989 votes claimed to have been prevented from being cast by dilatory and obstructive tactics in 29 precincts. Of these votes 717 were in precincts already rejected on other grounds. These voters made every effort to vote, and were prevented through no fault of their own. The evidence showed that "the elections at these points were conducted with a view to the very obstruction and delay which were accomplished."

To deny these voters recognition when they have come a second time to assert their constitutional right, of which they have been unjustly deprived, would, in our judgment, be an encouragement to the people who are seeking to profit by such methods and an insult to the loyalty of the voters.

On all these findings contestant was shown to have a majority of 5,199, and the committee said: "In our opinion, the vote of the Second

Congressional district at the election of November, 1896, if fairly received and fairly counted, would show the contestant's majority as large as that which is here accorded him." They therefore recommended resolutions declaring contestant elected.

The minority found that the testimony did not establish any general fraud, but only irregularities, due to the intricacies of the law.

It would be interesting and helpful in the very beginning of this investigation if we could ascertain just exactly what position the majority takes upon the question of the validity of the Virginia election law under which this election was held, and of the obligation of Congress to recognize the provisions of that law in determining the legality of this election. The value of such knowledge is apparent.

If the law is valid, and Congress, in determining this contest, is bound by it, then all such alleged irregularities in the conduct of the election as may reasonably be supposed to result from the intricacies of the law itself, or from ignorant misconception of it, are removed from the category of those fraudulent practices which destroy the value of the returns as evidence, justifying the rejection of the entire polls, and become, unless committed with fraudulent intent, mere irregularities, to be corrected (it is true) where possible, but not of themselves vitiating the returns. This is too plain for argument, for no man can be said to be guilty of *fraud* if he strictly follows the provisions of the law, nor if he *ignorantly* interprets or executes it.

If, on the other hand, the law is invalid, or—which amounts to the same thing—Congress can ignore the decision of the supreme court of appeals of Virginia declaring it valid and reasonable in its provisions, then Congress may declare the conduct of election officers at the polls unreasonable, oppressive, and illegal, though in strict accordance with the election law of the State, and may determine the election invalid, notwithstanding it has been conducted in true obedience to the law. But in such a case the decision would be not because the election law was tainted with fraud, but because Congress determines that the State has *no election law* which can be honestly administered.

It is a general rule that the Federal authorities will follow the decisions of State courts both in the construction and the validity of State constitutions and statutes.

We see no reason why this rule should be departed from in this case. The highest court in the State of Virginia having upheld the validity of this law, and declared its provisions reasonable, we are bound by that decision, and in considering the evidence here we must endeavor to ascertain whether this election was conducted in accordance with the provisions of that law. If we find it so, the contestee is entitled to retain his seat. If we find that any of the provisions of this law were disregarded in the conduct of this election, we should further ascertain whether such disregard of the law was with fraudulent intent, or through ignorance, or misinterpretation of the law. If done with fraudulent intent the value of the returns as evidence is destroyed, and the returns may be rejected; but if done through ignorance, or misconstruction of the law, while the votes may be illegal, that fact will not affect the election, or render it void, unless the number of such illegal votes is great enough to affect the general result; and where it is shown that illegal votes have been cast for a candidate, they should be deducted from his vote. This is the common leaning of the profession on this subject.

The distinction is between mere *illegality* and fraud in the conduct of elections. The first does not deprive the candidate of any votes save those proven to have been illegally cast for him; the second, by destroying the value of the returns as evidence, causes the rejection of the entire poll and deprives the candidates of *all* the votes cast for them, as well the *legal* as the illegal ones, unless otherwise proved. (6 Am. and Eng. Ency. of Law, "Elections," pp. 351-357; *Le Moyne vs. Farwell*, 4 Cong. Elec. Cases, 411; *Washburn vs. Voorhees*, 3 Cong. Elec. Cases, 59.)

Fraud, however, is never presumed, and "nothing but the most *positive, credible, and unequivocal* evidence should be permitted to destroy the credit of official returns. It is not sufficient to cast suspicion upon them." (6 Am. and Eng. Ency. of Law, p. 354; *Littell vs. Robbins*, 2 Cong. El. Cases, 138; *Ingersol vs. Naylor*, 2 Cong. El. Cases, 33; *Gooding vs. Wilson*, 4 Cong. El. Cases, 79; *Norris vs. Handley*, 4 Cong. El. Cases, 75; *Strobach vs. Herbert*, 6 Cong. El. Cases, 7.)

A fortiori mere opportunities for fraud should not be taken for *proof of fraud*.

The minority then proceeded to analyze the testimony by precincts. The evidence of the voters, most of whom were illiterate negroes, was generally contradicted by the testimony of the election officers, most of whom were intelligent white men. Many of the voters, on cross-

examination, did not know whether they voted for McKinley, Hobart, or Wise for Congress, and some of them insisted that they voted for all three for Congress. "They simply were too ignorant to know what they were testifying about." The minority found the testimony only sufficient to reject two precincts, and to count for contestant a moderate number of additional votes at some others. Deducting the votes in regard to which the testimony was not clear, the remainder was not more than could be explained by the large number of rejected ballots, as shown by the returns.

The minority held that the evidence of the certificates was hearsay. They said:

Votes proved by certificates. We can not agree with the majority that these certificates could be counted as proven votes. They seem to us the barest kind of hearsay. And while it is true that it often occurs that what would otherwise be regarded as hearsay testimony becomes admissible as a part of *res geste*, this is true only where the admission of such testimony would not contravene some well-established principle of law or be against public policy. In this case both of these reasons apply against their admission. The State of Virginia has passed a law for the conduct of elections in which, according to the opinion of her highest court, the dominant purpose is to "secure the independence of the voter by secluding him within an isolated booth;" "to free him from all solicitations and annoyance." (*Pearson vs. Supervisors*, 91 Va., 331.)

But how is this independence to be secured if the voter is permitted to be escorted to the polls by his political bosses, instructed or even given to understand by his political overseers that he is expected to disclose his vote after depositing it, and knows that he will be spotted as as a political traitor if he refuses to do so? To permit such practices is to continue the very evil the law was enacted to cure, to destroy the independence of the voter, and to make a delusion of the secrecy of the ballot. Such considerations overcome the mere rule of evidence that testimony otherwise hearsay may be admitted as part of *res geste*. The contestant should not be allowed these additional votes.

In regard to the "excluded votes" they said:

The excluded vote of 1,989 is given contestant by the majority report on the ground that these voters were "hindered, delayed, obstructed, and prevented from voting for him at 29 precincts."

In an election where 31,298 votes were actually cast, it is not remarkable that 1,989 men should be found who would say that they did not have the opportunity to vote. Even if this were true, it was in no sense the fault of the officers of election that it occurred. This record is full of testimony from the contestant's own witnesses that nothing was done by the judges improperly to hinder or delay the vote, nor can it fairly be claimed to be due to fraudulent conspiracy on the part of the State officers charged with the duty of providing sufficient voting precincts. These same precincts in 1892 accommodated a vote of 31,326, and, while the vote cast in 1894 was only 21,994, there seems never to have been any suggestion that this falling off was due to insufficient accommodations in the provision for receiving the vote. We are of opinion that neither should the contestee be blamed nor the 15,789 electors who voted for him be deprived of their choice of Representative because there might have been, even if that be conceded, more ample provision made for receiving the vote, and we therefore report that contestant is not entitled to have this vote counted for him.

Cooley (*Const. Lim.*, pp. 781, 789), Biddle and Richard *vs.* Wing, and Whyte *vs.* Harris were cited in support of the doctrine that votes not cast can not be counted, and the expression in Frost *vs.* Metcalf was explained as dictum. They added:

But, pursuing this inquiry more in detail, we find that of this alleged excluded vote of 1,989, there were, who made no proper effort to vote, 835, and there were witnesses examined whose names were not on notices to take depositions, numbering 109, total 944, leaving at the most but 1,045 voters who could be claimed to have been excluded, even if this alleged excluded vote could be with propriety counted for contestant.

On all these findings the minority found that contestee still had a plurality of 1,961. Even if the 1,045 excluded votes should be subtracted from this he would still have a plurality of 916. The minority therefore presented resolutions declaring contestee elected.

When the case was called up in the House the question of consideration was raised, and the House decided by a vote of 146 to 121 to consider the case. After full debate a motion to recommit was lost by a vote of 101 to 147, and the resolutions presented by the minority were lost by a vote of 107 to 147. The resolutions presented by the majority were then passed without division, and on April 26, 1898, Mr. Wise was sworn in.

[Report 772, parts 1 and 2, second session Fifty-fifth Congress (part 2 erroneously printed as of the Fifty-fourth Congress)].

(15) PATTERSON *vs.* CARMACK.

Fraud; false counting, partisan appointment of election officers; poll tax paid by campaign committee. Majority report for contestant; minority report for contestee. Contestee retained the seat.

Majority report by Mr. Kirkpatrick; minority report by Mr. Brundidge.

Both the parties to this case were Democrats, and both claimed to be the regular nominees of regular Democratic conventions, but contestant was a Gold Democrat and had received the indorsement of both wings of the Republican party. It was charged, however, that the indorsement of the colored Republicans (known as the "black and tans") had been obtained by bribery.

On the face of the returns contestee received a majority of 365. Ten precincts were in dispute. In the undisputed precincts contestant had a majority of 1,207; in the disputed precincts contestee had a majority of 1,572. These were strong colored precincts, and the committee called attention to the fact that, if the returns were correct, contestee must have received all the white vote and three-fourths of the colored vote, though everywhere else the colored vote was solid for contestant and there was no reason to expect it to be different at these precincts. At the other precincts there were election officers representing both sides, and the election was fair. At these precincts there was either no officer of election favorable to contestant or there was an illiterate negro judge claimed to be a Republican. Some of these, even, were in fact Democrats, and one of them was an idiot as well. Contestant claimed that these facts indicated a conspiracy to defeat him by fraud in these districts, in which the contestee secured his whole majority. The committee referred to Threet *vs.* Clark, McDuffie *vs.* Turpin, and Hill *vs.* Catchings, Fifty-first Congress; Buchanan *vs.* Manning, Forty-seventh Congress; Donnelly *vs.* Washburn, Forty-sixth Congress, and Thorp *vs.* McKenney, Fifty-fourth Congress, and said:

According to the foregoing citations, the appointment on the election boards to represent one of the opposing parties of persons not in sympathy with or objectionable to that party, or of persons unable to read and write and without the necessary mental capacity to enable them to serve intelligently, should of itself be regarded as evidence of conspiracy to defraud on the part of the election officials, and that the appointment of such persons was *prima facie* evidence of fraud and misconduct on the part of those charged with the constitution of these boards and the conduct of the election, where it was possible to appoint competent and well-known representatives of

the complaining party to act as judges or inspectors of election. This presumption is still more emphatic where, as in this case, these appointments were strongly objected to by the friends of the contestant in the several districts complained of, and where timely application was made for proper representatives and the attention of the appointing parties called to a number of proper and unobjectionable persons for such place on the boards. * * *

There is no pretense that it was not possible to have selected persons who could read and write, the proof showing that there were many such persons in all these districts who were Republicans. Therefore, according to the rule laid down in the cases above cited, this one fact is a very strong circumstance, sufficient in itself, unless explained, to prove a conspiracy to defraud, and even making out, according to the holding in *Thorp vs. McKenney*, a prima facie case of fraud and misconduct on the part of the officials charged with the conduct of the election.

Tables showing, by precincts, the returned vote compared with the colored and white vote were given, and the committee added:

If the colored voters in the districts embraced in this last table had refrained from voting altogether, and the contestee had received all the white votes cast at the polls, he would still have had only 830 votes instead of 1,492, and contestant would have had a clear majority in the entire Congressional district.

According to the proof a very large majority of the colored people were Republicans, whose habit it was to vote the straight Republican ticket.

It can not be denied that the fact shown by above tables, that so large a majority of the colored voters in the contested districts appear to have voted, not only for the contestee, but for all the Democratic candidates, is a very suspicious one, in the light of the proof in this case. Unless some reason for this is shown, it will certainly add great strength to the presumption of fraud arising from the selection of ignorant judges, and force us to the conclusion that the vote returned from these contested districts did not represent the actual vote cast by the voters.

Taking up the districts in detail, the committee showed that there was independent evidence of fraud in each one of them. In several cases it was shown by the testimony of list takers, corroborated by the testimony of the voters themselves, that many more votes were cast for contestant than were returned for him. The election officers refused to allow friends of contestant to witness the count, in violation of the statute, which in plain terms gave them this right; and there were other indications of fraud. The committee rejected or corrected these returns, according to the testimony in each case.

In two precincts the officers of election refused to open the polls at the proper time, and the friends of contestant, after some delay, organized other polls at which they cast their votes. The officers of election later opened polls, and the friends of contestee cast their votes at these. The committee were of opinion that the polls organized by the voters, after the appointed officers had refused to do their duty, were the only legal polls, but they counted the vote cast at both polls in one of the precincts. At the other they counted only the poll held to be legal. They said:

It is true that there are cases in some of the States which hold that the purpose to commit a fraud on the part of the election officers in charge, however clearly evidenced, is not of itself sufficient to authorize electors who fear to cast their votes at such polling place, however reasonable that apprehension may be, to set up and hold another election.

No case, however, was cited from Tennessee, and in view of the very liberal provisions of the statutes of that State and the still more liberal interpretation placed upon those statutes by its courts in construing and overlooking irregularities in the interest of a fair and free expression of the popular will, there is room for doubt as to whether this poll might not be sustained.

But in judging "of the elections, returns, and qualifications of its own members" under the grant of the Constitution, this House exercises judicial power, and is a

court of competent and exclusive jurisdiction. In passing upon these returns and elections, even if no Federal statute is in existence regulating the elections of its members, it interprets and construes the State election laws, which for the purposes of such election are to be regarded as having the quality of Federal legislation, and the opinions of State judges are only to be adopted so far as they commend themselves by the intrinsic force of their reasoning, and where such decisions are in conflict with its own determinations, the precedents established by Congress are the expression of the law, and must control that court with the same force and effect that its own prior deliberate rulings guide and control any other court.

It has been decided in numerous cases by Congress that it is its privilege and its duty in the exercise of its constitutional right to pass upon the election and qualifications of its own members, to award the seat in Congress to the candidate who is ascertained to be the choice of the majority of the legal voters of his district, even though slight technicalities are required, in doing so, to be overlooked and disregarded. This power may be regarded as implied in the constitutional grant, and to that extent and thereby State legislation, so far as it relates to and regulates the elections of members of Congress, supplemented and modified by that Constitution as the supreme law of the land.

But in precincts where the supporters of contestant, not trusting the election officers, simply declined to vote, the committee did not count their votes, stating that these voters "should have tendered their votes, and, having failed to do so, of course can not be counted."

Contestee charged that 3,000 votes were cast for contestant on poll-tax receipts which had been paid for by contestant's political supporters, and not by the voters themselves.

We are of the opinion that when the voters accepted the poll-tax receipts for taxes paid by others for them, they ratified the payment so made for their benefit, and they thus constituted the parties so paying the taxes their agents in that behalf. Nor was it necessary that the voters should offer or bind themselves to repay such taxes to the person so paying them in order to constitute it a payment by the voter or a ratification thereof. The acceptance by the taxpayer of the receipt is in itself a sufficient adoption of the payment by another for him, and it makes no difference how or by whom the payment was made, the State's demand is fully satisfied by the payment and the delivery of the receipt to the voter, and his acceptance thereof is a final payment and appropriation.

Besides, according to a proper construction of the Tennessee statute, a voter who has any one of the evidences named in the statute that he paid his poll tax is entitled to cast his vote and have it counted upon exhibiting such statutory evidence, whether he paid his tax in person or some other person paid it for him, provided he adopts the act by availing himself of such receipt, even though such payment was by a political committee for the purpose of qualifying him to cast his vote. * * * Nor is the mere furnishing and acceptance of such receipt a corrupt act or proof of bribery. It must appear that such payment of a tax by another than the voter and delivery to him of the receipt therefor was done as an inducement or consideration for the vote or for the purpose of influencing the choice of the voter.

According to the findings of the committee, contestant was elected by a majority of 1,242, and they therefore recommended resolutions giving him the seat.

The minority held that the "outside polls," informally organized and held at places different from the regular voting places, could in no case be counted—

it being an indisputable principle of law that there can be but one lawful election held at the same time and same place for the same office. And it is further well settled, both by the decisions and text writers on contested-election cases, that there is no law, State or national, which authorizes electors, who believe that their votes will not be counted at the regular polls or for any other imagined reasons, to resort to the holding of an election for themselves at an outside poll.

There was no proof of the vote cast at these irregular polls, except the return of the persons holding them, which had always been held to

be insufficient. The elections, moreover, had not been held at the places designated by law, and—

there is less latitude allowed in changing the place at which an election is held than in varying the time of opening or closing it; and it is a rule to which there are very few exceptions that an election held at any improper place will be held absolutely void, without proof of any fraud or injury.

The minority then proceeded to analyze the testimony in regard to the disputed precincts, showing that the testimony of contestant was not consistent or conclusive, and was contradicted by the testimony of the election officers and by other evidence. The charge of conspiracy they held was not sustained by the evidence, and was negatived by circumstances.

On the poll-tax vote they said:

Now, we fully recognize the doctrine that one's poll tax may be legally paid by another, provided the voter shall properly ratify the act afterwards, but we do not think the mere taking of the receipt and voting on the same is such a ratification as the law contemplates. We think that the better and sounder doctrine is that the voter should not only accept the receipt but he should recognize the act in the more substantial way, by repaying or promising to repay the amount; and it was so held by the supreme court of Massachusetts in the case of *Humphreys vs. Kingman* (5 Metcalf, 162), and courts of other States have more recently announced the same rule.

Moreover, many of the receipts were issued in blank, and—

it also appears that at the time these poll-tax receipts were issued there was an agreement and understanding made with the officer issuing them that all those not used could be returned and pay would only be exacted for such as were not returned; and many of them, in fact, were returned.

This practice does not meet with our approval. The laws of the State make the poll tax a charge and burden against the voter, and it is not a tax against a campaign committee or a certain candidate, and neither of them should be permitted to use them for the purpose of bribing voters.

However, the minority only deducted 75 of the 3,000 votes, and deducted these on the ground that \$150 of the poll-tax money was not paid until eighteen days after the election.

The minority also rejected the vote of one "outside" poll which had been counted by the county canvassers. By their findings contestant was elected by a majority of 590, and they recommended resolutions declaring him elected.

When this case was brought up in the House the question of consideration was raised, and the House first voted, by a vote of 118 to 129, not to consider it. A motion to reconsider was made, and a motion to lay the motion to reconsider on the table was lost by a vote of 123 to 126. The motion to reconsider was then passed, by a vote of 127 to 123, and the House voted, without division, to consider the case. After debate, the substitute resolutions proposed by the *minority* were (on April 22, 1898) passed by a vote of 138 to 120, and the resolutions as thus amended passed by a vote of 136 to 118. So the contestant retained the seat.

[Report 895, parts 1 and 2, second session Fifty-fifth Congress.]

(16) BROWN vs. SWANSON.

Irregularities; fraud; precincts too large and voting obstructed. First report for contestant; second report for contestee. House refused to consider case.

First report by Mr. Crumpacker; second report by Mr. Miers.

The first report in this case, presented by Mr. Crumpacker, was ordered submitted by a vote of a majority of a quorum of the committee, but was signed by only four members, less than a majority of the whole committee. When it was submitted to the House (on April 13, 1898) there was considerable debate as to the propriety of receiving it, but the House voted to give the four signers leave to present their report, and granted the other members of the committee ten days in which to submit their report. The first report, signed by Messrs. Walker, Mesick, Kirkpatrick, and Crumpacker, was printed in the usual form of a committee report; the second, signed by the other five members of the committee, was printed as the "Views of the majority."

According to the returns, contestee had a majority of 551. The committee counted the votes of three precincts rejected by the county canvassers, the first on the ground that one of the judges was not sworn, the second on the ground that the signatures of the judges were written, at their direction, by the clerk, and the third on the ground that there was an excess of 2 ballots in the box. In another precinct 55 ballots, 48 of which had been correctly marked for contestant and 5 for contestee, had been burned by the judges, on the ground that they were improperly marked for President. The committee counted these, as the law plainly required the judges to have done. The contestee claimed that this whole return should have been rejected for fraud, because the illiterate Republican voters whose ballots had been marked by a Democratic judge exhibited them to the Republican judge before depositing them, but the committee held that this was not fraud, and was not prohibited by the law. "The secrecy is for the protection of the voter, and is not compulsory as to him."

The principal issue in the case was in three precincts in Pittsylvania County, where 526 voters testified that they had made earnest efforts to vote, but had not succeeded in doing so when the polls closed. The committee held that 494 of these, whose testimony was entirely clear, should be counted for contestant, for whom they testified that they would have voted. This county was the "black county" of the district. The negroes as a whole were Republicans, but contestee, the Democratic candidate, obtained the whole of his majority in this county, contestant carrying the rest of the district by a majority of 635. At these three precincts two lines were formed, one for white and one for colored voters, and votes were received alternately from the two lines, with the result that all the white and only half the colored vote was cast. The conduct of the officers of election was arbitrary and dilatory throughout, and there was an evident purpose to obstruct the voting. The precincts were too large, but it was the duty of the county court, under the law, to have divided them, if necessary, on the petition of 15 voters. In at least one of the cases such a petition had been presented, but the precinct was not divided.

The purpose of elections is to register the will of a majority of the voters, and it is the duty of the officers of the law to afford every qualified voter a reasonable opportunity to exercise the important right of suffrage. If that opportunity is afforded

and the voter fails to avail himself of it, or if by some fault of his own he violates some regulation in attempting to exercise the right and thereby loses his vote, he can have no just cause of complaint. But if conditions exist for which the voter is not responsible, that operate to defeat the rights of a substantial number of electors to vote so that it can not be said that the result at a particular poll reflects the will of a majority of the voters, it discredits the entire poll. * * *

Where, however, the rejection of the poll might aggravate the wrong or would defeat the ends of justice and it is shown by reasonably satisfactory evidence the number of votes so excluded and for whom they would have been cast had there been an opportunity, the poll will be considered and the excluded votes will be counted for the candidate who would have received them. This has been the rule of the House for many years, and it is based upon principles of justice and a wise public policy. * * * The claim on behalf of contestee that votes not cast can not be counted under the Australian system of voting, because of its peculiar features, is entirely destitute of merit. The rule is the same under all systems of voting.

Nor will it do to withhold from the voter an opportunity to cast his ballot and in answer to his complaint say to him that he probably would have lost his vote in trying to cast it. Every legal voter is entitled to an opportunity, and if he fails to register his voice on account of incapacity or neglect, the fault is his own.

At another precinct one of the officers of election testified that he had marked 14 votes for contestant and 1 for contestee, striking through only the surname of the "scratched" names. All these ballots were thrown out, but the committee counted them, saying:

It is manifest that these votes should be counted. There is no dispute about the facts, and it is well settled that an elector can not lose his right to vote by the mistake of one of the election officers. If the voter himself made the mistake, the ballot should not be counted, but where he depends upon an officer whose duty it is to assist him in the preparation of his ballot and the officer, through ignorance or design, fails to mark the ballot properly, it should be counted.

The committee held also that the fact of registration could be proved by parol evidence.

Registration is designed to prevent fraud and to determine disputed questions that might otherwise arise at elections in advance, so as to avoid confusion and delay. Election boards do not have the time nor opportunity on election day to investigate critically questions that may arise respecting the qualifications of voters, and for the purposes of election the registration books are primary evidence; but when questions arise, as they do here, before a tribunal fully equipped to investigate for the truth, the qualifications, including the registration of voters, may be proved by parol.

Registration does not create the right to vote, but it is an official memorandum of an existing right, and parol evidence is as near the fact as the books. In fact, the books are made from parol evidence, and they are never regarded as more than *prima facie* evidence of the right to vote. In most of the States laws exist requiring a record to be made of marriages, but the record does not constitute the marriage; it is only an official memorandum of it; and in all the States marriage may be proven by parol evidence, notwithstanding the record. A very liberal policy has always been followed in election cases respecting the admissibility of evidence.

The four members signing the report found that contestant was shown to be elected by a majority of 372, and recommended resolutions declaring him elected.

The second report, or "views of the majority," is as follows:

The returns show that 28,115 votes were cast for Congressman in the Fifth Congressional district of Virginia on November 3, 1896, and that Claude A. Swanson, Democrat, the contestee in this case, received a majority of 551 votes.

Contestant urges (brief, p. 3), upon what he terms the "principal and all-sufficient grounds" of his contest, that he is entitled to a majority of 158 votes.

He further contends that there are "other claims" which ought to be allowed, which would give him a majority of 760 votes (brief, p. 65).

In his reply brief (p. 48) contestant reduces the majority which he claims upon his principal grounds to 51, and his majority on all claims to 306 (reply brief, p. 52).

Contestee, in his brief (p. 94), claims that 249 votes should be added to the votes returned for him, making his majority 800.

After listening to exhaustive arguments in this case, four members of the committee have filed a report in which they recommend that contestant be given a majority of 372 votes. They also direct attention to 147 other votes which, in their opinion, might justly be counted for contestant, making his majority 519.

The undersigned agree with the conclusions of the said report, except so far as they relate to the so-called excluded vote at Stokesland, Ringgold, and Design precincts, and the 147 votes aforesaid, which we do not think should be counted for contestant.

After a careful examination of the cases and authorities cited by contestant and a rigid analysis of the evidence contained in the record relating to these three precincts, we are constrained to conclude that, while the law is correctly stated by contestant, the facts, as disclosed in the record, do not warrant the counting for contestant of the 495 excluded votes.

We are therefore of the opinion that the returns should give to the contestee a majority of 123 votes, and we recommend the adoption of the following resolutions.

The case was not called up until January 19, 1899. The question of consideration was raised, and the House, by a vote of 79 to 143, refused to consider the case. On February 23 the case was again called up, but the House, by a vote of 101 to 133, again refused to consider it.

[Report 1070, parts 1 and 2, second session Fifty-fifth Congress.]

FIFTY-SIXTH CONGRESS, 1899-1901.

Committee on Elections No. 1.

Mr. TAYLER, Ohio.	Mr. PEARSON, North Carolina.
LINNEY, North Carolina.	BARTLETT, Georgia.
MANN, Illinois.	FOX, Mississippi.
DAVENPORT, Pennsylvania.	GLYNN, New York.
Mr. BURKETT, Nebraska.	

Committee on Elections No. 2.

Mr. WEAVER, Ohio.	Mr. THOMAS, Iowa.
OLMSTED, Pennsylvania.	ROBINSON, Indiana.
LANDIS, Indiana.	GREEN, Pennsylvania.
MILLER, Kansas.	SNODGRASS, Tennessee.
Mr. BURKE, South Dakota.	

(Mr. SNODGRASS was appointed on January 19, 1900, in place of Mr. GAINES, who had been excused.)

Committee on Elections No. 3.

Mr. MESICK, Michigan.	Mr. DRISCOLL, New York.
COCHRANE, New York.	MIERS, Indiana.
FARIS, Indiana.	BURKE, Texas.
ROBERTS, Massachusetts.	McLAIN, Mississippi.
Mr. WEEKS, Michigan.	

Special Committee on the Case of Brigham H. Roberts.

Mr. TAYLER, Ohio.	Mr. McPHERSON, Iowa.
LANDIS, Indiana.	DE ARMOND, Missouri.
MORRIS, Minnesota.	LANHAM, Texas.
FREER, West Virginia.	MIERS, Indiana.
Mr. LITTLEFIELD, Maine.	

*Cases.**Special Committee.*

- (1) Brigham H. Roberts, *Utah*.

Committee No. 1.

- (2) Walter Evans *vs.* Oscar Turner, *Kentucky*.
 (3) William F. Aldrich *vs.* Gaston A. Robbins, *Alabama*.
 (4) Robert Wilcox, *Hawaii*.
 (5) George M. Davidson *vs.* George G. Gilbert, *Kentucky*.
 (6) James A. Walker *vs.* William F. Rhea, *Virginia*.

Committee No. 2.

(7) John D. White *vs.* Vincent S. Boreing, *Kentucky.*

Committee No. 3.

(8) Richmond Pearson *vs.* William T. Crawford, *North Carolina.*

(9) Richard A. Wise *vs.* William A. Young, *Virginia.*

(1) ROBERTS.

Polygamy. Majority report to exclude; minority report to admit and then expel. Claimant excluded, but by more than the two-thirds vote necessary for expulsion.

Majority report by Mr. Tayler; minority report by Mr. Littlefield and Mr. De Armond.

Brigham H. Roberts, a polygamist, had been elected a Representative from Utah. This fact attracted much public attention, and was officially brought to the notice of the House on the opening day of the session. When the name of Mr. Roberts was called, at the swearing in of members, on protest he was requested to step aside. Mr. Tayler presented a resolution providing for the appointment of a special committee to consider both the *prima facie* right and the final right to the seat. The resolution went over one day, and on the next day (December 4, 1899), Mr. Richardson presented a substitute resolution providing that Mr. Roberts be sworn in on his credentials and that the papers be referred to the Committee on the Judiciary. After debate, the substitute resolution was lost by a vote of 59 to 247, and the resolution presented by Mr. Tayler was passed by a vote of 304 to 32. The Speaker then appointed the special committee above named, and the case was referred to it. On January 20, 1900, the elaborate reports of the majority and minority of the committee were presented, and the case was then debated for several days. The majority favored excluding Mr. Roberts by a simple resolution declaring the seat vacant; the minority favored swearing him in as elected and then immediately expelling him as unworthy. The resolution proposed by the minority was finally lost by a vote of 81 to 244, and the resolution proposed by the majority was passed by a vote of 268 to 50. So (on January 25, 1900) the seat was declared vacant. The resolution of exclusion, it will be noted, was passed by much more than the two-thirds majority which a resolution of expulsion would have required.

The majority of the committee prefaced its elaborate report with the following introduction and summary of the argument:

Your committee, appointed December 5, 1899, in pursuance of the following resolution—

"Whereas it is charged that Brigham H. Roberts, a Representative-elect to the Fifty-sixth Congress from the State of Utah, is ineligible to a seat in the House of Representatives; and

"Whereas such charge is made through a member of this House, on his responsibility as such member and on the basis, as he asserts, of public records, affidavits, and papers evidencing such ineligibility:

"Resolved, That the question of the *prima facie* right of Brigham H. Roberts to be sworn in as a Representative from the State of Utah in the Fifty-sixth Congress, as well as of his final right to a seat therein as such Representative, be referred to a special committee of nine members of the House, to be appointed by the Speaker; and until such committee shall report upon and the House decide such question and right the

said Brigham H. Roberts shall not be sworn in or be permitted to occupy a seat in this House; and said committee shall have power to send for persons and papers and examine witnesses on oath in relation to the subject-matter of this resolution—"submit the following report:

The committee met shortly after its appointment, and in Mr. Roberts's presence discussed the plan and scope of its inquiry. Mr. Roberts submitted certain motions and supported them by argument, questioning the jurisdiction of the committee and its right to report against his *prima facie* right to a seat in the House of Representatives. The determination of these questions was postponed by the committee, to be taken up in the general consideration of the case.

Subsequently certain witnesses appeared before the committee and were examined under oath, in the presence of Mr. Roberts and by him cross-examined, relating to the charge that he was a polygamist. This testimony has been printed and is at the disposal of the members of the House.

The committee fully heard Mr. Roberts and gave him opportunity to testify if he so desired, which he declared he did not wish to do, and, upon the testimony adduced before it, unanimously agrees upon the following

FINDING OF FACTS.

We find that Brigham H. Roberts was elected as a Representative to the Fifty-sixth Congress from the State of Utah, and was at the date of his election above the age of 25 years; that he had been for more than seven years a naturalized citizen of the United States and was an inhabitant of the State of Utah.

We further find that about 1878 he married Louisa Smith, his first and lawful wife, with whom he has ever since lived as such, and who since their marriage has borne him six children.

That about 1885 he married as his plural wife Celia Dibble, with whom he has ever since lived as such, and who since such marriage has borne him six children, of whom the last were twins, born August 11, 1897.

That some years after his said marriage to Celia Dibble he contracted another plural marriage with Margaret C. Shipp, with whom he has ever since lived in the habit and repute of marriage. Your committee is unable to fix the exact date of this marriage. It does not appear that he held her out as his wife before January, 1897, or that she before that date held him out as her husband, or that before that date they were reputed to be husband and wife.

That these facts were generally known in Utah, publicly charged against him during his campaign for election, and were not denied by him.

That the testimony bearing on these facts was taken in the presence of Mr. Roberts, and that he fully cross-examined the witnesses, but declined to place himself upon the witness stand.

The committee is unanimous in its belief that Mr. Roberts ought not to remain a member of the House of Representatives. A majority are of the opinion that he ought not to be permitted to become a member; that the House has the right to exclude him. A minority are of the opinion that the proper course of procedure is to permit him to be sworn in and then expel him by a two-thirds vote under the constitutional provision providing for expulsion.

Your committee desire to assert with the utmost positiveness at this point that not only is the proposition of expulsion as applied to this case against precedent, but that exclusion is entirely in accord with principle, authority, and legislative precedent, and not antagonistic to any legislative action which the House of Representatives has ever taken.

For convenience we present herewith, before proceeding to the extended argument in support of the committee's resolution, the following:

SUMMARY.

Upon the facts stated the majority of the committee assert that the claimant ought not to be permitted to take a seat in the House of Representatives, and that the seat to which he was elected ought to be declared vacant.

The minority, on the other hand, assert that he ought to be sworn in in order that if happily two-thirds vote therefor he may be expelled.

Three distinct grounds of disqualification are asserted against Roberts.

I. By reason of his violation of the Edmunds law.

II. By reason of his notorious and defiant violation of the law of the land, of the decisions of the Supreme Court, and of the proclamations of the Presidents, holding himself above the law and not amenable to it.

No government could possibly exist in the face of such practices. He is in open war against the laws and institutions of the country whose Congress he seeks to enter. Such an idea is intolerable. It is upon the principle asserted in this ground that all cases of exclusion have been based.

III. His election as Representative is an explicit and offensive violation of the understanding by which Utah was admitted as a State.

THE PROPOSITION OF EXCLUSION.

The objection is made to the refusal to admit Roberts that the Constitution excludes the idea that any objection can be made to his coming in if he is 25 years of age, has been seven years a citizen of the United States, and was an inhabitant of Utah when elected, no matter how odious or treasonable or criminal may have been his life and practices.

To this we reply:

1. That the language of the constitutional provision, the history of its framing in the constitutional convention, and its context clearly show that it can not be construed to prevent disqualification for crime.

2. That the overwhelming authority of text-book writers on the Constitution is to the effect that such disqualification may be imposed by the House, and no commentator on the Constitution specifically denies it. Especial reference is made to the works of Cushing, Pomeroy, Throop, Burgess, and Miller.

3. The courts of several of the States, in construing analogous provisions, have with practical unanimity declared against such narrow construction of such constitutional provisions.

4. The House of Representatives has never denied that it had the right to exclude a member-elect, even when he had the three constitutional requirements.

5. In many instances it has distinctly asserted its right so to do in cases of disloyalty and crime.

6. It passed in 1862 the test-oath act, which imposed a real and substantial disqualification for membership in Congress, disqualifying hundreds of thousands of American citizens. This law remained in force for twenty years, and thousands of members of Congress were compelled to take the oath it required.

7. The House in 1869 adopted a general rule of order, providing that no person should be sworn in as a member against whom the objection was made that he was not entitled to take the test oath, and if upon investigation such fact appeared he was to be permanently debarred from entrance.

THE PROPOSITION OF EXPULSION.

The interesting proposition is made that the claimant be sworn in and then turned out. Upon the theory that the purpose is to permanently part company with Mr. Roberts, this is a dubious proceeding. Such action requires the vote of two-thirds of the members. We ask if such a vote is possible or right, in view of the following observations:

The expulsion clause of the Constitution is as follows:

"Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member."

No lawyer can read that provision without raising in his own mind the question whether the House has any power to expel, except for some cause relating to the context. The ablest lawyers from the beginning of the Republic have so insisted, and their reasoning has been so cogent that these propositions are established, namely:

1. Neither House of Congress has ever expelled a member for acts unrelated to him as a member or inconsistent with his public trust and duty as such.

2. Both Houses have many times refused to expel where the guilt of the member was apparent; where the refusal to expel was put upon the ground that the House or Senate, as the case might be, had no right to expel for an act unrelated to the member as such, or because it was committed prior to his election.

The most notable instances are the following:

IN THE SENATE.

1. The Humphrey Marshall case in 1796. Much dispute has arisen as to the ground upon which the Senate refused to expel. The fact remains, however, that he was charged with the commission of an offense—a grave offense in the State of Kentucky—unrelated to him as a Senator, and the report of the committee embodied the proposition that the Constitution did not give jurisdiction to the Senate to expel him.

2. The case of John Smith arose in 1808. He was charged with participation in Aaron Burr's conspiracy. The Senate refused to expel.

3. In 1893 an effort was made in the Senate to expel William N. Roach, a Senator from North Dakota. He was charged with having committed a felony some years prior to his election. The case was elaborately argued on both sides, the objection to his expulsion being grounded upon the proposition that in such case the Senate had no right to expel. The subject was dropped; those who were prosecuting the effort to expel him discerning, no doubt, that the Senate would never expel under such circumstances.

IN THE HOUSE OF REPRESENTATIVES.

1. O. B. Matteson had committed a grave offense during the Thirty-fourth Congress. He was elected to the Thirty-fifth Congress and was permitted to take his seat without objection. A resolution of expulsion was introduced and referred to a committee, which reported that the House had no authority to expel, because his offense was committed while in a previous Congress. The House sustained the committee.

2. In the case of Oakes Ames and James Brooks the special committee reported in favor of expulsion. The Judiciary Committee reported against it, on the ground that the House had no authority to expel for acts committed before that Congress. The House refused to expel, and merely censured.

3. In the case of George Q. Cannon, Delegate from Utah in the Forty-third Congress, 1874 and 1875, we find a series of events suggesting, in the light of this case, how history repeats itself.

Cannon's seat was contested by Maxwell, who had received but a handful of votes, and had no right whatever to the seat, even if Cannon was not entitled to it. The claim was made that Cannon was a polygamist. There was no evidence at that time before the House that he had married a plural wife after the act of 1862. If he had not he had violated no law. A resolution was adopted declaring that he was entitled to the seat as Delegate, the claim being made that he might be proceeded against in expulsion proceedings. Whereupon, on the same day, May 12, 1874, a committee was appointed to investigate the question of Cannon's polygamy and the right of the House to expel. It reported in January, 1875, that Cannon was a polygamist, and brought in a resolution of expulsion. A vigorous minority report was filed, in which the right of expulsion was combated on three grounds.

First. That the House had already declared that Cannon was *entitled* to the seat. The force of the argument was apparent, for nothing had intervened to make him any less entitled then than on the day his title was confirmed by the previous action of the House.

Second. That when Utah was created as a Territory Congress knew it would send Mormon Delegates, and it ought not now to complain that a Mormon had come to the House.

Third. That a graver ground of objection existed. "The question is," said the report, "whether the House ought, as a matter of policy, or to establish a precedent, expel either a Delegate or Member on account of alleged crimes or immoral practices unconnected with their duties or obligations as Members or Delegates, when the Delegate or Member possesses all the qualifications to entitle him to his seat."

The reasoning of the committee and the cogent force of an unbroken line of precedents against expulsion seem to have profoundly impressed the House, for when a couple of weeks later the case was called up and the question of consideration raised, only a beggarly 21 could be found ready to take up the case, and it was never heard of again.

Thus ended the first campaign to confirm a polygamist in his seat in the fond hope that he might later be expelled.

4. The next is the case of Schumaker and King in connection with the China mail service, August 9, 1876. The Committee on the Judiciary submitted a report, in the course of which it asserted that the House of Representatives had no authority to take jurisdiction of violations of law or offenses committed against a previous Congress. Referring to the constitutional provision respecting expulsion, it says:

"This power is evidently given to enable each House to exercise its constitutional function of legislation unobstructed."

The committee recommended that the House leave the charges against Schumaker and King "where they are now," in court.

The minority report did not combat the position of the majority in so far as this case is concerned. They say that—

"They do not deny but that there are limitations on the power of this House [to expel] arising from the circumstances of particular cases and the relations of this

House to the constituency of an accused member; therefore, as will be seen, the undersigned need not go further in this case than to assert jurisdiction, because the offenses complained of were not known to the constituents of the members in question until after their election."

If there is any fact apparent in *this* case it is that the constituents of Mr. Roberts knew all about him before his election.

Can there be room to doubt the proper action of the House? Is it prepared to yield up this salutary power of exclusion? Will it declare itself defenseless and ridiculous?

Nor are those who assert that expulsion is the remedy necessarily barred from voting for the resolution declaring the seat vacant. He must, indeed, be technical and narrow in his construction of the Constitution who will not admit that if a vote to declare the seat vacant is sustained by a two-thirds majority the Constitution is substantially complied with. He may not agree with the committee that a mere majority can exclude, but he can reserve the right to make the point of order that the resolution is not carried if two-thirds do not vote for it.

On the question of *prima facie* right the committee considered that it was settled by the conclusions reached in regard to the final right. "Both Houses of Congress have in innumerable instances exercised the right to stop a member-elect at the threshold and refuse to permit him to be sworn in until an investigation has been made as to his right to a seat. In some cases the final right was accorded the claimant; in many cases it was denied. This question, as we view it, is always to be answered from the standpoint of expediency and propriety. The inherent right exists of necessity."

It is not true that the exercise of this right could block the organization of the House. All the members on the Clerk's roll, whether sworn in or not, have a right to vote on organization and on the question of swearing in members. "If every individual member had been objected to *seriatim* the only objectionable result would have been the inconvenience and delay involved in the time necessary to vote upon all the cases."

On the general question of constitutional qualifications the committee said:

This question meets us at the threshold: Does the constitutional provision, "No person shall be a Representative who shall not have attained to the age of 25 years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of the State in which he shall be chosen," preclude the imposition of any disqualification by Congress or by either House?

Must it be said that the constitutional provision, phrased as it is, really means that *every* person who is 25 years of age, and who has been for seven years a citizen of the United States, and was, when elected, an inhabitant of that State in which he was chosen, is eligible to be a member of the House of Representatives and must be admitted thereto, even though he be insane, or disloyal, or a leper, or a criminal?

Is it conceivable that the Constitution meant that crime could not disqualify? The whole spirit of government revolts against any such conception.

Not now discussing the question as to whether or not that constitutional provision is exclusive, so far as ordinary qualifications are concerned, is it to be said that there is in it no implied power of *disqualification* for reasons which appeal to the common judgment of mankind, and which are vital and essential to the very constitution and integrity of the legislative body as such?

We are compelled to answer that that provision, in the sense to which we have just adverted, is not exclusive, and that reasonable disqualifications may attach to certain individuals, which may, for the sake of argument, be assumed to amount in practice to added qualifications.

A marked distinction is to be made between arbitrary disqualifications and those which arise out of the voluntary act of the individual who places himself, by the commission of an offense against the law or civilization, within the prohibited class. *We believe, whatever general statements may have been made by public men, that no commentator on the Constitution, no court, or either House of Congress has ever questioned the propriety of that distinction, but that the contrary doctrine has been universally held wherever the question was clearly raised.*

In our opinion it is demonstrable that no such exclusive meaning can be given to the provision above quoted as is contended for on the other side of this proposition, and that the sound rule is declared by Burgess in his work on Political Science and Constitutional Law when, on page 52, he says:

"I think it certain that either House [of Congress] might reject an insane person * * * or might exclude a grossly immoral person."

We desire at the very threshold of this discussion to lay down these general propositions, never to be forgotten and always to be kept clearly in mind:

1. That the House has never denied that it had the right to refuse to permit a member-elect to be sworn in, although he had all of the three constitutional qualifications.

2. That it has in many instances affirmatively declared that it had the right to thus refuse.

3. That the right to so refuse is supported on principle, and by the overwhelming weight of authority of constitutional writers and judicial opinions on analogous constitutional questions; and

4. Upon the converse proposition of admission and then expulsion we assert this: First. That the House has never declared that it had the right to expel a member for acts unrelated to him as such or for acts committed prior to his election; and

Second. That both the House and the Senate have in many instances refused to expel members where the proof of guilt was conclusive, but where the acts complained of were unrelated to the members as such.

The committee then outlined the history of the legislation against polygamy and the judicial opinions thereon. They also showed that the claimant, Roberts, was not only a polygamist in violation of the law, but that as recently as December 6, 1899, he had publicly proclaimed his defiance of the law and refused to obey it, saying:

Even were the church that sanctioned these marriages and performed the ceremonies to turn its back upon us and say the marriages are not valid now, and that I must give these good and loyal women up, I'll be damned if I would.

The report continues:

We have thus presented to our view the status of Roberts. What are we going to do about it?

We assert that it is our duty, as it is our right, to exclude him; to prevent his taking the oath and participating in the councils of the nation.

Three methods present themselves by which to test the soundness of this view:

First. On principle, and this involves—

(1) The nature of the legislative assembly and the power necessarily arising therefrom;

(2) The express language of the constitutional provision;

(3) The reasons for that language;

(4) Its context and its relation to other parts of the instrument;

(5) The obvious construction of other portions of the same instrument necessarily subject to the same rule of construction.

Second. The text-books and the judicial authorities.

Third. Congressional precedents. These are of two classes—

(1) Action respecting the rights of individual members;

(2) Acts of Congress and general resolutions of either House.

As to the first proposition, what is the argument on principle? We think it will be undoubted that every legislative body has unlimited control over its own methods of organization and the qualifications or disqualifications of its members, except as specifically limited by the organic law. We do not think that this proposition needs amplifying; it is axiomatic. It is apparent that every deliberative and legislative body must have supreme control over its own membership, except in so far as it may be specifically limited by a higher law; there is a distinction to be drawn between the legislative power of a legislative body and its organizing power, or those things which relate to its membership, and its control over the methods of performing its allotted work. That is to be distinguished from the legislative power to be expressed in its final results.

When our Constitution was framed there was practically no limit to the right and power in these respects of the English Parliament. Such power is necessary to the preservation of the body itself and to the dignity of its character. In England it was at one time admissible to permit the admission into the House of Commons of minors, of aliens, and of persons not inhabitants of the political subdivision in which

they were elected. To this day it is well known that an inhabitant of London may be elected by a Scotch constituency, and a member has been elected by more than one constituency to the same Parliament.

The wording of the Constitution is negative, thus not necessarily excluding other than the specified qualifications, though it would have been just as easy to make it positive if such had been the intention. The first draft of the constitutional provision was in a positive form, and the slight contemporaneous discussion was on this form. There were some objections to the provision, but the next day it was put in the present form and passed. The committee illustrated the principle by numerous supposed cases of wrongdoing which would evidently make it impossible for a member to sit in the House or to be admitted if he were not yet sworn in, and added:

So much for illustrations upon that question. Look, now, at the last paragraph of Article VI of the Constitution:

"The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution."

Here is an affirmative declaration that a certain oath shall be administered to certain officials. If the theory of exclusion is applied to the qualification clause as to Representatives, it must be applied to this clause, and therefore Congress has no power to demand any other oath, or superadd to this oath any other provisions.

And yet the very oath we took as members of this House has additional provisions. Congress passed also the test oath act in 1862, making vital additions to the constitutional oath, and, indeed, adding a new ground of disqualification for members of Congress. This act was passed by a large majority and compelled members of Congress to submit to that oath for many years. Chief Justice Marshall, the great expounder of the Constitution, in the case of *McCulloch v. Maryland*, declared that "He would be charged with insanity who should contend that the legislature might not superadd to the oath directed by the Constitution such other oath or oaths as its wisdom might suggest," and the whole opinion in that case is addressed in principle to the very doctrine that is here advocated.

If Congress could add to the constitutional oath, the same theory of construction must permit it to at least add reasonable qualifications to the requirements for members of the legislative body, at least to the extent of declaring disqualifications which in their nature ought to bar a man from entrance into a great legislative body.

The same clause to which we have just referred has this provision:

"But no religious test shall ever be required as a qualification to any office or public trust under the United States."

If the Constitution had laid down all the qualifications which Congress or any other power had the right to impose, it was unnecessary to go on and declare that no religious test should be required. That great instrument is inconsistent in its parts and contradictory of itself if it be true that it meant that no disqualifications should be provided except those named. Nor was it necessary, if the proviso means an oath merely, that such exception should be made, for the preceding words of the paragraph set out the required oath.

The effort to make the negative declaration of minimum qualifications exclusive of all others, whatever the necessities of the House may be, falls to the ground if we admit that the paragraph respecting oaths is in the same instrument as that which defines the qualifications of members of Congress.

Of text-book authorities the committee referred to Story on the Constitution, Burgess's Political Science and Constitutional Law, Pomeroy's Constitutional Law, Justice Miller's Lectures on the Constitution, Throop on Public Offices, and Cushing on Law and Practice of Legislative Assemblies. The well-known statement of Story the committee disposed of as follows:

First. That it is dismissed in a very few words. Justice Story himself disclaims explicitly in his work that he gives his own opinion as to what the Constitution means, but asserts that he undertakes merely to give the statements of others.

Second. This statement of Judge Story does not at all interfere with the proposition we have laid down: That the power of the House to exclude from its membership a person who is, for instance, disloyal, a criminal, insane, or infected with a contagious disease is not superadding any qualifications, within the meaning of Story, such as a property qualification or an educational qualification.

We find, however, that Story's expression, if it means all that is claimed for it by the minority, does not accord with the opinion of other commentators, with the courts, or with the Congressional precedents.

Of court decisions, the committee quoted from *Barker v. The People* (3d Cowen, N. Y.); *Royall v. Thomas* (28 Gratton (Va.), 130); *Commonwealth v. Jones and Cochran v. Jones* (Kentucky); *Mason v. The State* (58th Ohio State); *Commonwealth v. Walker* (83 Pennsylvania State, 105); *Rogers v. Buffalo* (123 N. Y., 184); *Ohio ex rel. Attorney-General v. Covington* (29 Ohio State, 102); *Darrow v. The People* (8 Colo., 417).

They also referred to the case of Jeremiah Larned, excluded by the legislature of Massachusetts in 1785, and to the cases of Niles, Thomas, and Stark in the United States Senate, and to the Kentucky cases of 1867, the Whittemore case, and the case of George Q. Cannon, in the House of Representatives.

Senator Niles appeared in the Senate on April 30, 1844, a short time after being discharged from the insane asylum as improved but not completely restored to health. He was not sworn in until a committee had inquired into the case and reported that he was not of unsound mind in the technical sense of that phrase.

Philip F. Thomas was excluded from the Senate by resolution in 1867, on the ground that he had been disloyal and could not take the test oath.

Benjamin Stark, appointed Senator from Oregon in 1862, was accused of disloyalty, but the proof was not sufficient to cause a majority of the Senate to vote either to exclude or expel him. In a report on the preliminary question, however, Senator Lyman Trumbull said:

It is admitted that neither the Senate, Congress, nor a State can superadd other qualifications for a Senator to those prescribed by the Constitution, and yet either may prevent a person possessing all those qualifications and duly elected from taking his seat in the Senate.

A State, for instance, might arrest him for felony before he was sworn in and keep him imprisoned through the term; Congress might pass a law imposing disability to hold any office, including that of Senator, as a punishment for crime; or the Senate might refuse to admit a felon, an insane, or disloyal person, or one who was at the moment of his application for admission violently disturbing the session of the Senate.

In the Kentucky case, in 1867, the House refused to permit the swearing in of the members-elect, when their credentials were presented, and referred the charges of disloyalty to the Committee on Elections. At other times after the objection was made to the swearing in of other members-elect the House assumed jurisdiction, tried the cases in advance of administering the oath, and where, as sometimes had been the case, it appeared that the claimant had not been disloyal, he was of course sworn in; in other cases he was excluded. On March 22, 1869, the following was adopted as a standing rule of the House, and therefore as the matured expression of its deliberate judgment:

Resolved, That in all contested-election cases in which it shall be charged by a party to the case, or a member of the House, that either claimant is unable under the

act approved July 2, 1862, entitled "An act to prescribe the oath of office, and for other purposes," it shall be the duty of the committee to ascertain whether such disability exist, and if such disability shall be found to exist the committee shall so report to the House and shall not further consider the subject without the further order of the House, and no compensation will be allowed by the House to any claimant who shall not have been entitled at the time of the election and whose disloyalty shall not have been removed by act of Congress.

In the Forty-first Congress Representative Whittemore, who had escaped expulsion for selling a cadetship by resigning, was again elected at a special election, but was excluded by a vote of the House of 180 to 24 after full debate.

George Q. Cannon was excluded from the Forty-seventh Congress, to which he had been elected Delegate from Utah, on the ground of polygamy. Speaking of this case the committee said:

The case of George Q. Cannon, who was excluded from the Forty-seventh Congress as a Delegate on the ground that he was a polygamist, on principle clearly sustains the proposition of exclusion of a member.

It is true that when excluded Cannon was merely a Delegate-elect from the Territory of Utah and not a person elected to an office created by the Constitution.

Nevertheless, we assert that on principle that case can not be differentiated from the case at bar.

Allen G. Campbell was a candidate for Delegate from the State of Utah against George Q. Cannon in 1880. Campbell received about 10 per cent of the votes cast, and the governor issued a certificate to him on the theory that Cannon was ineligible to be a Delegate in Congress. Campbell's seat was contested by Cannon. The committee, in January, 1882, made a very elaborate report. All but one united in declaring that Campbell, not having received a majority of the votes, was not entitled to a seat, and the dissenting member finally agreed with the majority that whatever Cannon's rights might be, Campbell ought not to be seated.

A considerable majority of the committee further found that as Cannon was a polygamist he was ineligible and disqualified to be Delegate in Congress. At this time the Edmunds law had not been passed and there was no statutory ground of ineligibility.

Some members of the committee undertook to differentiate between the right of the House to exclude a member and its right to exclude a Delegate, while other members insisted that, while there was a sharp distinction to be drawn between a member and a Delegate, yet that in so far as the matter of ineligibility on the ground of polygamy was concerned the same principle would apply to both.

This, then, was the condition of the Cannon case before the Edmunds law was passed. The committee was unanimously of the opinion that Cannon was duly elected a Delegate from the State of Utah and therefore that he was entitled to hold the certificate of election; that he stood in the attitude of a man appearing before the bar of the House with the proper certificate of the governor of the Territory of Utah and with no infirmity except that which went to his disqualification, namely, the fact of polygamy.

Before the case was taken up in the House for discussion and action the Edmunds law was passed. Mr. Cannon in his speech says that there were some members of the House who had told him that while they would not have excluded him under the report of the committee, they would then vote to exclude him because of the provisions of section 8 of the Edmunds Act; and Mr. Ranney, of Massachusetts, a member of the Committee on Elections, who had dissented from the majority report, declared that he felt compelled to vote in favor of the exclusion of Cannon because of the passage of that law.

Nevertheless the fact appears, and we believe it to be the just inference from what occurred from the report of the committee and the debate on the floor of the House, that Cannon would have been excluded if the Edmunds law had never been passed. The vote in favor of allowing him his seat was 79 and against it 123.

The committee quoted at length from the debate in the Cannon case. In regard to the English precedents they said:

We have to say that after diligent search we find no cases where the House of Commons ever held or decided that it had not the right to exclude at the very threshold a member whose certificate or credentials were perfect and uncontested, although the ground of exclusion was not a want of legal qualifications; and there are scores of cases since 1780 where it has claimed and exercised that right.

Cases apparently inconsistent were explained as not really so.

It may be said that the House of Commons has uniformly taken the view that under the right to judge of the "qualifications" of its members—their legal election and return being conceded—it rests wholly within the discretion of that body to establish a new test or requirement of qualification for membership, and that it may be either mental, such as for imbecility or insanity, physical, as for paralysis, or for grave offenses against criminal laws.

Thus we see that the Senate and the House have taken the ground that they had the right to exclude for insanity, for disloyalty, and for crime, including polygamy, and, as we believe, there is no case in either the House or the Senate, where the facts were not disputed, in which either the Senate or House has denied that it had the right to exclude a man, even though he had the three constitutional qualifications. There is a large amount of debate, where opinions are given on both sides of the proposition, but as against that is the never-varying action of the two bodies themselves.

Congress has, moreover, by law, imposed statutory disqualifications. Acts of 1790 and 1791 disqualified bribe givers from holding any office under the United States, and the context of many other statutes, as well as of the Constitution itself, shows that the position of Representative in Congress is such an "office." The test-oath act of July 2, 1862, was invariably construed as applying to Representatives, and claimants were excluded under it. Section 8 of the Edmunds Act, whatever its meaning, evidenced the legislative will to disqualify polygamists for office.

In the very nature of things the House of Representatives, wherever it is as a House of Representatives, is in a place under the exclusive jurisdiction of the United States; therefore when Roberts comes into the District of Columbia in the status of a polygamist he is ineligible under the Edmunds Act to hold any office or place under the United States, and therefore ineligible to hold the position of member of the House of Representatives.

The committee summed up the argument on the second main ground of disqualification as follows:

We assert before the House, the country, and history that it is absolutely and impregably sound, not to be effectively attacked, consonant with every legislative precedent, in harmony with the law and with the text-books on the subject:

That Brigham H. Roberts's persistent, notorious, and defiant violation of one of the most solemn acts ever passed by Congress, by the very body which he seeks now to enter on the theory that he is above the law, and his defiant violation of the laws of his own State, necessarily render him ineligible, disqualified, unfit, and unworthy to be a member of the House of Representatives. And this proposition is asserted not so much for reasons personal to the membership of the House, as because it goes to the very integrity of the House and the Republic as such.

On the third main contention, the committee said:

We come now to the third main proposition, that his election involves a breach of the compact and understanding by which Utah was admitted to the Union.

Utah was admitted to the Union with the distinct understanding upon both sides that polygamous practices were under the ban of the church, prohibited and practically eradicated, both as a practice and a belief, and that they would not be renewed.

The effort is made to alarm people upon this proposition that some similar objection might be made to representation from States in which the claim might be made that the right to vote was denied to some citizens. It is a sufficient answer to this to say that if such ground of complaint exists the Constitution specifically tells us what our remedy is; and declares precisely, in the fourteenth amendment, what we may do in any event when the right of suffrage is improperly denied. There is no possible escape from that position, even assuming that there was anything in the bogie man.

But as to Utah, she was admitted on the express statement that the practice of polygamous living was interdicted by the church, was practically abandoned by the people, and eradicated as a belief. Of course that sporadic instances of the violation of the law against cohabitation might occur no one doubted.

The committee gave an account of the public renunciation of polygamy by the Mormon Church and of the arguments used at the time Utah was admitted as a State, and added:

And so the enabling act was passed. Every incredulous member who cast doubt upon the sincerity of polygamists in Utah was whistled down the wind. Every legislator who doubted if the funeral of polygamy had really taken place was laughed to scorn. Polygamy was dead! That was the battle cry, and on it the battle was fought and won.

What would have become of the bill if Mr. Rawlins had declared that the State of Utah, just about to be born, would reserve the right to send a polygamist to Congress? His bill would have been buried beneath an avalanche of votes beyond the hope of resurrection.

The language of the enabling act is, "provided that polygamous or plural marriages are forever prohibited." * * *

It is not to be assumed from the fact that a rare or sporadic case of polygamous marriage occurred in Utah, or sporadic instances of unlawful cohabitation had come to light, that that would be a violation of the agreement; but we take it that it is in the last degree a violation of the agreement or understanding when that State sends to Congress a man who is himself engaged in the persistent practice of the very thing the abandonment of which was the condition precedent to its admission; and that man the most conspicuous defier of the law and violator of the covenant of statehood to be found in Utah.

On the proposition to expel instead of exclude the committee held "that neither House ought to expel for any cause unrelated to the trust or duty of a member." Story, sections 837, 838; Rawle, 48; Paschal on the Constitution, 87, and the case of *Hiss vs. Bartlett* (3 Gray, 468) were referred to as sustaining this contention. The Senate cases of Marshall, Smith, and Roach, and the House cases of Herbert, Matteson, Brooks and Ames, Cannon, Schumacher, and King, described (except the Herbert case) above, were more elaborately analyzed, and the committee concluded:

If the House takes the action which the minority of the committee insists it ought to take, it will, for the first time in its history, part with a most beneficent power which it has often exercised—a power that ought rarely to be exercised, but which the House has never declared it did not possess.

Mindful of the gravity of the question and realizing the responsibility imposed upon us, we recommend the adoption of the following resolution:

Resolved, That under the facts and circumstances of this case Brigham H. Roberts, Representative-elect from the State of Utah, ought not to have or hold a seat in the House of Representatives, and that the seat to which he was elected is hereby declared vacant.

The minority held that the House had a right to expel the claimant after admission, but not to exclude him before admission:

Finding that Mr. Roberts has been and is now a polygamist, unlawfully cohabiting with plural wives, if the House of Representatives is for that reason of the opinion that he ought not to be a member thereof, what course should it rightfully pursue under the Constitution, the supreme law of the land—exclude him or expel him? If he is to be excluded, it must be because he is for such reason legally ineligible or disqualified. The purpose is to consider the question of constitutional right, not of arbitrary power, as it is conceded that the House has that power to exclude, with or without reason, right or wrong. The exercise of such a power, without constitutional warrant, would simply be brute force, a tyrannous exercise of power, unreviewable by any tribunal. * * *

Is it seriously contended that this House can of its own motion, by its own independent action, create for the purposes of this case a legal qualification or disqualification? This House alone can not make or unmake the law of the land. Before any one of its acts can become law it must be concurred in by the Senate and approved by the President, or passed by two-thirds of each House over his veto. It is quite clear that the House, by its independent action, can not, if it would, make for this case any disqualifying regulation that would have the force of law.

On the general question of adding to the constitutional qualifications, the minority said:

It is a very grave question as to whether Congress can, by a law duly enacted, add the qualifications negatively stated in the Constitution. There is no decision of the United States Supreme Court directly or indirectly construing this provision. There is no decision of any State court directly in point.

The various cases referred to by the majority were analyzed to show that they did not apply to the principle of this case or did not establish the contention of the majority. The text-books cited by the majority gave no authority for their opinions, and Story, Cooley, Cushing, in a later statement (2d ed., p. 27, sec. 65), Tucker, Foster, Paschal, McCrary, and Paine all agree that the constitutional requirements are exclusive.

On the Whittemore case (Forty-first Congress) the committee said:

We have examined that case with care, and we feel bound to say that we do not think it entitled to any weight as a precedent. The argument upon which it was based shows the action of the House to have been unwarranted and ill advised in excluding Whittemore. The only speeches made in support of the proposition were by Mr. Logan. He does not in any way refer to the one great legal question involved, as to whether Congress, to say nothing of the House, acting alone, had the power to add to the qualifications specified in the Constitution, and that question was not raised during the debate, although at that time (1870) several State courts, one at least, had discussed it, *People vs. Barker* having been decided in 1824.

The House had, apparently, never heard that there was such a question. The only provision of the Constitution that could possibly justify the action of the House, that constituting the House the judge of the "elections, returns and qualifications of its own members," was not referred to directly or indirectly, and if the debate is the criterion, the House acted without any reference to it whatever. The clause stating the qualification was incidentally referred to once. Indeed, they apparently acted upon an entirely different provision, that does not relate to exclusion or determining eligibility or qualifications, and Mr. Logan distinctly based his case upon it when he says:

"I base my opinion, first, upon the Constitution of the United States, which authorizes Congress to prescribe rules and regulations for the government of their members, and provides that by a two-thirds vote either House may expel anyone of its members without prescribing the offenses for which either House may expel."

He then proceeded to make this gratuitous and unwarranted assumption:

"This being the theory with which I start out, I then assume that where the House of Representatives has power to expel for an offense against its rules, or a violation of any law of the land, it has the same power to exclude a person from its body."

Without giving any attention to the legal distinctions involved, or even referring to the constitutional right of passing upon qualifications, or adverting to the fact that exclusion is the act of a majority and expulsion of two-thirds, he begs the whole question and assumes their identity. He quotes a statute which makes a disqualification to hold office absolutely dependent upon a conviction, and then assumes it disqualified Whittemore, although there had been no conviction. He admits there was no Congressional precedent for the action which he proposed. He cites the *Wilkes* case in the English Parliament as a precedent, when, as he states it, that case was directly in point against him.

Wilkes, he says, was elected four successive times to the same Parliament, three times without opposition and the fourth time against an opposing candidate. Three times he was expelled. The fourth time his opponent was seated. Neither time, according to his statement, was *Wilkes* excluded.

Just how that case could be an authority for excluding as against expelling Whittemore we can not see. These considerations (and many more could be suggested), in view of the fact that the House, under Mr. Logan's lead, absolutely refused to allow any committee to examine, for the information of the House, the legal questions involved, or to have the case referred to any committee—though such a course was desired by such men as Poland, of Vermont, Farnsworth, of Illinois, and Schenck and Garfield, of Ohio—and would not allow Schenck and Garfield to be heard on the

law for even ten minutes each, deprive this case, in our opinion, of all weight as a precedent.¹

The minority did not agree with the reasoning of the majority on the general principle expressed. If the Congress or the House can add to the qualifications of Representatives named in the Constitution, they can add to them to any extent. The power is unlimited or it does not exist, and if it is unlimited it leads to absurd conclusions. Moreover, the debates in the Constitutional Convention and the papers in the *Federalist* clearly show that the only contemporaneous opinion was that the constitutional qualifications were exclusive. The change in phraseology from the first to the second draft was made by a committee authorized to revise the style and arrangement of the articles referred to it, but not to alter their sense. To suppose that they did so would be to impeach either the character or the intelligence of some of the most illustrious men in our history.

The minority quoted from the text-books above mentioned and from *Thomas vs. Owens* (4 Md., 223), *Page vs. Hardin* (8 Ben. Mon., 661), and *Black vs. Trover* (79 Va., 125) in support of their contention that "certainly the great weight of authority is against the right to add, even by law, to the qualifications mentioned in the Constitution."

The disqualification of the Edmunds Act, the minority held, could not in any case apply to Mr. Roberts. Its only disqualification was against holding any "office under the United States," and the entire context of the Constitution, as well as the rulings of the courts and of the two Houses, shows that the position of Representative in Congress is not such an "office" within the meaning of the Constitution. Moreover, the disqualification applied only to acts committed "in a Territory or other place over which the United States have exclusive jurisdiction." Mr. Roberts's former polygamy was committed in the Territory of Utah, but to make him now ineligible for past crime would be impossible, and his present polygamy could not possibly be committed within a Territory which had ceased to exist.² The condition of the enabling act was met by Utah in the act of becoming a State, and the condition, being finally fulfilled, ceased to exist.

It seems to us beyond question that this act (the Edmunds Act) does not now apply to Mr. Roberts. Then there is no law having any application to this case, by which the attempt is made to add anything to the constitutional qualifications. This House, by its independent action, can not make law for any purpose. The adding by this House, acting alone, of a qualification not established by law would not only be a violation of both the Constitution and the law, but it would establish a most dangerous precedent, which could hardly fail to "return to plague the inventor." You might feel that the grave moral and social aspects of this case allowed you to—

Wrest once the law to your authority
To do a great right, do a little wrong.

But what warrant have you, when the barriers of the Constitution are once broken down, that there may not come after us a House with other standards of morality and propriety, which will create other qualifications with no rightful foundations, that, in the heat and unreason of partisan contest—since there will be no definite

¹ This case, it will be noticed, is not among those given in this "Digest" in connection with the Forty-first Congress. It has been omitted from all collections of contested election cases, never having gone to a committee or been reported on, and thus never having become a contested election case in the usual sense of the words.

² The majority had met this objection by saying that it is status, not act, that constitutes the disqualification, and status adheres to the person at all times and places. Moreover, whatever may be the case with Utah, the House of Representatives is certainly in a place "over which the United States have exclusive jurisdiction."

standard by which to determine the existence of qualifications—will add anything that may be necessary to accomplish the desired result? Exigency will determine the sufficiency. It would no longer be a government of laws, but of men. To thus depart from the Constitution and substitute force for law is to embark upon a trackless sea, without chart or compass, with almost a certainty of direful shipwreck.

It is contended that if all other reasons assigned for exclusion are found to be insufficient, as we believe they are, still Mr. Roberts should be excluded, upon the alleged ground that, by virtue of the enabling act, a compact now exists between the United States and Utah which has been violated by the election of Roberts to Congress, and that the State can be in this manner punished for such breach of the compact. Compact is synonymous with contract. The idea of a compact or contract is not predicable upon the relations that exist between the State and the General Government. They do not stand in the position of contracting parties. The condition upon which Utah was to become a State was fully performed when she became a State. The enabling act authorized the President to determine when the condition was performed. He discharged that duty, found that the condition was complied with; and that condition no longer exists.

What did Congress require by the enabling act? Simply that "said convention shall provide by ordinance irrevocable," etc., and the convention did in terms what it was required to do. It was a condition upon the performance of which by the "convention" the admission of Utah depended. Its purpose accomplished, its office is gone, and as a condition it ceases to exist. No power was reserved in the enabling act, nor can any be found in the Constitution of the United States, authorizing Congress, not to say the House of Representatives alone, to discipline the people or the State of Utah because the crime of polygamy or unlawful cohabitation has not been exterminated in Utah. Where is the warrant to be found for the exercise of this disciplinary, supervisory power? This theory is apparently evolved for the purposes of this case, is entirely without precedent, and has not even the conjecture or dream of any writer or commentator on the Constitution to stand upon.

The right to expel a member, on the other hand, is absolute, and limited only by the condition that it can be exercised only by a two-thirds majority. The right is inherent, in the nature of things, as well as expressly conferred. The minority quoted authorities on this point, and concluded:

It is proper to observe that the determinations of the court and the opinions of eminent legal authors, unexcelled in reputation and learning, are entitled upon these propositions to great weight, as they are in every instance the result of careful, dispassionate, and disinterested research and sound reasoning, unaffected by considerations that must necessarily have been involved in legislative precedents. The two-thirds limitation upon the right to expel not only demonstrates the wisdom of the fathers, but illustrates the broad distinction between exclusion and expulsion.

A small partisan majority might render the desire to arbitrarily exclude, by a majority vote, in order to more securely intrench itself in power, irresistible. Hence its exercise is controlled by legal rules. In case of expulsion, when the requisite two-thirds can be had, the motive for the exercise of arbitrary power no longer exists, as a two-thirds partisan majority is sufficient for every purpose. Hence expulsion has been wisely left in the discretion of the House, and the safety of the members does not need the protection of legal rules.

It seems to us settled, upon reason and authority, that the power of the House to expel is unlimited, and that the legal propositions involved may be thus fairly summarized: The power of exclusion is a matter of law, to be exercised by a majority vote, in accordance with legal principles, and exists only where a member-elect lacks some of the qualifications required by the Constitution. The power of expulsion is made by the Constitution purely a matter of discretion, to be exercised by a two-thirds vote, fairly, intelligently, conscientiously, with a due regard to propriety and the honor and integrity of the House and the rights of the individual member. For the abuse of this discretion we are responsible only to our constituents, our consciences, and our God.

We believe that Mr. Roberts has the legal, constitutional, right to be sworn in as a member, but the facts are such that we further believe the House, in the exercise of its discretion, is not only justified, but required by every proper consideration involved, to expel him promptly after he becomes a member.

We recommend the following as a substitute for the resolution proposed by the committee:

Resolved, That Brigham H. Roberts, having been duly elected a Representative in the Fifty-sixth Congress from the State of Utah, with the qualifications requisite for admission to the House as such, is entitled, as a constitutional right, to take the oath of office prescribed for members-elect, his status as a polygamist, unlawfully cohabiting with plural wives, affording constitutional ground for expulsion, but not for exclusion from the House.

And if the House shall hold with us and swear in Mr. Roberts as a member, we shall, as soon as recognition can be had, offer a resolution to expel him as a polygamist, unlawfully cohabiting with plural wives.

[Report 85, first session Fifty-sixth Congress.]

(2) EVANS *vs.* TURNER.

Bribery. Report for contestee, who retained the seat.

Report by Mr. Linney.

The report is as follows:

The Committee on Elections No. 1 submit the following report in the contested-election case of Hon. Walter Evans *vs.* Hon. Oscar Turner, from the Fifth Congressional district of the State of Kentucky.

The grounds of contest, as alleged by the contestant as against the contestee, are fraud and bribery alleged to have been committed in the election in said district at the last election for Congress in that district by the contestee and his political supporters. The specifications of fraud and bribery are denied by the contestee in his answer to the notice of the contestant. The official returns show a plurality for the contestee of 568 votes. There were 340 pages of testimony in the record. The committee have examined the evidence and heard arguments of counsel, and we make the following report and recommend the adoption of the accompanying resolutions.

The evidence offered by the contestant tends to prove the allegations of fraud and bribery, and much of it discloses the resort to methods that were disreputable. Among other things it is in evidence that on the morning of the election a circular was issued and generally distributed in the city of Louisville among the political workers of the contestant, printed on the paper of the Congressional campaign committee, on that date, and containing a proposition to place \$100 in each precinct, and requesting captains of each ward, if they do not get the money by 6.30 on the morning of election, to come to headquarters. This circular was issued by enemies of contestant. This is a novel method in the history of political struggles in the United States, and in the opinion of the committee demands the unqualified condemnation of the committee. This, with the evidence tending to prove fraud and bribery in other respects, in our opinion, tends strongly to establish the contention of contestant, but does not show that contestee was a party to such fraud.

There is no evidence tending to show that the contestee had anything to do with this fake circular, and there is much evidence offered by the contestee tending to show that the propositions of bribery came from persons who had organized for the purpose of obtaining money from some one—anyone from whom they could obtain it. Upon a careful consideration the committee is unable to determine the exact number of votes tainted and vitiated by fraud and bribery. As the proof fails to disclose that enough votes were thus vitiated to overcome the contestee's plurality of 568 votes as shown by the returns, the committee recommend the adoption of the following resolutions:

Resolved, That Walter Evans was not elected a member of the Fifty-sixth Congress of the United States from the Fifth Congressional district of Kentucky, and is not entitled to a seat therein.

Resolved, That Oscar Turner was elected a member of the Fifty-sixth Congress from the Fifth Congressional district of the State of Kentucky, and is entitled to a seat in the Fifty-sixth Congress.

The resolutions were passed by the House on February 5, 1900, without debate or division.

[Report 198, first session Fifty-sixth Congress.]

(3) ALDRICH *vs.* ROBBINS.

Fraud. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Mann; minority report by Mr. Bartlett.

The issues in this case were similar to those in the previous cases from the same district (the Fourth Alabama) and it will therefore not be necessary to go into details as to particular precincts. According to the returns, contestee had a majority of 1,230. In the five "white counties" contestant had a majority in four and contestee a small majority in the fifth, but in Dallas County, the "black county," contestee was returned as receiving 2,438 and contestant 392 votes. The committee referred to the recent history of the district, since the last apportionment, as follows:

In accordance with the official returns, a certificate of election was issued to Mr. Robbins, by virtue of which he now occupies a seat in the House.

The contest instituted by Mr. Aldrich rests solely upon the claim of alleged frauds and errors in Dallas County. No objection is made by either Mr. Aldrich or Mr. Robbins as to the returns from any of the other counties in the district.

The records of Congress show that this is the third contest instituted by the contestant for a seat in the House of Representatives from the same Congressional district. The public records of Congress show that each of these three contests instituted by Mr. Aldrich has turned mainly upon the alleged commission of election frauds in the county of Dallas.

At the Congressional election of 1894 Mr. Aldrich and Mr. Robbins were the respective rival candidates for Congress, and the official returns from Dallas County gave to Mr. Robbins 5,462 votes and to Mr. Aldrich 72 votes.

The Committee on elections of the Fifty-fourth Congress, to which the contest of Aldrich *vs.* Robbins was submitted, made a report to the House showing that such gross frauds had been committed in Dallas County that a plurality of the committee recommended that Mr. Robbins's vote in Dallas County be cut down from 5,462 to 568, though two Republican members of the committee thought that Robbins should be allowed 1,274 votes. On the strength of the report of the committee Mr. Robbins was declared not elected, and the seat was awarded by the House to Mr. Aldrich.

At the Congressional election of 1896 Mr. Aldrich and Mr. Thomas S. Plowman were the rival candidates.

The official returns of Dallas County gave to Mr. Plowman 4,289 votes and to Mr. Aldrich 1,200 votes.

The Committee on Elections No. 1 of the Fifty-fifth Congress, on the contest instituted by Mr. Aldrich, reported to the House that such gross frauds were shown to have been committed in Dallas County at the election that it found Plowman's official returns of 4,289 votes should be cut down to 809 votes; and on the strength of that report Mr. Plowman was declared not elected and Mr. Aldrich was awarded a seat in the House.

It will be noticed that of the 6 counties in the district, each of them except Dallas County, according to the census of 1890, contained more white voters than colored voters.

Of these 5 white counties Aldrich carried all but one with fair majorities at the election of 1898, and in the one white county carried by Robbins his majority was less than 200.

Mr. Robbins, who was the Democratic candidate, relies for his majority on Dallas County, which in 1890 had 2,146 white voting population as against 8,531 colored. That Mr. Robbins was justified in attempting to gain a seat in Congress by striving to obtain the colored vote your committee readily admits. If no fraud was committed and Mr. Robbins was elected by the aid of colored votes, that ought to cast no reflection upon him, and his seat in this House should be secure; but if the election in many of the precincts in Dallas County has been made a mockery and a farce, and the commission of crime and fraud in connection with the election has come to be considered by the election officials there the proper course to be pursued, and through such frauds and crime the election returns have been so manipulated and manufactured as to overbalance the votes really cast in the white counties by the votes

fraudulently claimed to have been cast in Dallas County, then your committee think that a most careful examination should be made for the purpose of determining who in fact received the majority of the votes honestly cast.

The committee quoted from the laws of Alabama, and said:

It will be noticed that the Alabama law provides that the judge of probate, the sheriff, and the clerk of the circuit court must, at least thirty days before the holding of any election in their county, appoint three inspectors for each place of voting, two of whom shall be members of opposing parties, if practicable, and that it shall be the duty of the sheriff to notify such inspectors of their appointment within ten days after such appointment.

The three county officers of Dallas County who constituted this appointing board were all Democrats, and supported Mr. Robbins at the election.

It appears by the report of the committee in the Fifty-fifth Congress that in the Congressional election of 1896 the appointing board was composed wholly of Democrats, and that, although at that time lists were submitted to them of suitable men in each precinct by the Republican and Populist managers for Mr. Aldrich, they did not appoint a single Republican or Populist inspector of election.

There are 31 election precincts in Dallas County. In 1898, at the proper time, a request was submitted to the probate judge, sheriff, and circuit clerk of Dallas County by the chairman of the People's Party of Dallas County, the chairman of the Republican party of Dallas County, the chairman of the Aldrich campaign committee, and by Mr. Aldrich himself, all joining in the one request, asking for the appointment of a citizen named in the request for each of the precincts as an inspector to represent the Republican party and People's Party. In 20 of the precincts the respective inspectors asked for by the Republican committee were named by the appointing board. In 11 of the precincts, without any satisfactory reason or explanation, the persons requested by the Republican party managers were not appointed, but either some lame or illiterate person or Democrat appointed in their stead.

Of the 20 precincts in which the regular Republican inspectors were appointed, your committee has followed the official returns in all but 3. In the 11 precincts in which the persons regularly presented for Republican inspectors were unreasonably rejected, your committee finds sufficient fraud in 7 precincts to warrant the rejection of the official returns. In 2 other of these 11 precincts no election was held. As to 1 other, your committee disregards the evidence of fraud because offered as rebuttal and not as direct testimony.

But not only did the appointing board refuse to give proper representation to Mr. Aldrich in the election officials in 11 precincts, but they also neglected and refused to give him information prior to election day as to what election officers had been selected for any of the precincts. The chairman of Mr. Aldrich's campaign committee, by a registered letter, made application to the probate judge of Dallas County for a certified copy of the names of the inspectors and returning officers, and offered to pay the legal fees in order to get such copy. The only answer he could obtain from the appointing board was the ordinary postal-card receipt returned to the sender in cases of registered mail, and which in this case was signed by the probate judge.

The provision of law requiring the sheriff to notify the persons appointed inspectors within ten days of their appointment was generally disregarded. Mr. Aldrich and his campaign managers did not know, and had no way of ascertaining, who were to be the election officials in the various precincts prior to the day of election, and they did not know, and had no way of ascertaining, which of the names suggested by them for inspectors had been selected by the appointing board.

The public records of the Fifty-fourth Congress show that in the election of 1894 the colored voters who were supporting Mr. Aldrich were requested in Dallas County to remain away from the polls, and that they did so remain away and did not vote, but that, notwithstanding this, the election officials in the various precincts entered their names on the poll lists as voting, and counted the supposed ballots cast by them, and made returns accordingly in favor of Robbins, so that the House in the Fifty-fourth Congress threw out between four and five thousand votes which had been fraudulently returned as cast, but which in fact had never been cast.

The public records of the Fifty-fifth Congress show that at the election of 1896 in many precincts the colored voters remained away from the polls, and yet the poll lists were padded and votes fraudulently returned which had never been cast; that in other precincts votes which were cast for Mr. Aldrich were fraudulently counted by the solid Democratic election boards for his opponent.

It is not to be wondered at, then, that in 1898, when he could not ascertain whether he was to have representation among the election officials at any of the precincts, a request was made by Mr. Aldrich's campaign managers that his supporters should

stay away from the polls in certain precincts. Such a request was issued in fact, and the Aldrich supporters in precincts 3, 5, 7, 8, 9, 12, 13, 14, 15, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, and 35 were instructed not to vote, while his supporters in precincts 1, 2, 4, 6, 10, 11, 16, 22, 23, 26, and 36 were requested to vote.

Your committee are of the opinion that any man of ordinary sense and with but even a slight knowledge of elections in Dallas County, as disclosed by the public records of Congress, would not expect a fair election to occur in precincts where representation was denied to the one party, and all of the election officials conceded supporters of the other.

No just election is intended to be had where the appointing board selecting the election officials denies representation to the opposing party. The only purpose of packing the election officials of a precinct is to commit fraud more easily. The only purpose of appointing three Democratic inspectors and other Democratic officials entire, in the precincts in Dallas County, was to commit fraud in the interest of the Democratic candidate, and in the Congressional election of 1898 there was no candidate for any other office than Congress.

Although we do not find it necessary to rest our conclusion in this case upon the following proposition, yet we still affirm, as a matter of proper statement—

That in view of past experience in Dallas County elections, Mr. Aldrich was entitled at the election of 1898 to notify his supporters to remain away from the polls at all precincts where he was not given representation among the election officers. To request his supporters to vote at such precincts would be only to increase the vote of his opponent. If his voters remained away from the polls and counted the persons who went inside of the polls, they had a check on the number of votes which could be returned for his opponent, but if they voted themselves they would only add to the vote counted to the opponent, without any satisfactory method of preventing the fraud. And in those precincts where Mr. Aldrich was entitled to request his supporters to remain away from the polls, because of proper and well-grounded expectation of intended fraud, we further think that it would be a travesty upon justice to permit his opponent to be allowed the votes which were cast at the election in his favor.

It is the duty of this House to give some incentive to just elections in such districts (or rather in this district, because it has no equal), and the only way to give the incentive to fair elections in Dallas County is to compel the officers there to allow official representation to both parties, or to disregard the returns from such precincts in those cases where the Aldrich supporters for sufficient reason remained away from the polls.

The committee then analyzed the evidence of fraud in the precincts in contest, calling attention in some cases to the fact that it was the same sort of fraud, committed by the same persons, that had been found in these precincts by the committee in the previous Congress. The committee rejected the returns or the vote of these precincts according to the circumstances. In the case of the Selma precinct part of the testimony taken in time for rebuttal was claimed by contestee to be testimony in chief. The committee said: "We have concluded, in order to give contestee every right to which he can possibly be entitled, to disregard this evidence." The returns were, however, thrown out on other evidence. Most of the votes were proved aliunde on both sides in this precinct and were counted as proved.

On all the findings contestant was shown to have a majority of 206 in the district and the committee recommended resolutions declaring him elected.

The minority claimed that the testimony in chief taken in time for rebuttal which the majority professed to disregard had in fact been considered, and that the vote of Selma could not have been thrown out without it. They also complained that in the rejected precincts the majority had counted the vote proved aliunde wherever the contestant had proved the most votes, and had refused to count it wherever contestee had shown the most votes.

The rule of law which requires that when a precinct has been rejected for fraud in the conduct of the election the party shall be entitled to receive the votes proven by

aliunde to have been cast for him is not applied when it benefits the contestee, but is applied when it benefits the contestant. The universal rule of law is that where the evidence shows the returns to be false and not a true statement of the votes cast such returns are impeached and destroyed, but that the true vote may be proven by calling the electors whose names are on the poll list as having voted at such election, and such votes as are proven by competent evidence should be counted for each candidate. Fraud does not invalidate the legal vote cast, but simply makes it necessary for those claiming the benefit of it to prove the vote. The rule of rejecting an entire poll is not to be adopted if it can be avoided. No investigation should be spared which would reach the truth without resorting to it. When a return is rejected for fraud this will not disfranchise the legal voters of the precinct, but the true vote may be proven by competent evidence.

These principles of law have been uniformly held to be correct in many contested-election cases decided by the House, and sustained by all the authorities, some of which will be hereinafter cited.

Before proceeding to discuss the several precincts we desire to say that if all of the precincts attacked are rejected, and the contestant and contestee are credited with the votes which they proved by the voters whose names are on the poll list were cast for each, then the contestant will not be entitled to a seat in this Congress, and it will appear that he was not elected, but that the contestee was elected by a very considerable majority.

The minority also denied that contestant's supporters had been arbitrarily denied representation on the election boards. There was no law to compel the appointing board to choose the persons named by contestant. It was also not true that contestant had been refused information in regard to the appointments.

Another view we desire to present to the House, before proceeding with the details of the various precincts, is that the election in Dallas County was conducted, not for the purpose of securing votes for Mr. Aldrich, or having those who claimed to be his supporters to vote for him, but was conducted solely with the view of having a contest made after the election, and to transfer the election from the Fourth district of Alabama to the House of Representatives in Washington.

The minority then discussed the precincts in detail, showing that the evidence was not in most cases sufficient to establish the facts on which the majority based their decision. On the question of failure to appoint Republican election officers they said:

These requirements as to the appointment of clerks are not mandatory, but are directory, and an unintentional failure to comply with them would not vitiate the returns. In order for the failure to do certain specified acts or the doing of certain prohibited specific acts to be fatal to the validity of the election the statute must declare such acts or the omission to do such things as fatal to the election; that is, in order to destroy a return, for the failure of the officers to perform certain requirements in the method of conducting the election, the law must be mandatory—that is, it must declare that the failure to perform these duties avoids the election. Ignorance, inadvertence, mistake, or even intentional wrong on the part of the officials should not be permitted to disfranchise the district, and unless the statute plainly shows that the legislature intended compliance with the provision in relation to the manner of procedure as essential to the validity of the election it is to be regarded as directory only. Nor are statutory provisions relating to elections rendered mandatory by the circumstance that the officers of the election are criminally liable for their violation. The rule prescribed by law for conducting elections is designed chiefly to afford opportunity for the people to exercise the elective franchise, and to prevent illegal voting, and to ascertain the true result. As such rules are directory, and not mandatory, a departure from the mode prescribed will not vitiate the returns of the election.

According to the findings of the minority, contestee had a majority of 1,138 votes. If, however, all the returns from all the precincts in contest should be rejected, and all the votes proved aliunde counted, contestee would still have a majority of 389. The minority therefore recommended resolutions declaring contestee elected.

This case was first called up on March 1, 1900, but the House, by a vote of 137 to 144, refused to consider it. Later in the day it was called up under the call of committees, but was ruled out of order. It was again called up as a privileged question, and consideration was again refused by a vote of 128 to 132. The next day it was again called up, and the House, by a vote of 136 to 129, decided to consider it. After a debate of several days the substitutes presented by the minority were lost by a vote of 134 to 138, and the resolutions presented by the majority were passed by a vote of 141 to 135. Then, on March 8, 1900, Mr. Aldrich was sworn in.

[Report 327, first session Fifty-sixth Congress.]

(4) WILCOX.

Treason; bigamy; no valid election law. Report for sitting member, who retained the seat.

Report by Mr. Taylor.

The report is as follows:

Your committee, to whom were referred the charges preferred against Robert W. Wilcox, a Delegate from Hawaii, present the following report:

The charges against Wilcox divide themselves into three general heads:

First, that he was guilty of bigamy;

Second, that he was guilty of treason against the United States;

Third, that there was no valid election for Delegate from Hawaii.

As to the first of these charges, it appeared that Wilcox, having been married to an Italian lady, sought to obtain a divorce from her, and, under the impression that a valid divorce had been granted to him, married another woman. The most that can be claimed respecting his action is, that under a mistaken view of the law he assumed that when he contracted a second marriage the first marriage relation had been dissolved. There was no pretense that he undertook to live with two wives at the same time, or to maintain two establishments, or to hold himself out as the husband of two women. Your committee therefore were of opinion that no question of ineligibility was raised, and that this case bore not the slightest resemblance to the Roberts case, which was presented as a precedent. The Delegate from Hawaii was informed of this conclusion of the committee before he was called upon to answer formally to the charges, and for that reason his formal answer does not refer to the charge of bigamy.

In answer to the other propositions, he filed with the committee the following statement:

"IN THE MATTER OF PETITION AFFECTING DELEGATE FROM HAWAII.

"In answer to the alleged charges and facts presented to the Elections Committee No. 1 of the House of Representatives the undersigned, Robert W. Wilcox, Delegate from the Territory of Hawaii, submits:

"That he is a native Hawaiian; that he shared with the people, native then, loyalty to the former Queen Liliuokalani during her reign, and was not in sympathy with the reigning power immediately succeeding her reign.

"That after the annexation of Hawaii to the United States he labored earnestly to secure from the United States Congress an organic law for the people of Hawaii, and came to Washington and remained for five months to promote the same. He freely confesses that he did not theretofore understand fully the institutions or the feelings of the United States, but all doubts were dispelled when the Congress gave to the people of Hawaii a splendid system of organic laws, providing as fully as could be for their rights—personal, property, and political—and making them citizens of the United States.

"That in common with the people then, he at all times, with genuine patriotism, supported the United States and its institutions, and is now and has been a loyal supporter of the Constitution, laws, and Government of the United States. That on the passage of the said organic law for Hawaii, he, and the citizens of the United States and Hawaii generally, registered as a voter, and he announced his candidacy as a Delegate to Congress from Hawaii, as provided by law. That during his canvass he loyally supported the United States and its Constitution and laws, and no word

of his during said time uttered could be otherwise construed. He did during that time hold out the hope that Hawaii, now a Territory of the United States, would some time become a State of the Union. He admits that on January 31, 1899, and on March 8, 1899, he wrote two several letters marked Exhibits B and C in the petition. That said letters were of a personal and confidential nature, and sent to whom he supposed was a friend, and who he thought would not betray his confidence.

"This view was justified by the fact that the letters, exhibits, were in aid of him. He further says that said letters were written by him under an entire misconception of the real attitude of the Government of the United States toward the people of the Hawaiian Islands. And his false impressions were entirely dissipated by the action of Congress in enacting the organic law for the Territory, which was passed April 30, 1900, and took effect June 14, 1900.

"That under the laws of the United States, at a fair and free election, he was elected as a Delegate from Hawaii to the United States Fifty-sixth Congress, was sworn in as such, and is now performing the duties thereof. That in all respects he is duly qualified as such Delegate, and no reason exists or has existed disqualifying him as such Delegate from Hawaii.

"ROBERT W. WILCOX,
"Delegate from Hawaii."

THE CHARGE OF TREASON.

On the 7th of July, 1898, Congress adopted a joint resolution to provide for annexing the Hawaiian Islands to the United States. The organic act providing for a system of government for these islands was not passed until April 30, 1900. Early in 1899, Wilcox wrote several letters to an Italian friend of his in Washington, and one letter of introduction of this friend to certain representatives of the Philippines then in Washington, in which he gave expression to unpatriotic and treasonable propositions. In one of these letters he told the Philippine representatives that he was ready to give his services to their country and ready to obey orders to go to their country and fight for the independence of their people.

Your committee has carefully considered the duty of the House in this relation, and after full discussion and consideration are clearly of opinion that under the circumstances of the case no action ought to be taken by the House.

Wilcox was one of the adherents of Queen Liliuokalani, and therefore of the "royalist party." Against his will, and in spite of his objection and the objection of his associates, the monarchy was overthrown and a republic created. No doubt this revolution was in the interest of civilization and good government, but the attitude of those who believed in the monarchy and whose Government was overthrown was not to be scrutinized with the same care as if those whose conduct was questioned could justly be compelled to show instant allegiance to the new governing power.

When in 1898 the Republic of Hawaii proposed to the United States terms of annexation, which were accepted by the joint resolution of July 7, 1898, it is not strange that those who were opposed to the Republic and hoped for the restoration of the monarchy should be unwilling to yield allegiance to the power which, as it seemed to them, had forcibly assumed jurisdiction of their country. At the time when Wilcox wrote his treasonable letters the only government which the Hawaiian people had was that which the Republic of Hawaii had set up, supplemented by the resolution of 1898, which merely transferred nominal sovereignty to the United States. When in 1900 Congress provided a system of government for the Hawaiian people at once just and generous, by the orderly operation of which the Hawaiian people, on a full and representative vote, elected Wilcox as their Delegate in Congress, it was natural that a revolution in public sentiment should occur.

A Territorial Delegate has no legislative power; he can in no respect influence the legislation applicable to the States; he has no power to be feared, and is indeed merely the agent and spokesman of his people. Such being the case, in view of the changed—the radically changed—political relations between the Hawaiian people and the United States, resulting from the act of April, 1900, we do not think that the conduct of a native of the Hawaiian Islands a year or more prior to the adoption of that organic act, however improper it may have been, abstractly viewed, ought to deprive the Hawaiian people of the representative whom they have solemnly sent.

THE VALIDITY OF THE ELECTION.

The second objection to the Delegate from Hawaii is that there was no valid election by which he can claim a seat as a Delegate in this House. Technically this objection has some force. The organic act passed April 13, 1900, has this provision:

"Sec. 85. That a Delegate to the House of Representatives of the United States, to

serve during each Congress, shall be elected by the voters qualified to vote for members of the house of representatives of the legislature; such Delegate shall possess the qualifications necessary for membership of the senate of the legislature of Hawaii. The times, places, and manner of holding elections shall be as fixed by law. The person having the greatest number of votes shall be declared by the governor duly elected, and a certificate shall be given accordingly. Every such Delegate shall have a seat in the House of Representatives, with the right of debate, but not of voting."

It is not clear that the expression "shall be as fixed by law" does not mean as fixed by the law then in force in the Hawaiian Islands. This organic act reenacts all of the election laws of the Republic of Hawaii in so far as they are applicable to the conditions then existing or made to exist by the organic act itself. Under the Hawaiian system of government the only officials elected were the representatives and senators to the legislature of the Republic. For the election of these senators and representatives, full and complete machinery was devised and had been in operation up to the time of the joint resolution annexing the islands. Of course, they made no provision for the election of a Delegate to Congress, nor was any additional legislation had except that which is contained in section 85 of the act of Congress above referred to. With no machinery of election except that provided by the laws of the Republic of Hawaii and section 85 above quoted, it is claimed that no valid election could be held. In this view we do not concur.

Previous to the election of November, 1900, the proper officers issued a proclamation calling for the election of a Delegate to the United States Congress, as well as for the election of representatives and senators to the Territorial legislature. Separate ballot boxes were provided, tickets were printed, and the whole machinery set in perfect motion for the election of the Delegate to Congress. The same precautions were observed and the same kind of machinery of election provided for the election of Delegate as for representative and senator in the Territorial legislature. Practically all of the people voted, and quite as many voted for Delegate to Congress as for representatives and senators in the Territorial legislature. There was a full and free expression of the popular will, under the theory that the Territory was entitled to send a Delegate to Congress, and as a result of that full and free popular expression, Wilcox was chosen by a considerable plurality. He comes here, therefore, as the agent of his people, chosen apparently under the forms of and with all the solemnity which surrounds the most carefully conducted election, and we think he ought to be permitted to retain his seat as their representative in the capacity of a Delegate.

We are not uninfluenced, in arriving at this conclusion, by a consideration of the fact that the people who send him here are to a large extent unfamiliar with the methods, the policy, and the inspiration of a free government. They have undertaken to give expression to their desire. Since the organic act, they have, so far as we are advised, shown themselves to be loyal citizens of the American Republic, and we think that when they have thus spoken, their Representative ought to be welcomed as such. If he is not a suitable person to give expression to the wishes and feelings of the people who inhabit those islands, and who are, for all time, to be citizens of the American Republic, they will doubtless discover that fact, and in due time send another.

This report was presented March 1, 1901.

[Report 3001, second session Fifty-sixth Congress.]

(5) *DAVISON vs. GILBERT.*

Constitutionality of State redistricting law. Report for contestee. No action.

Report by Mr. Tayler.

The report is as follows:

The Committee on Elections No. 1, to whom was referred the contested election case of George M. Davison *vs.* George G. Gilbert, from the Eighth district of Kentucky, make the following report:

The contestee was elected, as shown by the official returns, by a plurality of 841.

The claim of the contestant chiefly rests upon the fact that on March 11, 1898, an act was passed by the legislature changing the boundaries of the Eighth and Eleventh Congressional districts of Kentucky, whereby the county of Jackson was taken from the Eighth district and added to the Eleventh. Jackson County having a large Republican majority, the effect of its transfer to the Eleventh was to change the

Eighth from a district which had immediately previously been Republican into a Democratic district.

As respects this act, the contestant claimed three things:

First. That it was contrary to the constitution of the State of Kentucky;

Second. That it was never properly passed by the legislature in the manner required by the Kentucky constitution;

Third. That it was contrary to the act of Congress apportioning Representatives among the States.

As to the first two propositions your committee has no difficulty in arriving at the conclusion that the act of March 11, 1898, was not in contravention of the Kentucky constitution, and that it was, as far as we have authority to inquire, properly passed by the legislature.

The third proposition, namely, that it contravenes the act of Congress, is more serious, and requires more careful consideration.

The Federal Constitution, Article I, section 4, paragraph 1, is as follows:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such regulations, except as to the Places of Choosing Senators."

This provision of the Constitution has been very much discussed; first, as to the scope of the power granted to Congress respecting the manner of holding Congressional elections; and, second, as to the expediency of the exercise of such power where it was sought to be exercised, if possessed, for the purpose of controlling the division of a State into Congressional districts.

It is believed that this is the first time in the history of the Government when Congress has been called upon to undo the work of a State which had divided itself into the proper number of Congressional districts.

When the Constitution was under consideration by the various States several of them opposed the unqualified acceptance of the provision above quoted, on the express ground that the clause was liable to misconstruction and that under its terms Congress might at some time seek to divide the States into districts, and in several States the ratifying body accepted the Constitution on condition that effort should be made to change the phraseology so as to put this matter beyond dispute. For nearly forty years the States proceeded to elect Representatives, some at large and some by districts. In 1840 the policy of electing by districts was generally approved and adopted, but several of the States continued to elect their Representatives by the vote of the entire State. The first legislation on the subject going beyond the mere apportionment of the States was enacted in 1842. In the apportionment act of that year an amendment was added in the House providing for the division of the several States into districts, composed of contiguous territory, equal in number to the number of Representatives to which the State was entitled, and each district to elect one Representative, and no more.

The amendment provoked considerable discussion, but was finally adopted.

The apportionment act based upon the census of 1850 made no provision for the division of States into districts, nor did the act of 1862. The act of February 2, 1872, provided that Representatives should be elected by districts composed of contiguous territory, and added the provision "containing, as nearly as practicable, an equal number of inhabitants." The same provision appears in the apportionment acts of 1882 and 1891.

So far as legislative declaration is concerned, it is apparent that Congress has expressed an opinion in favor of its power to require that the States shall be divided into districts composed of contiguous territory and of as nearly equal population as practicable. Whether it has the constitutional right to enact such legislation is a very serious question, and the uniform current of opinion is that if it has such power under the Constitution, that power ought never to be exercised to the extent of declaring a right to divide the State into Congressional districts or to supervise or change any districting which the State may provide.

The best opinion seems to be that the Constitution does not mean that under all circumstances Congress shall have power to divide the States into districts, but only that the constitutional provision was inserted for the purpose of giving Congress the power to provide the means whereby a State should be represented in Congress when the State itself, for some reason, has failed or refused to make such provision itself.

Justice Story, in his commentaries on the Constitution, says:

"In answer to all such reasoning it was urged that there was not a single article in the whole system more completely defensible. Its propriety rested upon this plain proposition, that every government ought to contain within itself the means of its own preservation. A discretionary power over elections must be vested somewhere.

There seem to be but three ways in which it could be reasonably organized. It might be lodged either wholly in the National Legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former. The last was the mode adopted by the convention. The regulation of elections is submitted in the first instance to the local government, which in ordinary cases, and when no improper views prevail, may both conveniently and satisfactorily be by them exercised; but in extraordinary circumstances the power is reserved to the National Government, so that it may not be abused, and thus hazard the safety and permanency of the Union."

He adds: "It is not too much, therefore, to presume that it will not be resorted to by Congress until there has been some extraordinary abuse or danger in leaving it to the discretion of the States respectively."

Hamilton, in the *Federalist*, makes this, among other comments, on the subject:

"Nothing can be more evident than that an exclusive power of regulating elections for the National Government in the hands of the State legislatures would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it by neglecting to provide for the choice of persons to administer its affairs."

Madison expressed the same views in the Virginia convention with great force, and expressed the opinion that if the elections were exclusively under the control of the State government the General Government might easily be dissolved.

Chancellor Kent, in his *Commentaries*, says:

"The legislature of each State prescribes the times, places, and manner of holding elections, subject, however, to the interference and control of Congress, which has permitted them for the sake of their own preservation, and which it is to be presumed they will never be disposed to exercise except when any State shall neglect or refuse to make adequate provision for the purpose."

In the Twenty-second Congress, first session, an elaborate report was presented by Mr. Webster on the subject of apportionment. In the course of this exhaustive statement he discusses the very question which is here involved. The following extract is fairly representative of the rest of the report on that phase of the question:

"Whether the subdivision of the representative power within any State, if there be a subdivision, be equal or unequal, or fairly or unfairly made, Congress can not know and has no authority to inquire. It is enough that the State presents her own representation on the floor of Congress in the mode she chooses to present it. If a State were to give to one portion of her territory a representative for every 25,000 persons, and to the rest a representative only for every 50,000, it would be an act of unjust legislation, doubtless, but it would be wholly beyond redress by any power in Congress, because the Constitution has left all this to the State itself."

These are the guarded words of a great commentator on the Constitution, uninfluenced by any bias or special motive, except to justly interpret its provisions.

A remarkable and convincing speech is that made in the Twenty-seventh Congress by Nathan Clifford, then a Representative from Maine and afterwards a justice of the Supreme Court of the United States. Mr. Clifford argued with great cogency against the theory that Congress had any such power as the act of 1842 undertook to express, and in our opinion those arguments have never been satisfactorily answered.

And, indeed, the force which the proposition contended for by the contestant in this case possesses is derived chiefly from the fact that, without objection for the last three decades, Congress has legislated as though no question was made as to its power over the division of States into districts. If the act of 1842, in which we find the first Congressional expression of power, had sought by its terms to define the geographical boundaries of every Congressional district in the several States it could not by any possibility have been adopted. So far as we have been able to learn, no friend of the amendment to that act contended that Congress had any such power. The construction of Madison, Story, and Kent seems most reasonable and natural.

Your committee are therefore of opinion that a proper construction of the Constitution does not warrant the conclusion that by that instrument Congress is clothed with power to determine the boundaries of Congressional districts, or to revise the acts of a State legislature in fixing such boundaries; and your committee is further of opinion that even if such power is to be implied from the language of the Constitution, it would be in the last degree unwise and intolerable that it should exercise it. To do so would be to put into the hands of Congress the ability to disfranchise, in effect, a large body of the electors. It would give Congress the power to apply to all the States, in favor of one party, a general system of gerrymandering. It is true that the same method is to a large degree resorted to by the several States, but the division of political power is so general and diverse that notwithstanding the inherent vice of the system of gerrymandering, some kind of equality of distribution results.

Your committee therefore recommends the adoption of the following resolutions:
Resolved, That George M. Davison was not elected a Representative to the Fifty-sixth Congress from the Eighth district of Kentucky, and is not entitled to a seat therein.

Resolved, That George G. Gilbert was elected a Representative to the Fifty-sixth Congress from the Eighth district of Kentucky, and is entitled to retain his seat therein.

This report was presented March 1, 1901, just before the close of the last session.

[Report 3000, second session Fifth-sixth Congress.]

(6) WALKER *vs.* RHEA.

Fraud. Report for contestee. No action.

Report by Mr. Tayler.

Aside from formal parts and tables of returns and population, the body of the brief report is as follows:

The printed testimony in the case comprised about 3,000 pages, and brought in vast detail before the committee the evidence relating to the charges of the contestant and the counter charges of contestee.

The case was most elaborately and ably argued for about two weeks before the committee, and was then considered for many weeks with the greatest care.

The conclusion arrived at as a consequence of the committee's investigation is that while the evidence shows that there were frauds and irregularities practiced, chiefly in the interest of the contestee, they fall very far short of being sufficient to justify a change in the result of the election.

This report was presented January 30, 1901.

[Report 2566, second session Fifty-sixth Congress.]

(7) WHITE *vs.* BOREING.

Name not regularly on party ticket. Report for contestee, who retained the seat.

Report by Mr. Olmsted.

Contestant and contestee were both Republicans. Contestant received 11,244 votes and contestee 15,706, a plurality for contestee of 4,462. The Democratic candidate received 3,319 votes, and the Populist candidate 122. Contestee's name was printed on the ballot under the heading "Republican ticket" and the regular Republican emblem, a log cabin. Contestant was nominated by petition, and his name was printed under the heading "Free Republican ticket," with a picture of himself as emblem. Contestant was not a candidate for the Republican nomination and did not claim the right to have his name printed in the party column, but he charged that contestee was irregularly nominated and should not have had his name in the party column. He claimed that either the party vote for contestee should be thrown out and the seat given to himself who had a majority of the remaining votes, or the election should be declared void.

Under the laws of Kentucky, party organizations and party committees were recognized. Parties were permitted to nominate either by primary election or by convention. If they nominated by primary election the committee or governing authority of the party had power

to provide for the manner in which the expenses of holding the election should be paid. Any candidate not notifying the party committee at least fifteen days before the primary election, "and any person who has not given such notice to the committee or governing authority, or who has not complied with the conditions prescribed by the committee or governing authority for the government of candidates, shall not have his name printed on the ballots used in such primary election."

It was a custom of the party in cases where only one candidate had announced himself, as above provided, to nominate that candidate by a resolution of the committee, after due notice, without action by either primary or convention.

The Republican committee had provided that the expenses of a primary election, in this case, should be provided by assessments on the candidates, to be paid at least fifteen days prior to the election. Contestee was the only candidate complying with this condition and he was nominated by the committee. Contestant claimed that both meetings of the committee were irregular, as votes were cast at them by proxy and there was not a quorum present without counting the proxies. The committee said:

We are referred to Rule No. 29 of the Republican organization of Kentucky, which is said to read as follows:

"No delegate elected to a State or district Republican convention shall be permitted to cast a vote by proxy."

This was not, however, a State or district Republican convention, and the parties present did not attend as delegates elected to said convention, but as members of the district committee of the Eleventh Congressional district of Kentucky, a standing committee. As this district committee or governing authority is recognized by statute, and is authorized in the case of a tie vote or contest at a primary election to hear and determine such contest and decide who shall be entitled to the nomination, the argument is made on behalf of contestant that its members are public officers and can not delegate their powers. But even as to public officers the distinction is always drawn between duties of a judicial nature and those which are purely ministerial. The evidence shows that not only in the State central committee, but also in the district committees of the Republican party the use of proxies is quite common.

Mr. White was not a candidate for the Republican nomination; his name was on the ballot where he had wished it to be. No effort had been made by him or by anybody to take legal steps to have contestee's name kept off the ballot as Republican candidate. The case was therefore much less strong than the case of Fairchild *vs.* Ward, in the Fifty-fifth Congress, which had been decided by that Congress not to be strong enough. There was no evidence how many voters voted for contestee by stamping under the party emblem for a "straight ticket." So far as the evidence showed, all of them may have voted for him by stamping after his name or by writing his name on the ticket. He received the majority of the votes, and the committee held that he was entitled to the seat.

Seven members of the committee signed the report above outlined. Mr. Snodgrass agreed to the conclusion, on the ground that the contestee was regularly nominated. Mr. Green also agreed to the conclusions, but presented a brief explanation stating the arguments in a slightly different way.

The report was presented March 29, 1900. The House adopted the resolutions presented without division.

[Report 876, first session Fifty-sixth Congress.]

(8) PEARSON *vs.* CRAWFORD.

Illegal registration; bribery; intimidation. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Roberts; minority report by Mr. Miers.

On the face of the returns as canvassed, contestee's majority was 238. Correcting some obvious errors, his majority was 218. Contestant made charges of bribery, intimidation, and irregularities, and of the circulation of spurious letters attributed to himself. He also attacked the vote of certain precincts, and certain individual votes, for fraud. The committee found "that the campaign was waged on the race issue, notwithstanding the fact that no negroes hold office in the Ninth Congressional district, and that they do not constitute one-tenth part of the population of said district." Contestee's entire gain over the election of 1896 was in the two counties containing most of the negro voters.

It is significant that the falling off in the Republican vote occurs in those precincts and counties in which intimidation is charged. Exhibit K, for instance (Record, p. 129), shows that the vote cast at the second precinct at Asheville was nearly 40 per cent less than the registration at that precinct; and the testimony of Henry Benson (Record, p. 147) shows that armed men, nonresidents of this precinct and partisans of contestee, were stationed at the polling place on election day. The same witness also testifies that the Republican voters of this precinct were prevented by threats from holding political meetings, and were even afraid to appear on the streets at night just prior to the election. The testimony of Senator Pritchard shows conclusively that intimidation on the part of the Democrats was predetermined, widespread, and systematic. * * *

It is impossible for the committee to define the scope or to estimate the effect, in precise words or figures of arithmetic, of the influence of intimidation, of the circulation of these letters, of the bribing of Republicans to stay away from the polls, and of mob violence on the night preceding and on the day of election. We have no hesitation in reaching the conclusion that these unlawful methods and proceedings, operating concurrently, are sufficient to overturn contestee's plurality of 228 votes; and if nothing else appeared in this case these reprehensible and dishonest methods resorted to by partisans of the contestee would justify the House in declaring a vacancy.

According to the committee, contestee claimed in his brief that one precinct should be rejected because the registration was not conducted as prescribed by law. If this claim were conceded it would settle the whole case, as there were enough other precincts of the same sort, in which the returned majorities were for contestee, to overcome, if rejected, within 3 votes of the entire returned majority of contestee, and contestee had practically admitted that 4 votes should be deducted for bribery. The committee quoted a recent legislative precedent in South Carolina for the doctrine that the law of the State was mandatory as to time and place of registration. They said:

The language of the North Carolina statute on this point is as follows (sec. 8):

"Provided, That no registration shall be had except at the times and places herein-after provided."

And in section 9:

"And such registrars shall also, between the hours of 9 o'clock a. m. and 4 o'clock p. m., for four consecutive Saturdays, and between the hours of 9 a. m. and 12 o'clock m., on the second Saturday preceding the election, at the voting place of said precinct, keep open said book for the registration of any electors residing in such precinct, etc."

Here we have the affirmative requirement that the registration shall be had at the polling place, coupled with the explicit proviso that it shall be had nowhere else; and it would be impossible to word a law in language more clearly mandatory. Upon a strict construction of the statute, and upon a strict compliance with contestee's claim as to the mandatory provisions of this statute, the case is easily settled.

In addition to this irregularity in registration there was evidence that a Democrat had stuffed the box at one precinct, and that the provision of law requiring the judges, before the opening of the polls, to examine the ballot boxes and see that there was nothing in them was violated at the other, as was shown by the discovery in it of several hundred old ballots from a former election when the box was opened at the close of the polls. The committee said:

The provision of law requiring ballots to be deposited in empty boxes is in its nature just as mandatory as a provision requiring that the ballots shall be on white paper and without device. Under such a law a ticket printed on red paper, or containing a device, is void; and, by parity of reasoning, ballots deposited in a box one-third full of tickets at the opening of the polls, resulting in an incorrect count, as in this case, must vitiate the returns. It is axiomatic that laws designed to secure the accuracy of the count are mandatory. So the returns from this precinct must be rejected, whether we decide that the law in respect of time and place of registration be mandatory or directory.

Evidence as to six other precincts was also considered by the committee and the votes of five of them rejected, and the return of the sixth rejected and the votes counted on evidence aliunde. The minority counted the five and held the evidence aliunde insufficient as to the sixth.

In one precinct the committee found that one of the officers of election had stuffed the box. The minority said that the evidence was inconclusive and contradicted, and that at most it applied only to the county, not to the Congressional, box. The majority said on this point:

The effort of the contestee's counsel to show that the box which Martin was caught in the act of stuffing was the county box is of no avail, because it is clear that he stuffed one of the boxes and that he handled part of the tickets from the Congressional box, so that his touch tainted the entire returns, and they must be rejected.

The majority rejected and the minority counted this return.

In another precinct the committee said that the evidence shows nine distinct varieties of fraud and irregularity. The return was false, the number of ballots exceeding the number of voters. The poll list introduced in evidence by contestee was forged. The Democratic judge of election, who was chairman of the board, confessed that he was drunk on quinine.

The minority could not find the nine sorts of fraud; the poll list was not introduced by contestee, and there was no proof that it was forged; the only thing wrong with the return was the omission of 11 votes cast for one Boggs.

Two returns were rejected by the committee for bribery, evidence being quoted. The minority said that there were only twelve witnesses in the one case who proved that two voters were bribed and that in the other case one witness testified that himself and two other voters were bribed.

In Asheville a witness testified that he had been promised by the Democratic county chairman of Buncombe County (who was one of contestee's attorneys in the case) \$70 if he would deliver 25 votes for contestee. This witness was arrested for perjury, and contestant claimed that his other witnesses were thereby intimidated from testifying. Three of them testified before the incarceration of the first witness, but the next morning four more who had been subpoenaed

failed to appear, and no more testimony was taken. The committee said:

Murphy's conduct in suppressing testimony at this place is absolutely indefensible, and is an act of contempt toward the House of Representatives and the notary acting under the authority of a statute of the United States which merits the emphatic condemnation of this House. This conduct of Murphy, the attorney of contestee, amply justifies the committee in rejecting the returns from the entire township.

The committee referred to the case of Featherston *vs.* Cate, in the Fifty-first Congress, as a precedent for this action.

The minority held that the case of Featherston *vs.* Cate was not a precedent. In that case a witness testified that he issued and saw voted more ballots for contestant than were voted for him. He was arrested for perjury in so testifying, and the threat was openly made by contestee's counsel that he would arrest all other witnesses he thought were swearing falsely. The committee had merely held that strict and technical proof of the vote would not be required where testimony had been suppressed. In this case the witness had charged contestant's attorney with an indictable offense and was guilty of a felony if he charged falsely. "No just inference could be drawn that the purpose was to intimidate witnesses. Witnesses who testify in contested election cases do so under regulations of law, as in other cases, and men who rely upon the testimony of such witnesses have no right to have them protected in the violation of law." There was no evidence that witnesses were intimidated from testifying. Those who failed to appear on February 24 were given in the notices to take testimony as called for February 23, and there were no subpoenas in the record to show that they had been required to appear on the next day. Even "if it be admitted that the evidence of Harrison is true, it only proves the fact that he was offered money, and that he received none, and therefore could in no way affect the results of the election."

Moreover, the arrested witness and the only other witnesses shown to have been called were all called to testify in regard to precinct No. 2, Asheville Township. There was no pretext whatever for rejecting the other eight precincts of the township, and the minority characterized the proposal to do so as "the most sweeping and monstrous proposition ever submitted to the House of Representatives."

Contestee claimed that the vote of Herrells precinct should be rejected on the ground that the Democratic judge having refused to remain for the count on the night of the election, the count was postponed until the next morning, the box in the meantime having been removed from the polling place and kept by the two Republican judges and the Republican clerk. The committee said:

While it would be a dangerous precedent to declare that the election returns should be rejected in the interest of contestee on account of the wrongful act of his own partisan, if the returns be rejected from this precinct for this informality, the contestant, of course, would be permitted to prove his vote aliunde; and this he has done, as shown by the testimony of J. C. Bowman, clerk of the superior court of Mitchell County, who, in the quotation from his testimony cited below, shows that a recount of this box was had by the notary in the presence of contestee's counsel and without objection; that the box was locked and sealed in accordance with the provisions of law, and that it had been kept in this condition in the custody of the said clerk continuously since the day after the election. The recount shows the identical number of votes for Pearson, to wit, 196, which were returned by the election officers from Herrells precinct.

The minority held that the statute requiring the ballots to be counted at the close of the polls was mandatory and that the vote must be

rejected. Votes could not be proved aliunde by recounting the discredited ballots.

The minority insist that the ballots could not be recounted as evidence aliunde of the vote actually cast at that precinct, for it is the ballots themselves which have been discredited. We submit that the only competent evidence to prove the vote cast would be testimony of sworn witnesses in such case.

On the general issues of the case the minority held that there was no evidence of the spurious character of the letters circulated in the name of contestant, or that they had lost him votes; that there was no evidence of intimidation or of any violence connected with or affecting the election, and that the precincts rejected for irregularity in the registration or for the failure to empty the box of the old ballots of the preceding election should be counted. Contestee had not asked that these precincts be thrown out, but had merely set up a counterclaim that if those asked by contestant be rejected, a similar one should be thrown out in his interest. There was no unfairness intended nor harm done by any of these irregularities, and the statute was plainly directory.

This case was called up on May 9, 1900, and Mr. Roberts, the author of the majority report, moved to strike out from that report the words "Reject Asheville 163," on page 16, and to deduct 163 from the total majority of 318 found for contestant, leaving him 155. Mr. Roberts explained that he made this motion for the purpose of limiting discussion and to show that the rejection of Asheville was not necessary to sustain the contentions of the majority. The point of order was made and sustained that the report of a committee can not be amended by the House. After further debate, the substitute resolutions proposed by the minority were lost by a vote of 127 to 128. (This is the corrected vote; it was first announced as a tie.) The resolutions proposed by the committee were passed by a vote of 129 to 127, and on May 10, 1900, Mr. Pearson was sworn in.

[Report 199, parts 1 and 2, first session Fifty-sixth Congress.]

(9) WISE vs. YOUNG.

Fraud; false counting. Majority report for contestant; minority report for contestee. Contestant seated.

Majority report by Mr. Weeks; minority report by Mr. Burke.

The issues in this case were generally similar to those in the case between the same parties in the preceding Congress, except that in place of charges of preventing votes from being cast by obstructive tactics, there were charges of stuffing the poll lists with the names of imaginary or illegal voters. Contestee only took a small amount of testimony, directed to the two points of the regularity of contestant's nomination and the good character of the election officers. So the case came before the committee practically on the evidence of contestant.

According to the returns as canvassed, contestee had a plurality of 5,979 and a majority of 2,534 votes. According to the report of the committee, the true result should be a plurality of 2,434 for contestant; according to the minority, contestee should have a plurality of 3,735, of 2,934, of 1,678, or of 897, according as the vote of Norfolk city was or was not counted, and according as the certificates of voters were accepted or rejected as evidence.

The committee rejected the entire returns of Norfolk, but counted such votes as were proved aliunde. They called attention to the fact that in the uncontested parts of the district there had been a large falling off in the vote since the Presidential election of 1896, but that in Norfolk there had been a very slight decrease, and added:

Contestant's return being laid aside, the disproportion between the return of votes cast in Norfolk and those returned from the counties, and the extraordinary vote returned for contestee from Norfolk, were sufficient to excite inquiry. After carefully looking into the evidence produced concerning these returns, we have no hesitation in declaring that no such vote was cast as was returned from Norfolk and that the contestee received no such vote there as was returned for him.

The evidence overwhelmingly establishes the fact that the judges of election in Norfolk were in collusion in the interest of the contestee, and that the contestant's theory of how the election was managed by corrupt officers, personally friendly to the contestee, is right.

In the contest in the Fifty-fifth Congress between the same parties, the House of Representatives decided that if election officers obstructed lawful voters the votes of such will be counted. It was also shown by the manner in which that contest was prepared and decided that where the aggregate of votes returned is approximately near the number of votes cast, the party defrauded, either by the throwing out of votes cast for him as defective or by the transfer of votes cast for him to the return for his opponent, may protect himself by proving the vote he actually received. In view of this, contestee, or his managers in the city of Norfolk, evidently resolved upon another plan in the last election. We call it a plan because of its uniform practice at every precinct of the city. The similarity of method with which it was put into effect in every precinct in Norfolk shows planning, forethought, and deliberation. It was in brief thus: To accept all votes offered, to make return of few defective ballots, and to add to the list of actual voters on the poll books of the several precincts enough names of fictitious voters to enable the judges to return for the contestee a false vote so large that the majority returned for him could not be overcome.

If this scheme had been worked adroitly it might have rendered the fraud practiced difficult of detection. The party thus defrauded does not complete his task by producing proof of the vote actually cast for him; the burden is still upon him to show that the vote returned for his adversary is false. Where the fictitious names copied from the registration list onto the poll book are those of his political adversaries whom he can not approach, his difficulty in getting at the proof that they did not vote is great. But the friends of the contestee practiced the fraud so bunglingly in Norfolk that their own work convicts them. It has neither the merit of novelty nor clever execution. The contestee admits, touching two precincts of the Fifth ward of Norfolk from which nearly 1,000 of his 3,600 votes from Norfolk were returned, that the returns are unworthy of belief. The admission was unnecessary, for contestant proved it. He kept tally of the votes cast and proved that the returns made were absurdly large. He then proved who were the last voters at these precincts, and that being proved, the poll books show that these sworn officers, both before and after the voting ceased, added hundreds of fictitious names to those of genuine voters on the list and returned them as cast for the contestee.

The Democratic registrars were summoned for many precincts, and admitted that many of the names appearing on the poll books were not even upon the registration lists. Many persons appearing in those poll lists, some of them Democrats, came forward and testified that they had not voted. The names thus fraudulently placed on the poll lists were so inartificially made up that they are evidence of crime. They show numbers of persons whose names begin with A voting together, followed by numbers whose names begin with B and C, and so on throughout the alphabet. Dead men were voted, and men known to be absent in the service of the United States. Prominent citizens, about whom the judges could pretend no ignorance, were written down on these lists as having voted. Where the frauds permeated every precinct, and the evidence leaves no doubt of conspiracy, and the returns are absurdly large, and poll books forged, it seems idle to go into the details of these returns from Norfolk, precinct by precinct. Suffice it to say that we dismiss the returns from Norfolk as evidence of nothing but an organized effort to return a fraudulent vote for contestee.

In the course of his impeachment of the returns in Norfolk, the contestant proved 437 votes, to which he is entitled.

In a large number of other precincts there was evidence that more votes were cast for contestant than were returned for him. In most cases more voters themselves testified that they voted for him than were returned, and a still larger number was proved by "certificates" similar to those held admissible in the previous case between the same parties. (See *Wise vs. Young*, Fifty-fifth Congress, *ante*.) The committee went over this testimony by precincts. In cases where the total vote remaining after accounting for the proved vote for contestant and the imperfect ballots was less than the vote returned for his two opponents, the committee rejected the whole return and counted only the vote proved. In cases where the discrepancy might, as a matter of arithmetic, be accounted for by the numbers of ballots rejected as imperfect, they corrected the vote according to the proof, deducting the discrepancy from contestee. Making all the corrections, they found the result as above indicated and recommended resolutions declaring contestant entitled to the seat.

The minority called attention to the fact that many of the witnesses testifying that they voted for contestant did not prove that they were registered or legal voters. They also objected to the "certificates." They then analyzed the testimony by precincts, showing that in a few cases, as admitted by contestee, the discrepancy was so large as to justify the rejection of the returns, but that in most cases the utmost that could be claimed was the correction of the returns according to the testimony, deducting the discrepancy from contestee. By this method, even on the construction most favorable to contestant, the majority of contestee was not overcome, and the minority therefore recommended a resolution declaring him elected.

The case was fully debated in the House, and the resolution presented by the minority was lost by a vote of 128 to 132. A motion to reconsider this vote was laid on the table by a vote of 132 to 129. The majority resolutions (which had first been amended to bring them into the usual form) were then voted on and were passed, the first by a vote of 132 to 127, and the second by a vote of 131 to 125. Mr. Wise was then (on March 12, 1900) sworn in.

[Report 186, parts 1 and 2, first session Fifty-sixth Congress.]

[In most of the Congresses for many years cases were duly presented to the House and referred to the Committee on Elections, which were never acted on or reported by the committee. A comparison of the list of cases given in the index to the Congressional Record (or Congressional Globe) in each Congress, with the list given in this volume, will show the names of the parties in these cases, but there is usually very little other information obtainable in regard to them, and none of that information has any bearing on the purposes of this volume. They are therefore disregarded here.]

PART II.

**DIGEST OF THE LAW OF CONTESTED ELECTION
CASES IN CONGRESS.**

INDEX OF TOPICS.

	Page.
ABANDONMENT.....	623
ABATEMENT.....	624
ABBREVIATION.....	624
ADJOURNMENT, for dinner, etc. <i>See</i> Irregularity in hours of holding election.	
ADJOURNMENT OF THE POLL by sheriff in Virginia.....	625
ADMISSION (<i>see also</i> Agreement and Waiver).....	626
AFFIDAVITS, ex parte. <i>See</i> Evidence.	
AGREEMENT (<i>see also</i> Admission and Waiver).....	626
ANSWER. <i>See</i> Notice of Contest.	
APPORTIONMENT.....	627
APPORTIONMENT ACT (<i>see also</i> Election by general ticket).....	627
ASSESSMENT OF GOVERNMENT EMPLOYEES.....	627
ASSESSOR OF DIRECT TAXES, disqualifying office. <i>See</i> Qualifications of Representatives.	
AUSTRALIAN BALLOT. <i>See</i> Ballots imperfectly marked under Australian system.	
BALLOTS, distinguishing marks.....	627
BALLOTS, double.....	634
BALLOTS, deficiency of.....	634
BALLOTS, excess of.....	634
BALLOTS, imperfect.....	636
BALLOTS irregularly marked under Australian system.....	640
BALLOTS, wrong emblem on party ticket.....	642
BALLOTS, wrong name in party column.....	643
BALLOTS in wrong box.....	643
BALLOTS, secrecy of (<i>see also</i> Election by ballot).....	645
BALLOTS as evidence of vote. <i>See</i> Recount; Returns, impeachment of; Returns, when rejected what vote counted.	
BALLOTS, recount of. <i>See</i> Recount.	
BALLOT BOXES, shifting of. <i>See</i> Ballots in wrong boxes.	
BALLOT BOXES, irregularity in and custody of. <i>See</i> Irregularity.	
BRIBERY, what constitutes (<i>see also</i> Campaign fund and Undue influence).....	646
BRIBERY, evidence of.....	648
BRIBERY, effect of.....	649
BRITISH PENSIONER, eligibility of, as Representative. <i>See</i> Qualifications of Representatives.	
BURDEN OF PROOF.....	651
CAMPAIGN FUND (<i>see also</i> Bribery).....	655
CANVASSING BOARD. <i>See</i> Irregularity in canvass and Ministerial officers.	
CENSUS as evidence.....	655
CERTIFICATE to documentary evidence. <i>See</i> Evidence, documentary.	
CERTIFICATE OF ELECTION. <i>See</i> Credentials and Prima facie right.	
CITIZENSHIP (<i>see also</i> Mexican citizens; Naturalization; Inhabitant).....	656
COMMITTEE ON ELECTIONS, precedents of.....	657
COMMITTEE ON ELECTIONS, powers of.....	657
COMMITTEE ON ELECTIONS, jurisdiction of.....	657
CONSPIRACY (<i>see also</i> Fraud).....	658
CONTEST, abandonment of. <i>See</i> Abandonment.	
CONTEST, dismissal of—	
For insufficiency of notice. <i>See</i> Notice of contest.	
For failure to appear or to take testimony. <i>See</i> Abandonment.	
For failure to take testimony before proper officer. <i>See</i> Evidence before wrong officer.	
For lack of time to investigate. <i>See</i> Mode of procedure.	
For failure of proof when application for time to take further testimony refused. <i>See</i> Evidence, additional.	

CONTEST, procedure in. <i>See</i> Mode of procedure.	
CONTEST, statute regulating. <i>See</i> Law for taking testimony.	
CONTEST, who are parties to, when contestee dead and his successor sworn in. <i>See</i> Vacancy and House of Representatives.	
CONTEST, jurisdiction over. <i>See</i> House of Representatives, jurisdiction of, and Committee on Elections, jurisdiction of.	
COUNSEL, hearing of, by House. <i>See</i> Mode of procedure.	
COUNTY COURT, power of, in West Virginia, to make a record. <i>See</i> Evidence, documentary.	
COURTS. <i>See</i> State laws.	
CREDENTIALS (<i>see also</i> Prima facie right)	660
DEAF AND DUMB. <i>See</i> Election, viva voce.	
DECEPTION (<i>see also</i> Ballots, wrong emblem and wrong name in party column).	663
DECLARATIONS OF VOTERS. <i>See</i> Evidence, hearsay, res gestæ, and declarations of voters.	
DE FACTO OFFICERS. <i>See</i> Officers of election, disqualification of, and not sworn.	
DELEGATE (<i>see also</i> Election, when set aside)	664
DEMURRE. <i>See</i> Notice of contest.	
DEPOSITIONS. <i>See</i> Evidence.	
DESERTERS. <i>See</i> Qualifications of electors.	
DILIGENCE. <i>See</i> Evidence, additional, and also under Contest, dismissal of.	
DIRECTORY LAWS. <i>See</i> Laws, mandatory and directory.	
DISMISSAL OF CONTEST. <i>See</i> under Contest, dismissal of.	
DISQUALIFYING OFFICE. <i>See</i> Qualifications of Representatives.	
DISTRICT (<i>see also</i> Apportionment act, and Election by general ticket)	668
DOMICILE. <i>See</i> Residence.	
ELECTION—	
Adjournment of. <i>See</i> Adjournment.	
Officers of. <i>See</i> Officers of election.	
Notice of. <i>See</i> Notice of election, and Irregularity.	
Place of. <i>See</i> Irregularity in place of election, and Polling place.	
Right of House to inquire into election. <i>See</i> House of Representatives.	
When election at any poll void. <i>See</i> Returns, impeachment of, and when impeached, what votes counted; and <i>see also</i> Fraud, Intimidation, Bribery, Deception, Undue influence, Irregularity, Officers of election.	
ELECTION, what constitutes	670
ELECTION, when whole election set aside	671
ELECTION, failure to hold	676
ELECTION, by ballot	677
ELECTION, viva voce (and <i>see</i> all early cases from Virginia and Kentucky)	678
ELECTION, by general ticket (<i>see also</i> election laws)	678
ELECTION, time of holding	678
ELECTION, in State in rebellion	680
ELECTION LAWS (<i>see also</i> Registration laws, and United States supervisors)	681
ELECTIVE FRANCHISE (<i>see also</i> Qualifications of electors)	683
ELECTOR. <i>See</i> Qualifications of electors.	
ELIGIBILITY. <i>See</i> Eligibility and qualifications of Representatives.	
ENABLING ACT (<i>see also</i> Utah)	683
ESTOPPEL (<i>see also</i> Agreement, Admission, Waiver, and Suppression of evidence)	684
EVIDENCE, additional	684
EVIDENCE, admissibility of	689
EVIDENCE, in chief, in time for rebuttal	690
EVIDENCE, before wrong officer (<i>see also</i> Law for taking testimony)	691
EVIDENCE, transcription and signing of	692
EVIDENCE, notices to take testimony	693
EVIDENCE, law for taking testimony	694
EVIDENCE, ex parte	695
EVIDENCE, res gestæ	697
EVIDENCE, hearsay	698
EVIDENCE, declarations of voters	700
EVIDENCE, matters of general knowledge or inference (<i>see also</i> Census)	701
EVIDENCE, how illegal votes cast (<i>see also</i> Illegal votes)	702
EVIDENCE, secondary	704
EVIDENCE, in other proceedings	705
(the above thirteen heads are properly classified under "Evidence, admissibility of," but are separated for convenient reference.)	

	Page.
EVIDENCE, documentary	706
EVIDENCE, weight of	709
For evidence required to set aside a return, <i>see</i> Return, impeachment of; for evidence of vote, when return impeached, <i>see</i> Return, when im- peached what votes counted; for amount of evidence required to prove a vote illegal, <i>see</i> Illegal votes, and Votes, presumption of legality; for evi- dence required to prove bribery, fraud, intimidation, etc., <i>see</i> under these heads.	
EVIDENCE, suppression of. <i>See</i> Suppression of evidence.	
EXECUTIVE. <i>See</i> Governor.	
EX PARTE AFFIDAVITS. <i>See</i> Evidence, ex parte.	
EX POST FACTO LAW. <i>See</i> Elective franchise.	
EXPULSION	710
EXTENSION OF TIME TO TAKE TESTIMONY. <i>See</i> Evidence, additional.	
FEDERAL ELECTION LAWS. <i>See</i> Election laws.	
FRAUD, effect of (<i>see also</i> Returns, impeachment of)	711
FRAUD, evidence of (<i>see also</i> Evidence)	715
FREEHOLD TITLE. <i>See</i> Qualifications of electors.	
GOVERNOR (<i>see also</i> Prima facie right, Credentials, and Vacancy)	718
HOUSEKEEPERS. <i>See</i> Qualifications of electors.	
HOUSE OF REPRESENTATIVES (<i>see also</i> Committee on Elections, Returns, Dele- gate, and Membership)	719
ILLEGAL VOTES, when inquired into	722
ILLEGAL VOTES, what are. <i>See</i> Qualifications of electors.	
ILLEGAL VOTES, how proved (<i>see also</i> Votes, presumption of legality of, Bur- den of proof, and Evidence)	722
ILLEGAL VOTES, how eliminated (<i>see also</i> Returns, when set aside what votes counted)	726
ILLEGAL VOTES, required evidence of qualification not produced at the polls ..	728
INCOMPATIBLE OFFICE. <i>See</i> Qualifications of Representatives.	
INDIANS	732
INDIAN RESERVATIONS	732
INELIGIBILITY (<i>see also</i> Qualifications of Representatives)	733
INHABITANT (<i>see also</i> Qualifications of Representatives)	734
INSPECTORS. <i>See</i> Officers of election.	
INTIMIDATION, what is	735
INTIMIDATION, when inquired into	737
INTIMIDATION, how proved	737
INTIMIDATION, effect of	737
INTIMIDATION, coercion of employees and dependents	741
INTIMIDATION, military interference	742
IRREGULARITIES, general principles (<i>see also</i> Laws, mandatory and directory) ..	743
IRREGULARITIES, miscellaneous informalities	745
IRREGULARITIES, indications of fraud (<i>see also</i> Fraud, and Returns, impeach- ment of)	746
IRREGULARITIES in registration (<i>see also</i> Registration)	746
IRREGULARITIES in hours of holding election (<i>see also</i> Election, time of holding) ..	747
IRREGULARITIES in form, custody or number of ballot boxes	749
IRREGULARITIES in place of election (<i>see also</i> Polling place and Unorganized counties)	751
IRREGULARITIES in officers of election (<i>see also</i> Officers of election)	753
IRREGULARITIES in poll book of viva voce election	754
IRREGULARITIES in count of votes	754
IRREGULARITIES in form of returns (<i>see also</i> Returns)	755
IRREGULARITIES in transmission of returns (<i>see also</i> Returns)	757
IRREGULARITIES in canvass of votes (<i>see also</i> Mistake)	760
JUDGES. <i>See</i> Officers of election.	
JUNIOR. <i>See</i> Ballots, imperfect, and Returns.	
JURISDICTION. <i>See</i> House of Representatives and Committee on Elections.	
LAND. <i>See</i> Qualifications of electors.	
LAND LISTS. <i>See</i> Evidence, documentary.	
LAWS, Federal election. <i>See</i> Election laws.	
LAWS of States. <i>See</i> State laws.	
LAW FOR TAKING TESTIMONY (<i>see also</i> House of Representatives, Evidence, and Notice of contest)	762
LAWS MANDATORY AND DIRECTORY (<i>see also</i> Election, Election laws, and Regis- tration laws)	763

	Page.
LEGISLATURE	766
MANDATORY LAWS. <i>See</i> Laws mandatory and directory.	
MEMBERSHIP	768
MEXICAN CITIZENS	768
MILITARY GOVERNOR	768
MILITARY INTERFERENCE. <i>See</i> Intimidation.	
MILITARY RESERVATIONS	769
MINISTERIAL OFFICERS (<i>see also</i> Officers of election and Canvassing board)	769
MISTAKE (<i>see also</i> Irregularities and Evidence)	770
MODE OF PROCEDURE	772
NATURALIZATION	775
NOTARY. <i>See</i> Evidence, before wrong officer, and Waiver.	
NOTICE OF CONTEST, service of	777
NOTICE OF CONTEST, sufficiency of	778
NOTICE OF CONTEST, binding force of	781
NOTICE OF CONTEST, answer to	783
NOTICE OF ELECTION (<i>see also</i> Vacancy)	784
NOTICE TO TAKE TESTIMONY. <i>See</i> Evidence, notices to take.	
OATHS. <i>See</i> Officers of election.	
OFFICE disqualifying. <i>See</i> Qualifications of Representatives.	
OFFICERS OF ELECTION, presumption in favor of acts of	784
OFFICERS OF ELECTION, disqualification of	786
OFFICERS OF ELECTION, not sworn	790
OFFICERS OF ELECTION, partisan appointment of	793
OFFICERS OF ELECTION, change or delay in appointment	796
PAUPERS (<i>see also</i> Residence)	796
PETITION. <i>See</i> Notice of contest.	
PLACE OF ELECTION. <i>See</i> Polling places.	
PLEADINGS. <i>See</i> Notice of contest.	
POLLING PLACES (<i>see also</i> Irregularities in place of election)	797
POLL TAX. <i>See</i> Tax.	
POLYGAMY	799
PRIMA FACIE RIGHT (<i>see also</i> Credentials and Burden of proof)	799
QUALIFICATIONS OF ELECTORS (<i>see also</i> Illegal votes, Residence, Agreement, Tax, Indians)	802
QUALIFICATIONS OF REPRESENTATIVES (<i>see also</i> Delegate, Inhabitant, Ineligibility, Citizenship)	805
REBUTTAL. <i>See</i> Evidence in chief in time for rebuttal.	
RECOUNT	809
REJECTED VOTES. <i>See</i> Votes illegally rejected.	
REGISTRATION (<i>see also</i> Illegal votes)	815
REGISTRATION LAWS	817
REPRESENTATIVES, qualifications of. <i>See</i> Qualifications of Representatives.	
RESIDENCE what constitutes	819
RESIDENCE of laborers	821
RESIDENCE of soldiers	822
RESIDENCE of soldiers in Soldiers' Home	822
RESIDENCE of paupers and prisoners	822
RESIDENCE of students	823
RESIGNATION. <i>See</i> Qualifications of Representatives and Vacancy.	
RES INTER ALIOS ACTA. <i>See</i> Evidence in other proceedings.	
RETURNS as evidence	825
RETURNS, when set aside (<i>see also</i> Irregularity)	828
RETURNS, evidence to impeach (<i>see also</i> Evidence and Fraud)	831
RETURNS, when rejected, what votes counted (<i>see also</i> Fraud, effect of)	833
RETURNS, when rejected. What evidence required to establish vote aliunde (<i>see also</i> Evidence)	837
RETURNED MEMBER. <i>See</i> Credentials and Prima facie right.	
SHIFTING OF BALLOT BOXES. <i>See</i> Ballots in wrong boxes.	
SOLDIERS. <i>See</i> Residence and Legislature.	
STATE LAWS (<i>see also</i> House of Representatives)	842
STIPULATION. <i>See</i> Agreement and Waiver.	
STUDENTS. <i>See</i> Residence of students.	
SUPERVISORS OF ELECTION. <i>See</i> United States supervisors.	
SUPPRESSION OF EVIDENCE	845
TAX	847
TAX LISTS. <i>See</i> Evidence, documentary.	

TENDER. <i>See</i> Votes constructively rejected.	
TERRITORIAL DELEGATE. <i>See</i> Delegate.	
TESTIMONY. <i>See</i> Evidence.	
TIE VOTE	84
TIME FOR TAKING TESTIMONY. <i>See</i> Evidence.	
TIME OF ELECTION. <i>See</i> Election.	
UNDUE INFLUENCE (<i>see also</i> Bribery, Deception, and Intimidation)	849
UNITED STATES MARSHALS (<i>see also</i> Bribery)	849
UNITED STATES SUPERVISORS	849
UNORGANIZED COUNTIES	851
UNORGANIZED TERRITORIES. <i>See</i> Delegate.	
UTAH	852
VACANCY (<i>see also</i> Resignation)	852
VACANCY occurring after redistricting. <i>See</i> District.	
VIVA VOCE ELECTION. <i>See</i> Election by ballot and Election viva voce.	
VOTERS, testimony of, when election by ballot. <i>See</i> Election by ballot.	
VOTERS, qualifications of. <i>See</i> Qualifications of electors.	
VOTERS, evidence of, to impeach returns. <i>See</i> Returns, evidence to impeach.	
VOTERS, relation to contest	853
VOTES, presumption of legality of	854
VOTES, sundry irregularities	854
VOTES, illegal. <i>See</i> Illegal votes.	
VOTES not cast. <i>See</i> Intimidation and Votes constructively rejected.	
VOTES, excess of. <i>See</i> Ballots, excess of.	
VOTES illegally rejected	855
VOTES constructively rejected	858
VOTING MACHINE	861
WAIVER (<i>see also</i> Agreement, Admission, and Estoppel)	862
WEST VIRGINIA	864

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DIGEST OF LAW.

ABANDONMENT.

Case not defended by contestee.

Where the contestee, being engaged in a contest for a seat in the Senate, did not appear to defend his right to a seat in the House, and produced very little testimony, the committee assumed that he was not entitled to the seat, apparently for this reason among others.

Sheridan vs. Pinchback, 43d Cong Smith, 322-341

Contests evidently abandoned; cases dismissed.

Where contestants failed to file briefs and paid no attention to repeated notices to appear before the committee, the committee reported resolutions declaring contestee elected, and giving contestants leave to withdraw their papers.

Merchant and Herbert vs. Acklen, 46th Cong I Ells., 345

No testimony taken; case dismissed.

Where no testimony was taken by contestant, he alleging that it was impossible for witnesses to testify with safety, the case was dismissed for want of prosecution.

Witherspoon vs. Davidson, 47th Cong 2 Ells., 163

Where the petitioner alleged irregularities and illegal voting, but presented no testimony and explained his laches by asserting that he had been refused permission to see the returns, or procure copies of them, and that there was no law of the Territory (of Arkansas) by which he could compel the attendance of witnesses, the case was dismissed.

Lyon vs. Bates, 17th Cong C. & H., 372

Neglect to appear.

A memorial was presented October 18, 1803. The petitioner at three different times requested further time to produce testimony. He was finally notified to appear before the committee with his testimony, and not having done so, on March 9, 1804, the case was dismissed.

Cabell vs. Randolph, 8th Cong C. & H., 134

Abandoned by petitioner, continued by the House.

Where a petitioner failed to appear and prosecute his petition after testimony had been taken, the case was recommitted to the Committee on Elections. The report of the committee and decision of the House were based on the testimony already taken by the parties.

Kelly vs. Harris, 15th Cong C. & H., 261

Committee does not lose jurisdiction of case.

Where testimony had been taken and briefs filed, but contestant, having been appointed minister to Guatemala, stated to the committee that he no longer desired to prosecute the contest, the committee expressed the opinion that it did not lose jurisdiction of the case, but in the absence of any suggestion of collusion and in view of the character of the issues (ordinary questions as to individual illegal votes), they did not deem it necessary to examine the evidence in detail and reported in favor of contestee.

Hunter vs. Rhea, 55th Cong Report 1356

Election of contestant conceded.

Where contestant conceded the election of contestant, the committee commended his action, and reported resolutions seating contestant.

Belknap vs. McGann, 54th Cong Report 5

Contest withdrawn; case dismissed.

Contestant claimed to have been injured by false reports that he had signed a petition against a law giving bicycles equal rights with other vehicles, and offered in writing to withdraw from the contest if any such petition with his signature could be shown. Contestee produced the petition and contestant formally withdrew. In view of these facts and of the fact that no testimony had been taken, the committee reported in favor of contestee.

Chesebrough vs. McClellan, 54th Cong Report 48

Contest abandoned; case dismissed.

Contestant served notice of contest, but appeared to have taken no further steps. The committee reported resolutions confirming contestee in the seat.

Davis vs. Culberson, 54th Cong Report 180

Where contestant gave no notice of contest, as required by law, and took no testimony, the committee reported in favor of contestee.

Pearce vs. Bell, 54th Cong Report 1529

Where contestant took no testimony and stated to the committee that he had no desire further to press his contest, the committee reported in favor of contestee.

Clark vs. Stallings, 55th Cong Report 188

After the taking of testimony in a case had proceeded for some time, contestant formally abandoned the contest, and filed a statement to that effect with the papers in the case. The committee reported these facts, and recommended resolutions declaring contestee elected.

Comer vs. Clayton, 55th Cong Report 195

Where contestant took no testimony, and stated to the committee that he had abandoned the contest, the committee reported in favor of contestee.

Willis vs. Handy, 55th Cong Report 1239

ABATEMENT.**Contest does not abate by death of contestee and swearing in of his successor.**

Where contestee had died after the testimony was taken and a successor had been elected to fill the vacancy and sworn in, the committee held that the contest did not abate, for if it should appear that contestant had been elected at the first election, then there was no vacancy to be filled, and the new sitting member had no rights to be prejudiced by any pleadings or agreements made by his predecessor.

Mackey vs. O'Connor, 47th Cong 2 Ells., 564

Contest under the statute abates by death of either party.

Contest between a contestant and contestee, under the statute, is a proceeding *inter partes*, and abates on the death of either party.

Mackey vs. O'Connor (minority report), 47th Cong 2 Ells., 599

ABBREVIATION.**The word "two" not to be counted as "twelve."**

Where the statute required the return to set forth the number of votes received "in words at length," and the return from one county showed for contestee "eight hundred and *two*" votes, the governor issued a special proclamation, quoting from cases in which the words "thous" and "hund" had been construed to mean

"thousand" and "hundred," and concluding that it would be "more in consonance with adjudged cases" to add the letters "lve" to the "twe" of the return than to change the "e" to "o." Counting the vote as eight hundred and *twelve* gave the majority to contestee. The committee held that the return should either have been counted as eight hundred and *two*, or evidence procured to explain the ambiguity, or the word rejected as meaningless and the return counted as eight hundred.

The minority sustained the legality of the governor's ruling, but there being evidence in the record (which had not been before the governor) that the actual vote was eight hundred and *two*, the minority so counted it.

Smith vs. Jackson, 51st Cong Rowell 17

ADJOURNMENT

For dinner, etc., see *IRREGULARITY in hours of holding election.*

ADJOURNMENT OF THE POLL

BY SHERIFF (IN VIRGINIA).

His power discretionary.

The power of the sheriff in Virginia to adjourn the poll to the second and third day, in consequence of rain, is discretionary. He also has power to close the poll at any time of the day after three proclamations made, and no voters appearing.

Trigg vs. Preston, 3d Cong C. & H., 78

Prima facie legal.

Under the power given the sheriff in Virginia to adjourn the poll in certain contingencies, an adjournment is *prima facie* legal.

Bassett vs. Bayley, 15th Cong C. & H., 255

Election officers in Virginia have full discretion.

Under the Virginia law authorizing the officers of election, if by rain or the rise of water courses many voters have been prevented from attending the election, to adjourn the poll for three days, the election officers from the very nature of the case must be the judges whether the contingency has occurred, and even had it "clearly appeared that they were mistaken in this judgment, the committee do not think that their proceedings should be declared illegal and void, in the absence of all proof and of all complaint that they acted fraudulently."

Goggin vs. Gilmer, 28th Cong I Bart., 71

The legal contingencies must exist.

Under the law of Virginia giving the sheriff power to adjourn the election for three days in case of rain, rise of water courses, or the attendance of more voters than can be polled in one day, the existence of the latter contingency is a question of fact, admitting of no discretion on the part of the officer, and on proof that it did not in fact exist the adjournment will be held to be illegal, and all votes given after the first day rejected. Where it was proved that only two persons voted during the last half hour, and at the close of the polls only four persons were present who had not voted, two of whom were deputy sheriffs, who had been in attendance all day, an adjournment to the second day was held to be illegal.

Bassett vs. Bayley, 18th Cong C. & H., 257

Mayor in Virginia has same power as sheriff.

Under the Virginia laws granting to the sheriffs of counties the right to adjourn the poll in certain contingencies, it was held that the same power was possessed, by implication, by the mayor of Norfolk.

Loyall vs. Newton, 21st Cong C. & H., 522

In Virginia entire election must not last more than three days.

Under the provision of the Virginia general election law of 1831, that the sheriffs in certain contingencies should adjourn the poll "until the next day, and so from day to day for three days; * * * but if the poll * * * is not closed on the first day the same shall be kept open two days thereafter," *held*, that the entire election should not consume more than three days, and votes given on the fourth day should be rejected.

Draper vs. Johnston, 22d Cong......C. & H., 705

It had been legal in Virginia for an election, under some circumstances, to be held for four days. The legislature passed an act in regard to elections in general, containing a provision which the committee construed to mean that elections were thereafter to be held not more than three days, but in regard to elections for Representative in Congress the provision was that they should be held "in the manner and according to the principles prescribed by the law *now* in force in relation thereto." It was claimed that this excepted elections for Representative in Congress, and permitted them to be held for four days, as under the old law, but the committee concluded that it was not the intention of the legislature to have the poll for Representative in Congress continued longer than that for other officers voted for at the same election.

Draper vs. Johnston, 22d Cong......C. & H., 705

ADMISSION (see also Agreement and Waiver).

Admissions of parties may be disregarded.

Where the contestant admitted 73 illegal votes, but the minority could not find so many, they deducted only those shown by the evidence to be illegal. "Generally the admission of a party is received as proof, but it would not be proper to do so in this instance."

Blair vs. Barrett (minority report), 36th Congress. Report No. 563......page 44

Admission in brief followed, but not held binding.

Where fraud was shown in a number of precincts, and the only votes proved aside from the returns were for contestant, but contestant in his original brief filed with the committee had conceded to contestee all the votes not proved to have been cast for himself, the committee, on account of this concession, and because it was only a question of the size of contestant's majority, and not of the result of the election, counted the votes according to the method of contestant's brief, but stated that the strictly legal course would have been to reject the entire returns and count only the votes proved *aliunde*.

Miller vs. Elliott, 51st Cong......Rowell, 527

AFFIDAVITS, EX PARTE.

See EVIDENCE.

AGREEMENT (see also Admission and Waiver).

Parties can not increase or diminish the elective franchise.

The agreement of parties can neither diminish nor enlarge the elective franchise as secured by the laws of the commonwealth.

Porterfield vs. McCoy, 14th Cong......C. & H., 269

To be received with great caution.

"The agreement of parties has sometimes been received as to disputed questions of fact, but it has always been held that this should be done with great caution, as these are not merely contests between the parties, but the rights of the people of the district and of the State and of the people of the United States are involved and can not be agreed away."

Holmes and Wilson, 46th Cong......I Ells., 324

APPORTIONMENT.

When State divided total representation not increased.

The State of Virginia, under the apportionment of 1850, was entitled to eleven Representatives. When the State of West Virginia was admitted, with three Representatives, the committee held that Virginia was then entitled to only eight.

Segar, 41st Cong.....2 Bart., 810

APPORTIONMENT ACT (see also Election by General Ticket).

When it went into force.

The apportionment act under the Seventh Census was held to apply *mutatis mutandis* to the Eighth Census, and as the apportionment under the Seventh Census was to go into effect on March 3, 1853, that under the Eighth was to go into effect on March 3, 1863.

Lowe, 37th Cong.....I Bart., 418

California act of March 13, 1883, constitutional.

The committee held that the apportionment act of California, passed March 13, 1883, was constitutional and that the members elected under it were entitled to retain their seats. The provision of the constitution of California requiring each bill to be read three times did not apply to amendments.

California Case, 49th Cong.....Mobley, 481-485

Doubtful if House should take cognizance of its violation by a State.

Where it was claimed that the legislature of Kentucky had redistricted the State contrary to the provisions of the apportionment act of Congress, the committee reported that it was doubtful if Congress had the power to interfere in such matters, and it was certainly not politic to exercise the power if it existed.

Davidson vs. Gilbert, 56th Cong.....Report 3000

ASSESSMENT OF GOVERNMENT EMPLOYEES.

To be condemned, but not fatal to the election.

The majority report held that while the assessment of Government employees for political purposes was demoralizing and ought to be made a criminal offense, it could not affect the result of an election unless it was shown that the money thus raised was used corruptly, which was not claimed in this case. On the whole case, which involved other issues, the House agreed with the minority.

Platt vs. Goode, 44th Cong.....Smith, 658

ASSESSOR OF DIRECT TAXES.

DISQUALIFYING OFFICE. *See* QUALIFICATIONS OF REPRESENTATIVES.

AUSTRALIAN BALLOT.

See BALLOTS irregularly marked under Australian system.

BALLOTS.

DISTINGUISHING MARKS.

Any mark by which ballot may be identified when counted.

Under the Michigan Australian ballot law, which provided that any ballot which shall have any distinguishing mark or mutilation shall be void and shall not be counted, the committee said: "A distinguishing mark may be defined as 'any mark

by which a ballot may be identified when it is counted, and by which parties making an agreement before voting can show by the ballot that they have carried out the agreement; no such vote should have been counted by the inspectors." They followed a recent decision of the supreme court of Michigan in throwing out these votes.

Belknap vs. Richardson, 53d Cong. Report 1946, p. 5

Their use condemned as a violation of the secrecy of the ballot.

Where the tickets used by one party were distinguished by having red stripes on the back, the committee said: "It is clear to the committee that such marks upon ballots are in violation of the spirit of the law that provides for a ballot system; one of its great objects, if not its greatest one, is to allow the elector to make his choice by a secret vote, which no one shall have the right to question, to examine, or to know; and to protect those who desire it in this right the law implies, if it does not absolutely require, that the tickets shall be folded by those who intend to vote them, and so folded they shall be placed in the ballot box. It is intended that no one shall be able to know, by seeing the outside of a ballot, what its character may be." "While it might be going too far to reject such ballots, unless so provided by law," yet it is evident that their use greatly facilitated intimidation.

Whyte vs. Harris (majority report), 35th Cong. I Bart., 260

Statute against, mandatory.

Where the statute prescribes the form of the ballot, and that "any ballot otherwise than described is illegal and must be rejected," the statute is mandatory. Under such a law ballots containing the names of candidates for "district electors," there being no such officers known to the law, must be rejected entire, and can not be counted even for the officers correctly designated.

Lowe vs. Wheeler (minority report), 47th Cong. 2 Ells., 107

South Carolina law mandatory.

Ballots rejected because obnoxious to the law of South Carolina against marked and mutilated ballots were properly rejected and can not be counted.

Smalls vs. Elliott, 50th Cong. Mobley, 669

Strict construction safest.

A strict construction of statutes in regard to distinguishing marks on ballots is the safest. (Authorities cited.)

Lynch vs. Chalmers (minority report), 47th Cong. 2 Ells., 373-375

Not a violation of a law that "the election shall be by ballot."

The law of Maryland provided that "the election shall be by ballot," and that "upon the ballot shall be written or printed the name or names of the persons voted for, and the purpose for which the vote is given, plainly designated." Where these provisions were complied with, but the tickets of one party were distinguished by having red stripes on the backs, the minority (whose conclusions were substantially adopted by the House) said: "We can not for a moment admit that the marks on the ticket, or the color of the paper on which the name and office are thus plainly designated, have anything to do with the legality of the vote cast, or are to be held as infringing the law of the State."

Whyte vs. Harris (minority report), 35th Cong. I Bart., 264

Numbering of ballots not fatal.

"The numbering of the ballots cast at an election, in the absence of any statute expressly so declaring, does not of itself invalidate an election, unless some injury is shown to have resulted."

McKenzie vs. Braxton, 42d Cong. Smith, 25

Where the statute made it a misdemeanor for any judge of the election to place a number or mark upon the ticket of any voter, but it was not declared that the vote of a legally qualified voter should be rejected because his ballot was marked by the judges, the committee said: "We should not be inclined to put a construction upon this statute which would enable an officer of election to destroy the effect of a ballot cast in good faith by a legal voter by placing a number or mark upon it. A

ballot may be thus marked or numbered without the knowledge or consent of the voter, and it would be manifestly unjust that he should, in this way, be deprived of his vote. We think it plain that, inasmuch as the statute affixes a penalty for marking a ballot, and does not expressly declare that a marked ballot shall be thrown out, the board erred in rejecting the vote of this county upon this ground."

Giddings vs. Clark, 42d Cong......Smith, 95

The numbering of ballots by the election officers held not to be an irregularity calling for the rejection of the poll under the laws of Florida.

Finley vs. Walls, 44th Cong......Smith, 374

The numbering of ballots in the absence of any statute forbidding it, and without fraud or injury, does not vitiate them.

Bisbee vs. Hull, 46th Cong......I Ells., 319

Ballots numbered by the officers of election, in the absence of, or contrary to State law, should be counted.

Donnelly vs. Washburn (minority report), 46th Cong......I Ells., 494-503

Not numbered, thrown out.

Under the Australian ballot law of Missouri, which the committee construed as mandatory, the committee threw out all the ballots on which the judges of election had not properly placed their initials or the ballot numbers. The minority held that the statute was directory, and counted the votes.

O' Neill vs. Joy, 53d Cong......Report, 268

A law for the numbering of ballots unconstitutional, where the election required to be "by ballot."

The constitution of Minnesota provided that "all elections shall be by ballot." The legislature passed an act requiring the election officers in cities to number the tickets. This law was held to be unconstitutional by the district court of one of the counties previous to the election, and the decision was affirmed by the supreme court of the State subsequent to the election. The decision was based on the ground that a numbered ticket is not a "ballot," inasmuch as it does not preserve the secrecy of the vote implied in the word "ballot." At the election in contest, previous to this decision, the election officers in some precincts numbered the ballots. The committee approved of the reasoning of the decision, and rejected the votes of all the precincts where the ballots were numbered, on this ground, and also on the ground that it was shown that the numbering was part of a conspiracy to intimidate the voters.

Donnelly vs. Washburn (majority report), 46th Cong......I Ells., 455

Ballots not numbered, thrown out.

Under the law of Missouri providing for the numbering of all ballots, and that "no ballot not numbered shall be counted," the committee rejected the votes of three precincts where none of the ballots were numbered.

Lindsay vs. Scott, 38th Cong......I Bart., 572

The prefix "Hon" not a distinguishing mark.

Where the statute provided that ballots should have no distinguishing mark, the committee unanimously held that the prefix "Hon" was not such a mark.

Burns vs. Young, 43d Cong......Smith, 181

Fenn vs. Bennett, 44th Cong......Smith, 593

Writing by officers of election not fatal.

Under the statute of California (sec. 1206) providing that "When a ballot found in any ballot-box bears upon the outside thereof any impression, device, color, or thing * * * it must with all its contents be rejected," the committee held that ballots on the back of which the election officers had written the word "challenged" and the voter's name ought not to be rejected. "While the strict letter of the law would exclude these ballots, yet the spirit of the law is evidently otherwise. If the voter had placed this indorsement upon the ballot, or any mark whatever by which it could be distinguished from other ballots, they should be rejected. The law was made to protect the voter, and not to disfranchise him."

Wigginton vs. Pacheco, 45th Cong......I Ells., 13

Voter's name on face of ballot not a distinguishing mark.

Under the statute of California (sec. 1207) providing that "when a ballot found in any ballot box bears upon it any impression, device, color, or thing, or is folded in a manner intended to designate or impart knowledge of the person who voted such ballot, it must, with all its contents, be rejected," the committee held that a mark on the face of the ballot, in order to invalidate it, must be one intended to impart knowledge of the person who voted it, and that the voter's name, written by himself at the bottom of the ticket, was not such a mark. The minority held that any mark whatever was included in the terms of the statute, and also that the voter's name in his own handwriting was calculated to impart knowledge of his identity.

Wigginton vs. Pacheco, 45th Cong. I Ells., 15, 40

Marks on back, by inadvertence, not material.

Where, under the Ohio statute against distinguishing marks, the judges of election had rejected a ballot containing a name and two rows of figures on the back, but the evidence showed that it was voted in this condition by inadvertence, the committee said, "we do not think that it is within the mischief intended to be prevented by the statute," and counted the ballot. The minority held that it was properly rejected.

Wallace vs. McKinley, 48th Cong. Mobley, 187, 209

Pencil marks made by voters on face of ballots not distinguishing marks.

Under the Ohio statute requiring the ballots to be "without any mark or device by which one ticket may be distinguished from another, except the words at the head of each," three ballots having pencil marks on the face, made by the voters, were rejected by the judges of election. Held, that "the object of this statute was to guard against frauds upon the voter, and these cases do not fall within the spirit or letter of the statute." The committee counted the ballots. The minority held that it being proved that the ballots in this case were marked for the express purpose of identification by persons who were suspected of a design to vote against their party ticket, and who adopted this plan to show the party managers how they voted, the ballots were properly rejected.

Campbell vs. Morey, 48th Cong. Mobley, 217, 235

The caption "Chronicle Selected Ticket" not misleading.

Ballots having the caption "Chronicle Selected Ticket" were not obnoxious to the law of Missouri, which provides that the caption shall not be calculated to mislead the voter, and should have been counted.

Sessinghaus vs. Frost, 47th Cong. 2 Ells., 392

The words "Republican ticket" a "device."

The law of North Carolina provided that "the ballots shall be on white paper and may be printed or written, or partly written and partly printed, and shall be *without device*." The committee held that under this statute ballots having printed at the head the words "Republican Ticket" were properly rejected by the election officers as having a device, but stated that they had "come to this conclusion with much reluctance."

The minority called attention to the fact that these tickets were printed in a Democratic printing office by the procurement of a prominent Democrat, and left to the House the question whether they should be counted or not. On the whole case the House sustained the report of the majority.

Yeates vs. Martin, 46th Cong. I Ells., 388, 412

Names of candidates for President and Vice-President a distinguishing mark.

Under a statute forbidding the printing of "any picture, sign, color, mark, index, or insignia" on the ballots, the committee rejected ballots containing the words "For President, Benjamin Harrison; for Vice-President, Whitelaw Reid" at the top. The minority counted these ballots.

Thrasher vs. Enloe, 53d Cong. Report 842, pp. 3, 10

The words "1st district," "2nd district," etc., not obnoxious to the law against "figures."

Where the ballot is required to be "a plain piece of white paper, without any figures, marks, rulings, or embellishments thereon," held that the numerals 1st, 2nd, 3rd, etc., designating the electoral districts of the State, do not come within the letter or the spirit of the law.

Lowe vs. Wheeler, 47th Cong. 2 Ells., 64

Where the statute prohibited printing or writing on the ballot anything but the names of the candidates and the offices to which they were to be chosen, Mr. Ranney held that "it is sufficient that the words and figures were designed only to describe the candidates and to designate the offices, so as to express the intention of the voter. * * * The statute allows of all that may properly be used to express the intention of the voter as to candidates and the offices." The words "1st district," "2nd district," etc., before the names of the candidates for presidential electors, were therefore not obnoxious to the law. (On this point Mr. Ranney's report evidently expresses the views of the majority of the committee.)

Lowe vs. Wheeler (Mr. Ranney), 47th Cong. 2 Ells., 82

Use of too heavy type a "mark."

When the ballot is required to be "without any figures, marks, rulings, characters, or embellishments thereon" the minority held that a ballot on which one of the names was printed in such heavy type as to be noticeable on the back of the ticket was "marked" within the meaning of the law and must be rejected.

Lowe vs. Wheeler (minority report), 47th Cong. 2 Ells., 116

The use of extra heavy type invalidates the ballot.

Under the South Carolina law requiring the ballot to be "without ornament, designation, mutilation, symbol, or mark of any kind whatsoever" * * * "and such ballot shall be so folded as to conceal the name or names thereon," the committee threw out all the ballots cast for contestant on the ground that his name was printed in heavy type, which, when the ballots were folded in a certain way, could be distinguished by the impression on the back.

Miller vs. Elliott, 52d Cong. Stofer, 170

The minority denied that the type and folding in this case in fact made the ballots distinguishable, and condemned their rejection.

Müller vs. Elliott (minority report), 52d Cong. Stofer, 188

Printers' dashes not distinguishing marks.

Where ballots were required to be "without any device or mark by which one ticket may be known or distinguished from another, except the words at the head of the ticket, * * * and a ticket different from that herein prescribed shall not be received or counted," the committee held that printers' dashes, such as are used in the ordinary course of printing and regarded by printers as marks of punctuation, did not constitute such "device or mark," especially where it was shown that they were printed on the tickets without any intention to violate or evade the law, and that they were not intended or used to distinguish the ballots. This decision was made in spite of a contrary decision by the supreme court of the state from which the case came.

Lynch vs. Chalmers, 47th Cong. 2 Ells., 340-353

Ordinary appliances of printing must be shown to have been used for illegal purposes to constitute them distinguishing marks.

Under a strict statute against distinguishing marks it may be that printers' dashes or other punctuation marks, or even the type in the body of the ticket or the arrangement of the words at the head, can be used as "marks or devices," but the extreme limit to which the law could be applied in such cases would be to inquire, "first, in the use of these appliances, which are ordinarily used in printing, were they so arranged as that they become 'marks and devices,' and were they so used and arranged for that purpose; and, secondly, was the unusual manner of their being used such as might or ought to put a reasonably prudent man on his guard?" No case had been called to the attention of the committee which went even so far as this.

Lynch vs. Chalmers, 47th Cong. 2 Ells., 351

The fictitious names "A. Doyle," "B. Doyle," "C. Doyle," etc.

Where, under the Australian ballot system, in New York, certain ballots had a name "scratched" and the fictitious names "A. Doyle," "B. Doyle," "C. Doyle," etc., in series, for sixteen names, substituted, the minority, whose conclusions were sustained by the House, rejected these ballots, among other reasons for these distinguishing marks. The committee refused to reject them.

Noyes vs. Rockwell, 52d Cong......Stofer, 31-35; 43

The preposition "for."

Where the ballots of contestant had been thrown out by county canvassing boards on the ground, among others, that the preposition "for" in the phrase "for Congress" was in contravention of the law requiring the ballots to contain nothing "except the name or names of the person or persons voted for and the office to which such person or persons are intended to be chosen," the minority held that the ballots were improperly rejected. (The majority rejected them on other grounds.)

Miller vs. Elliott (minority report), 52d Cong......Stofer, 183

Use of unusually thick paper a distinguishing mark.

Where ballots were required to be written or printed on "plain white paper" of a certain size and "without any distinguishing marks or embellishments thereon," tickets printed on white paper so much thicker than ordinary paper as to be easily distinguished were in violation of the law, and also of the State constitution, which provided that "all elections shall be by ballot."

English vs. Peelle, 48th Cong......Mobley, 168

Use of thicker paper not a distinguishing mark.

Where the tickets of one party were printed on "No. 2 book paper" and those of the other party on "No. 3 book paper," those printed on the thicker paper can not be thrown out as having a "distinguishing mark or embellishment."

English vs. Peelle (minority report), 48th Cong......Mobley, 178

Not on "plain white paper."

Under the mandatory statute of South Carolina requiring that the "ballot shall be of plain white paper," the committee rejected all the ballots cast for contestant on the ground that the paper on which they were printed ("40-pound white book paper," described by some witnesses as of a "dirty white" or "dark white" color) was not "plain white paper."

Miller vs. Elliott, 52d Cong......Stofer, 167-173

The minority asserted that the paper was in fact "plain white paper."

Miller vs. Elliott (minority report), 52d Cong......Stofer, 186

Type wrong size; ballots counted.

Under a statute, expressly mandatory in this clause, requiring the letters at the head of the columns to be one-fourth of an inch high, the letters in the word "Independent," at the head of an independent Republican column on the ballot, were only one-eighth inch high in two counties; but the committee counted them, concluding that from the general trend of its decisions on similar questions the supreme court of Illinois would in such a case inquire whether any fraud was intended or any harm done.

Rinkner vs. Downing, 54th Cong......Report 1400, p. 30

Exact size immaterial.

Under the Ohio statute requiring the ballot to be "not more than 2½ nor less than 2¼ inches wide," a written ballot 2¼ inches wide was voted. The committee held the exact size to be immaterial and that the ballot was properly counted, under the principle that "as to those things over which the voter has control the law is mandatory, and that as to such things as are not under his control it should be held to be directory only."

Campbell vs. Morey, 48th Cong......Mobley, 218

Less than one-fifth of an inch below last name immaterial.

Under the Ohio statute requiring a space of at least one-fifth of an inch between each name on the ballots, certain ballots were attacked on the ground that there was less than a fifth of an inch left below the last name on the ticket. The committee held that they were at least not vitiated as to the other names.

Campbell vs. Morey, 48th Cong. Mobley, 218

Too short; rejected.

Under the statute of South Carolina requiring ballots to be "5 inches long," the committee rejected all the ballots cast for contestant, on the ground, among others, that they were one-sixteenth of an inch too short.

Miller vs. Elliott, 52d Cong. Stofer, 170

The minority disagreed, on the ground that the slight error was not a distinguishing mark and "de minimis non curat lex."

Miller vs. Elliott (minority report), 52d Cong. Stofer, 182

Not of exact dimensions prescribed; rejected.

Under a mandatory statute prescribing the dimensions of ballots, ballots differing from these dimensions by one-sixteenth to one-eighth of an inch were thrown out by the election officers. The committee sustained the rejection. The minority counted the votes on the ground that the variation in size was not sufficient to be substantial.

Thrasher vs. Enloe, 53d Cong. Report 842, pp. 2, 10

Not fatal where envelopes used for ballots.

The use of tinted paper for tickets, where not forbidden by the statute, will not void the election if the statute, by the use of envelopes, preserves the secrecy of the ballot.

Page vs. Pierce, 49th Cong. Mobley, 504

Erasure in red pencil a distinguishing mark.

Under a mandatory statute against distinguishing marks, ballots having the words "For Amendment I" erased with a red pencil, so that they might be distinguished from others, should be rejected.

Sullivan vs. Felton, 50th Cong. Mobley, 762

In California, name erased in red pencil, printed name counted.

A statute providing that if names are erased or substituted "in any other manner than by the use of a lead pencil or common writing ink" the written name shall be rejected and the printed name counted should be construed to apply to erasures made with red or blue pencil or ink.

Sullivan vs. Felton, 50th Cong. (minority report) Mobley, 781

Various slight marks held to be immaterial.

Under a statute providing that "the voting shall be by ballot, which ballot shall be plain white paper, clear and even cut, without ornaments, designation, mutilation, symbol, or mark of any kind whatever, except the name or names of the person or persons voted for and the office to which such person or persons are intended to be chosen, which name or names and office or offices shall be written or printed, or partly written and partly printed, thereon in black ink or with black pencil, and such ballot shall be so folded as to conceal the name or names thereon, and so folded shall be deposited in a box to be constructed, kept, and disposed of as hereinafter provided, and no ballot of any other description found in any election box shall be counted," ballots were counted by the committee which had been rejected by the election officers on the following grounds: An extremely small asterisk, printed in the lower corner of the ticket; names "scratched" in red or purple ink; slight specks on the paper; a printer's dash in a place where no person was named for an office; printer's dashes separating the names on the ticket; the name of a candidate for justice of the peace written in with red pencil, and pencil marks on

the tickets made by the judges in pushing them into the box with a pencil. The minority agreed in counting all these votes except those on which red ink or pencil had been used, contrary to the terms of the statute. The committee counted those where red ink had been used, in spite of the statute, on the ground that this being the only ink to be had in the only store in the place its use was in a manner compulsory.

Goodrich vs. Bullock, 51st Cong......Rowell, 581-629

DOUBLE.

Counted by committee on proof that they were wrongly rejected.

Under a statute providing for the rejection and destruction of ballots appearing to be "deceitfully folded together," the judges had rejected two tickets on the ground that they were so folded. There appeared to be two names more on the poll list than votes counted, and testimony was admitted to show that the rejection of the votes was an error in fact. The committee counted the votes.

Reed vs. Coaden, 17th Cong......C. & H., 358

Their rejection by election officers sustained.

Where the inspectors of election in two towns had rejected 6 votes as being folded together contrary to law, the committee, considering them the best judges of the facts, declined to interfere with their decision.

Adams vs. Wilson, 18th Cong......C. & H., 375

Deducted from votes.

Double ballots, cast and counted for contestee, were deducted from his column.

Greery vs. Scull, 52d Cong......Stofer, 162

Under certain circumstances should be counted.

Where a voter openly voted a ballot containing the State and Congressional ticket and another containing the township ticket, and the judges received the same and folding the two together deposited them in the box, they had no right afterwards to throw them out as a double ballot.

Frederick vs. Wilson, 48th Cong......Mobley, 404

DEFICIENCY OF.

Deficiency of four ballots not fatal.

Where the ballots in a box were 4 less than the names on the poll book, and the judges of election in making up their return added 2 to the vote for each candidate: *Held*, that it was an error on the part of the judges, but not such an error as to vitiate the return.

Hurd vs. Romeis, 49th Cong......Mobley, 424

EXCESS OF.

Small excess immaterial.

Where there were two more ballots in the box than names on the poll list, but it did not appear who got the benefit of the excess, the committee refused to reject the poll or to deduct votes from either candidate.

Wigginton vs. Pacheco, 45th Cong......I Ells., 14

Where excess unfairly drawn out, returns corrected.

There was a large excess of ballots in many of the boxes in a county, the tickets were such as to be readily distinguishable by the touch, and in drawing out the excess only ballots for contestant were withdrawn. The contestant was prevented by widespread violence and disorder from taking testimony to establish the votes *abunde*: *Held*, that the vote might be corrected on the basis of the returns and the excess drawn out.

Bisbee vs. Finley, 47th Cong......2 Ells., 183

If drawn out according to law, return should stand.

Where an excess of ballots in the box is drawn out as provided by law, and the election is honestly conducted, the poll should not be rejected.

Bisbee vs. Finley (minority report), 47th Cong 2 Ells., 223

Where not purged by inspectors, excess deducted pro rata.

Where there was an excess of 11 in the number of ballots over the number of names on the poll list, and the statute of Florida requiring the box to be purged by drawing out the excess of ballots at random had not been complied with, the committee held that the statute of Florida provided a principle on which the box might be purged, and deducted the 11 votes from the candidates in proportion to the number of votes each had received. But some of those signing the majority report favored throwing out the whole vote of the precinct.

Finley vs. Walls, 44th Cong Smith, 389, 391

Deducted pro rata.

Ballots in excess of the names on the poll list should (in Ohio) be deducted *pro rata* from the vote cast for each candidate.

Campbell vs. Morey, 48th Cong Mobley, 216

The last ones found in the box should be rejected,

Campbell vs. Morey (minority report), 48th Cong Mobley, 235

Where excess large and fraudulent and unfairly drawn out, whole poll rejected.

Where the excess of ballots found in the box (in South Carolina) was drawn out unfairly, the officer purposely drawing out nearly all Republican ballots, which could be distinguished by the touch, the proceeding was condemned as illegal; and in a precinct where there were 817 ballots in the box, an excess of 229 over the number of names on the poll list, and 160 Republican and 69 Democratic tickets were drawn out, leaving the ballots to be counted 459 Democratic and 129 Republican, the committee held that "there is no means of ascertaining the true vote at this poll. It is certain that the official return is utterly unreliable, and * * * your committee are clearly of the opinion that the poll should be excluded."

Smalls vs. Tillman, 47th Cong 2 Ells., 458, 471

Where there is a large excess of votes in the box, due to fraud, the return should be rejected even if the excess has been drawn out under the South Carolina law.

Smalls vs. Elliott (minority report), 50th Cong Mobley, 729

Where unexplained and legally drawn out, returns should stand.

Where the provisions of the law of South Carolina were adhered to in the drawing out of the excess of ballots, and there was no proof as to how the excess of ballots came to be in the box, the return should stand.

Smalls vs. Tillman (minority report), 47th Cong 2 Ells., 486

Where the excess of ballots found in the box was drawn out in accordance with the law of South Carolina the proceeding was legal, and the polls can not therefore be rejected.

Smalls vs. Elliott, 50th Cong Mobley, 664

A small excess of ballots not evidence of fraud.

Where there was an excess of 9 ballots over the number of names on the poll list, but it was shown that this was owing to the crowding at the polls at certain hours, rendering it impossible for the clerks to take down the names as fast as the votes were cast, the excess was not considered an indication of fraud.

Eggleston vs. Strader, 41st Cong 2 Bart., 903

Where due to fraud of partisans of contestee, entire excess deducted from his vote.

Where there was a large excess of ballots over the number of names on the poll list in a large number of precincts, and from the fact that all the officers of election were Democrats, that Democratic "tissue ballots" were found in many of the boxes, and

other circumstances, it was evident that the ballot-box stuffing was a Democratic fraud, but in drawing out the excess under the South Carolina law nearly all the ballots drawn out were Republican (it being possible to distinguish the ballots by the touch), the minority (on this point apparently sustained by a majority of the committee) restored to the vote of contestant all the Republican ballots which had been drawn out and deducted the entire excess from contestee.

Lee vs. Richardson (minority report), 47th Cong...... 2 Ells., 521-561

Where there was a very large excess of ballots (averaging 139 and in one case amounting to 1,071) in two-thirds of the precincts of a district, and from the fact that all the officers of election were Democrats, that Democratic "tissue ballots" were found in the boxes, that Republican voters generally folded their tickets in the presence of the judges to show that they only voted one ballot, that in some precincts there were more Democratic tickets in the box than there were voters of both parties, and from other circumstances, it was evident that the stuffing of the ballot boxes was a Democratic fraud, but in drawing out the excess under the South Carolina law nearly all the tickets drawn out were Republican (it being possible to distinguish the tickets by the touch), the committee restored to contestant all the Republican ballots drawn out and deducted the entire excess from contestee.

Mackey vs. O'Connor, 47th Cong...... 2 Ells., 572-578

Considerable excess and other suspicious circumstances, return rejected.

Where there was an excess of 26 ballots in a vote of about 200, and the count was conducted without witnesses and under suspicious circumstances, the committee held that this was sufficient to reject the return.

Langston vs. Venable, 51st Cong...... Rowell, 441

Not of itself fatal.

The mere fact that the number of votes returned exceeds the number of names checked on the voting list does not, in the absence of fraud or of a change in the result, affect the validity of the election. (Paine, §599.) And where there were other suspicious circumstances claimed, but they were satisfactorily explained by one of the judges of election, who also testified to the honesty of the election, the minority held that the returns should be allowed to stand.

Langston vs. Venable (minority report), 51st Cong...... Rowell, 501

IMPERFECT.

Officers of election best judges of voter's intention.

Where the inspectors of election had counted as a blank a ballot containing the printed name of the sitting member struck through with a single stroke of the pen, but still legible, the committee, considering the inspectors the best judges of the facts, refused to alter their decision.

Adams vs. Wilson, 18th Cong...... C. and H., 375

To be counted according to the intention of the voter.

"The committee think it clear, although canvassing officers charged with purely ministerial duties may not go outside of the ballot, whatever may be the defect in the same, but must make their return upon the ballots as they appear on their face, that the House, as the final judge of the elections, returns, and qualifications of its members, has not only the right but the duty, when a ballot is ambiguous or of doubtful import, to look at the circumstances surrounding the election explaining the ballot, and to get at the intent and real act of the voter. This will not give the right to contradict the ballot itself, but simply to explain what is uncertain and ambiguous in reference to it."

Lee vs. Rainey, 44th Cong...... Smith, 590

The committee reported that votes returned for John Bowers and John M. Bowey were probably intended for John M. Bowers, but seemed to hesitate to so count them in the absence of proof that they were actually so intended.

Williams vs. Bowers, 15th Cong...... C. and H., 264

Votes returned as having been cast for "Judge Ferguson" instead of "Fenner Ferguson," and ballots reading "Bird B. Chapman for Congress" instead of "For Congress, Bird B. Chapman," were unanimously counted by the committee according to the evident intention of the voters.

Chapman vs. Ferguson, 35th Cong I Bart., 268

Where ballots read "For Congress, Francis P. Blair," but on the same ballots, over the names of thirteen candidates for the State legislature, were the words "For Representatives in Congress," the committee held that the evident intention of the voters was to vote for Mr. Blair for Representative in Congress, and counted the votes for him.

Blair vs. Barrett, 36th Cong I Bart., 318

Votes cast for E. M. Braxton and Elliott Braxton were counted by the committee for Elliott M. Braxton, the intention of the voters being clearly proved. The case of votes cast for C. M. Braxton and Braxton was not decided, not being material to the case.

McKenzie vs. Braxton, 42d Cong Smith, 21

Votes returned for Guntree, T. M. Guntree, Thomas M. Guntree, and T. Ros Guntree, but proved to have been cast for Thomas M. Gunter, were counted for him, but those returned for S. M. Guntree and Thomas M. Crenter, in regard to which no evidence was offered, were not so counted.

Gunter vs. Wilshire, 43d Cong Smith, 239

Where a large number of ballots containing the name Jas. H. Rainey were counted for Joseph H. Rainey, and it was proved that they were so printed by mistake; that the voters were informed that they were for Joseph H. Rainey, and that there was no other person of similar name a candidate for Congress, the committee refused to reject the votes.

Lee vs. Rainey, 44th Cong Smith, 589

Ballots for Hosea Rockwell, H. H. Rockwell, Hosey Rockwell, and H. Rockwell were counted for Hosea H. Rockwell, and ballots for H. Noyes, Henry T. Nois, and Henry Noyes were counted for Henry T. Noyes.

Noyes vs. Rockwell, 52d Cong Stofer, 36

Votes cast for Judge Abbott, Josiah G. Abbott, Josiah G. Abbott, of Chelsea, Abbott, of Chelsea, P. G. Abbott, J. G. Abbott, Abbott, and J. G. Abbott, of Chelsea, were unanimously counted for Josiah G. Abbott, of Boston, and votes for Benjamin Frost, of Chelsea, Rufus S. Frost, Frost, of Chelsea, Rufus S. Frost, of Boston, and R. S. Frost, of Chelsea, were unanimously counted for Rufus S. Frost, of Chelsea.

Abbott vs. Frost, 44th Cong Smith, 614, 617

Ballots for Mudd, S. E. Mudd, and S. N. Mudd were unanimously counted by the committee for Sydney E. Mudd, and a ballot for Compton for Barnes Compton. A ballot on which the name "Sydney E. Mudd" appeared twice was counted by the majority as one vote. The minority did not count it, on the ground that the "pastor" was so placed as to conceal the words "For Representative in Congress."

Mudd vs. Compton, 51st Cong Rowell, 152

James E. Campbell was a candidate for Congress and William McLain a candidate for sheriff. Where a voter had written the word "W. W. McCane" under the words "For Congress" and the word "camel" under the words "For sheriff," the committee held that the ballot ought to be counted for James E. Campbell for Congress, under the principle that "the intention of the voter ought to prevail whenever it can be ascertained by an inspection of the ballot, and, if the ballot is ambiguous, the intention of the voter may be shown."

Campbell vs. Morey, 48th Cong Mobley, 217

Ballots containing the names "Wallace," "J. H. Wallace," "John H. Wallace," "W. W. Wallace," "Maj. Wallace," "Ma. Willac," "Mag. Wolac," "Woloc," "J. Wales," "Jonathan H. Wallace," etc., were counted by the committee for contestant, Jonathan H. Wallace. The minority only counted those (like the first five above) closely approximating the true name.

Wallace vs. McKinley, 48th Cong Mobley, 186, 187

Where, by a mistake of the printer, contestee's name was spelled *Hebert* instead of *Herbert* on a number of ballots, but there was no other person of similar name a candidate, and the intention of the voters was plain, the committee refused to reject the votes.

Strobach vs. Herbert, 47th Cong 2 Ells., 6

Ballots reading "For Representative, Sixth district," were counted for Representative in Congress, Sixth Congressional district, where the circumstances were such that they could not reasonably have any other meaning.

Boynon vs. Loring, 46th Cong I Ells., 351

Where ballots were cast in the Third district of Massachusetts by voters in that district bearing the words "For Representative to Congress, Fourth district, Walbridge A. Field, of Boston," Mr. Field being a candidate in the Third district, the committee unanimously held that the words "Fourth district" did not constitute a part of the legal designation of the office, and the intention of the voters being plain, the votes should be counted for contestee.

Dean vs. Field, 45th Cong I Ells., 193, 217

The tickets voted for contestee were printed thus: "Representative in Congress, 3rd district, A. C. Latimer," and contestant claimed that they should not have been counted for him because they did not state that they were voted for a candidate for the Third district of the State of South Carolina nor for a Representative to the Fifty-fourth Congress. The committee (citing *Blair vs. Barrett, I Bart.*, 308) held that "the ballots complained of were clearly sufficient."

Moorman vs. Latimer, 54th Cong Report 626

The word "junior," omission not fatal.

The omission of the word "junior" on ballots evidently intended for a candidate known by that addition will not deprive him of the benefit of the votes if such intention can be clearly shown.

Turner vs. Baylies, 11th Cong C. and H., 235

Where votes were returned for Isaac Williams, *junior*, and Isaac Williams, and it appeared that there were three persons in the district by the name of Isaac Williams, but only the one known by the addition of "junior" was a candidate for Congress, the committee reported that the votes were probably cast for the same person, but seemed to hesitate to give him the seat until subsequent proof showed that many of the votes returned without the addition of "junior" were actually cast for Isaac Williams, jr., and wrongly returned by the mistake of the returning officers.

Williams vs. Bowers, 13th Cong C. and H., 264

Votes were returned for Westel Willoughby, but the evidence showed that they were cast for Westel Willoughby, jr., but the "junior" was omitted by the returning officers. The votes were counted by the committee for Westel Willoughby, jr.

Willoughby vs. Smith, 14th Cong C. and H., 265

Omission of initial of middle name.

Where votes were rejected by the county canvassers on account of the omission of the initial of the middle name of the candidate voted for, the committee unanimously counted the votes.

Miller vs. Thompson, 31st Cong I Bart., 119

Name written twice, counted once.

A ballot rejected by the election officers because the sitting member's name was twice written on it was counted by the committee.

Vallandigham vs. Campbell, 35th Cong I Bart., 231

Too many names; not counted by committee.

Where the district was entitled to elect one Representative and the petitioner had been credited with one vote on a ballot containing his name and four others, with no other designation than "for Congress," the committee rejected the vote.

Reed vs. Cosden, 17th Cong C. and H., 357, 358

Omission of Christian name immaterial.

Ballots not containing the Christian name of a candidate should nevertheless be counted for him where the intention of the voter is plain.

Sessinghaus vs. Frost, 47th Cong. 2 Ells., 393

The law knows but one Christian name, and the omission of the middle name or its initial on a ballot is not material or fatal.

McKenzie vs. Braxton, 42d Cong. Smith, 23

Omission of Christian name fatal.

Where two ballots having on them merely the name "Wilson" were counted by the election officers for Jeremiah M. Wilson, under the Indiana statute providing that votes should not be lost for defect of form if the election officers could satisfy themselves with reasonable certainty for whom they were cast, the minority of the committee held: "On their face the ballots were ambiguous and unintelligible. The defect was curable by extrinsic evidence to explain and apply them; it has not been offered, and they are deducted from contestee's vote on this account."

Gooding vs. Wilson (minority report), 42d Cong. Smith, 87

Can not be counted so as to contradict the ballot.

Where a voter wrote the name of contestee on his ballot after the words "For Presidential electors," but testified that he intended to vote for him for Representative in Congress, the committee held that the vote could only be counted for Presidential elector. "When a ballot clearly designates the office to be filled and the name of the person voted for, no court has ever permitted the voter to contradict his ballot by evidence that he intended to vote for a different person, or for the same person for a different office. Your committee do not feel at liberty to depart from the unbroken line of precedents in cases of this kind, although it is conceded in this case that the rule works a hardship on the voter. It is sometimes necessary to sacrifice the merits of a case in order to maintain an inflexible legal rule."

Wigginton vs. Pacheco, 45th Cong. I Ells., 18

It is the duty of an elector to clearly indicate for whom he intends to vote, at least to the extent that surrounding circumstances free his ballot from ambiguity without contradicting it. A ballot containing a name slightly resembling the name of one of the candidates can not be counted for him when the difference is so great that to count it would be to contradict the ballot.

Wallace vs. McKinley (minority report), 48th Cong. Mobley, 212

A meaningless ballot not to be explained by extrinsic evidence.

"We do not think the law of Massachusetts changes the general rule with reference to the designation which must appear upon all ballots in order to make them effectual. The words 'No vote shall be counted which does not clearly indicate,' etc., adds nothing to the general rule of law which requires the election officers to reject any vote when either the name of the person intended to be voted for or the office which the voter intended the person voted for to fill does not appear from the ballot itself; that is to say, where there is such ambiguity in the writing or printing of the name of the person voted for or of the office for which he is a candidate that it is impossible to tell from the ballot itself what the name of the person intended to be voted for is or the office which the voter intended him to fill, the ballot must be rejected, and no extrinsic evidence can be heard to supply the defect."

Boynston vs. Loring, 46th Cong. I Ells., 351

Ballot not to be contradicted, but a doubtful one may be explained.

"Evidence may not be received to contradict the ballot nor to give it a meaning when it expresses no meaning of itself; but if it be of doubtful import, the circumstances surrounding the election may be given in evidence to explain it and get at the intent of the voter."

Dean vs. Field (minority report), 45th Cong. I Ells., 217

Imperfect or ambiguous ballots may be explained in the light of surroundings, provided that proof *aliunde* shall not be permitted to contradict the ballot or to remove any imperfections which could not be similarly removed in the most solemn written agreements.

McKenzie vs. Braxton, 42d Cong. Smith, 23

In Illinois, where name written, but printed name not erased, neither name counted.

The statute of Illinois providing that when a ballot designates more persons for an office than there are candidates to be elected, it shall be counted for neither of the persons designated is mandatory, and under it ballots containing the name of contestant written under the unerased name of contestee should be counted for neither.

Worthington vs. Post, 50th Cong.Mobley, 647

"Paster" counted rather than original name.

Where a "paster" is so put on a ballot as not to cover the name of the opposing candidate, the "paster" should be regarded as the last act of the voter and counted. The same rule should apply as when the name of one candidate is written and the printed name of the other not erased.

Frederick vs. Wilson, 48th Cong.Mobley, 404

"Sticker" not covering original name.

Where a ticket had on it a "paster" bearing the name of the contestant, but leaving the name of the contestee exposed, the committee held that the placing of the sticker on the ballot indicated the intention of the voter and counted the vote for contestant. (The election officers had counted it for contestee.)

Greevy vs. Scull, 52d Cong.Stofer, 161

Written and printed name; writing should prevail.

Where the name of contestant was written on a ballot under the printed name of contestee, it should be counted for contestant.

Wallace vs. McKinley, 48th Cong.Mobley, 187

"The writing should prevail."

Wallace vs. McKinley (minority report), 48th Cong.Mobley, 194

Congressional part a separate ticket.

It would seem that the part of the ticket which relates to the candidate for Congress may be regarded as a separate ticket.

Lowe vs. Wheeler (Mr. Ranney), 47th Cong.2 Ellis, 83

Written ballots, where printed ones stolen.

In a precinct where all the printed tickets for contestant had been stolen and written ballots were used, the committee unanimously counted the votes.

Martin vs. Lockhart, 54th Cong.Report 2002

IRREGULARLY MARKED UNDER AUSTRALIAN SYSTEM.

Ballots marked by election officers without requiring oath of disability.

See *ILLEGAL VOTES, required proof of qualifications not produced at polls.*

Incorrectly marked for President, counted for Congress.

Ballots correctly marked for Congress had been thrown out and burned by the judges because incorrectly marked for President. The law plainly required the judges (in Virginia) to count them for the offices correctly marked, and the committee counted them.

Brown vs. Swanson, 55th Cong.Report 1070, p. 3

Where intention of voter clear, should be counted.

Where the ballots were so marked as unmistakably to show the will of the voter, but were technically defective, the minority counted them. "No rule of law, which would deprive a legal elector of his ballot, where his right to vote is unquestioned and his intention to vote for a particular candidate is clearly made out, will be favored by any court or any tribunal, and no mere technical construction of the law will be adopted or even tolerated which will produce such wrong and work such injustice."

Yost vs. Tucker (minority report), 54th Cong.Report 1636, part 2

Presumed to have been correctly marked.

Where witnesses in excess of the number returned for contestant swore that they voted for him, the committee held that it was to be presumed that the ballots were correctly made out, especially as they were, in most cases, marked by the election judges. The burden would be on the other side to show that the ballot was not correctly made out.

Wise vs. Young, 55th Cong Report 772, p. 13

Presumption that the voter will cast his ballot correctly.

The presumption is that the voter will cast his ballot correctly. It will not do "to withhold from the voter an opportunity to cast his ballot, and in answer to his complaint say to him that he probably would have lost his vote in trying to cast it. Every legal voter is entitled to an opportunity, and if he fails to register his voice on account of incapacity or neglect the fault is his own." But not so when the fault is with the election officers, or even with administrative officers who made the polls too large.

Brown vs. Swanson, 55th Cong Report 1070, p. 5

Where wrongly marked by officers of election, counted.

Where an officer of election testified that he had marked certain ballots for illiterates wrong, and these ballots were thrown out for irregularity, the committee counted them. "It is well settled that an elector can not lose his right to vote by the mistake of one of the election officers. If the voter himself made the mistake, the ballot should not be counted, but where he depends upon an officer whose duty it is to assist him in the preparation of his ballot, and the officer, through ignorance or design, fails to mark the ballot properly, it should be counted."

Brown vs. Swanson, 55th Cong Report 1070, p. 8

Fatal irregularities in Michigan.

Under the Michigan Australian ballot law and the decision of the supreme court of Michigan on it [*Scott vs. Glaserr*, 61 NW. Rep., 648] the committee threw out ballots marked as follows: With a cross in and other crosses on both sides of the party voting square; with two crosses at the head of the Republican ticket and two crosses at the upper left-hand corner on the face of the ballot; with a double cross at the head of the Republican ticket and the letter "H" over contestant's name; marked regularly for the Republican ticket; with two crosses at the right-hand upper corner of the ballot; with a cross on each side and one below the party voting square; with the words "This I vote for" in the space containing the vignette on the Republican ticket; with a strip of three-fourths inch cut off one margin of the ballot; marked regularly for the Democratic ticket, but with a cross opposite the name of the Republican candidate for Congress, the name of the Democratic candidate not being erased, but having a line drawn under it; with a name erased and the words "For Ben Harrison" written in; with a line drawn through the voting space on the Democratic ticket, and the words "No good;" with three crosses at the head of the Republican ticket; marked with a stamp after a few names with a stamp over one and partly over and partly on another name, not having the initials of the inspector; with a circle on each side of the party voting square; with a cross after each name on the Democratic ticket but two, which names were erased and a mark placed after the names of the competing Republican candidates; with the words "All right" at the head of the Republican ticket; with a pencil mark running down through three party tickets; with a voting stamp in the Republican square and a pencil cross in the Democratic square; with an extra voting cross at the bottom of the ballot; a voting cross before one name and on another.

Belknap vs. Richardson, 53d Cong Report 1946, p. 7-9

Accidentally blotted, not invalidated.

Ballots correctly marked in ink, but folded before the ink was dry so as to make a blot or impression on the unscratched name on the ballot were counted by the committee. "This is purely accidental and not to be deemed the marking or scratching intended by the statute [of Virginia], which is to be done by drawing a line 'with a pen or pencil' through the names of the candidates for whom the voter does not wish to vote."

Yost vs. Tucker, 54th Cong Report 1636

"Caption marked" ballots (in Virginia) counted.

The words "None other shall be a legal ballot" in section 3 of the [Walton] election law of Virginia refer to the Australian ballot provided for at the public expense, and the words in section 11, "No ballot save an official ballot, above provided for, shall be counted for any person," were, in the opinion of the committee, intended only as a prohibition of the counting of any other than the ballot provided for by the first section of the act. Where voters in erasing the names not voted for had also erased the caption of the ticket, but there being only one office to be filled, no ambiguity was possible. The committee held that these "caption-marked ballots" did not lose their character as official ballots and should be counted.

Yost vs. Tucker, 54th Cong......Report 1636

Names (in Virginia) not accurately "scratched;" ballots rejected.

Ballots "imperfectly marked" under the Virginia ["Walton"] ballot law, the line of erasure not actually touching three-fourths of the letters of some of the erased names, or the names being erased by a series of vertical or oblique dashes, were not counted by the committee. "It is not for the committee to decide whether the provision as to the marking of the ballot is a wise or reasonable one or not. The voter has failed to express his will by the so-called 'imperfectly marked' ballot according to the requirement of the statute, and, failing in that, the statute declares that the ballot is void."

Yost vs. Tucker, 54th Cong......Report 1636, p. 4

Fatal irregularities in Illinois.

Under the Illinois Australian ballot law of 1891 the committee found it to be the law "that ballots on which the voter undertook to express his choice by marks other than the cross placed in the circle or square, as provided by the statute, are not legal and should not be counted; that ballots voted by electors who were assisted in marking their ballots without having first made the affidavit of disability, as provided by said statute, are not legal and should not be counted; that the initials of that one of the judges of election who delivered the ballots to the voters are a part of the 'official indorsement' required by the statute, and ballots not bearing such initials are not legal and should not be counted."

Steward vs. Childs, 53d Cong......Report 1741, p. 3

Liberal construction in Illinois.

"It is by express statutory provision and not by judicial construction that ballots having irregular or distinguishing marks are not counted." In the absence of any such express provision, and with the general trend of former decisions in the State (Illinois) favorable to a liberal construction, the committee adopted a liberal construction, even under the new Australian ballot law.

Rinaker vs. Downing, 54th Cong......Report 1400, p. 15-21

Two column marks, not "double marking" for offices not duplicated.

Ballots marked (in Illinois) in the circle at the head of the Republican column, and also at the head of an "Independent Republican" column containing but one name, and that of a candidate for a local office, were counted for Congress, in accordance with a recent decision of the supreme court of Illinois that such marking was not "double marking" for the offices not duplicated.

Rinaker vs. Downing, 54th Cong......Report 1400, p. 14

WRONG EMBLEM ON PARTY TICKET.

Where the emblem at the head of a party column was fraudulently changed, whole vote of county thrown out.

As the result of a fraudulent conspiracy to injure contestant, participated in by the county clerk and carried out by bribery, the regular Republican emblem of the "eagle" was placed over bogus "Independent Republican" ticket and a raccoon substituted as the emblem over the regular Republican column. Seventy-nine votes were cast for the ticket under the eagle, and as these were under the circumstances evidently intended for contestant, the committee added them to his vote. They refused to throw out the vote of the county or to add or deduct other votes,

as there was no evidence that the fraud had any effect on any except these 79 votes. As these were not enough to overcome the returned majority, this decision would leave contestee in his seat.

Two members of the committee recommended that the vote of the whole county be thrown out, on the ground that the effect of this sort of fraud can not be accurately measured, and on the further ground that some of the signatures to the "Independent Republican" petition were not in legal form and the remainder fell short of the 100 necessary to make a valid petition. These two facts invalidated the whole ballot.

The House agreed with this minority and seated contestant on this issue.

Hopkins vs. Kendall, 54th Cong......Report 2809

WRONG NAME IN PARTY COLUMN

Where no deception, election valid.

Contestant and contestee both claimed to be the regular Republican nominees. A decision before the election was favorable to contestee, his name was placed in the party column on the ballots, and he received most of the votes. A subsequent decision, on appeal, after the election, was favorable to contestant, and he asked that the party votes be counted for him or that the election be declared void. There had been no deception of the voters, and the committee held that, the majority of them having actually voted for contestee, he was elected.

Fairchild vs. Ward, 55th Cong......Report 798

Party vote should be transferred to rightful candidate.

One member of the committee filed an elaborate dissenting report, holding that contestant was entitled to the party vote and was elected.

Fairchild vs. Ward (Mr. Gaines), 55th Cong......Report 798

Result unaffected.

Where contestant claimed that contestee's name was irregularly placed in the regular Republican column on the ballot, but had made no effort to have his own name placed there nor to prevent contestee's name from being so placed, and contestee received a large majority of the votes as cast, the committee saw nothing in these facts to affect the validity of the result of the election.

White vs. Boreing, 56th Cong......Report 876

IN WRONG BOX.

Whether counted

Where separate ballot boxes were used for the general election and for the vote on constitutional amendments, and twelve votes against the amendments were found in the general-election box and twelve votes for contestant in the amendment box, the majority held that the votes for contestant should be counted, the minority that they should not.

Platt vs. Goode, 44th Cong......Smith, 652, 677

Not counted.

Where, by mistake, a ballot containing the names of two candidates for the State senate was placed in the box provided for votes for Representative in Congress the committee unanimously held that it could not afterwards be changed, and a majority held that it should be counted as one vote for member of Congress. The minority held that it should be excluded.

Washburn vs. Ripley, 21st Cong......C. and H., 681

"The committee are unanimously of the opinion that when the votes are taken by ballot and separate boxes used, after they are deposited in the box it is not competent or proper for the voter or selectmen to alter or change the ballot as delivered into the boxes; and that the intention of the voter is to be ascertained alone from the box in which his ticket is deposited; and that the selectmen conducting the elections at the places above specified acted correctly in making out their return to the governor and council of all the ballots they found in the box which was

used for the reception of tickets for a member of Congress and in refusing to count the votes they found in other boxes with the name of Washburn on it and adding them to his list of votes given for him as a member of Congress. The adoption of any other rule would be fraught with danger to the purity of the elective franchise."

Washburn vs. Ripley, 21st CongC. and H., 681

Where a majority of all the votes was required for election, the committee held that votes placed in the Congressional box, probably by mistake, for persons who were candidates for other offices voted for at the the same election should be counted in reckoning up the whole number of votes cast for member of Congress, even though some of the persons voted for would have been ineligible to Congress. Similarly a vote evidently intended for the candidate for Congress, but placed in the senatorial box, was properly counted as a vote for him for State senator, and could not be added to his vote for Congress.

Washburn vs. Ripley, 21st CongC. and H., 681

Where a vote for contestee was found in the "State box" and was counted for him, though thereby the number of votes for Congress was made one greater than the number of names on the poll list, the committee deducted it from his vote.

Covode vs. Foster, 41st Cong2 Bart., 611

Decision of election officers in regard to them to be followed.

Where ballots for a candidate for Congress had been put by the voters in the box for receiving ballots for the State legislature, and ballots for candidates for the legislature in the Congressional box, and the judges, deeming it a mistake, had transferred the ballots to the right boxes and counted them, the committee said that the precedents were in such cases to abide by the decision of the judges, whatever it was, and argued that this was the proper course, but left the question to the House to decide. The committee report was in favor of petitioner, and the House merely declared the seat vacant, but it does not appear what bearing this question had on the result.

Newland vs. Graham, 24th CongI Bart., 8

Should be counted.

Where ballots are deposited in the wrong box by mistake they should be counted.

Campbell vs. Weaver, 49th CongMobley, 456

Shifting of boxes condemned and ballots in wrong boxes counted.

The shifting of ballot boxes for the purpose of deceiving voters and enforcing on them an educational test not permitted by the constitution of the State is an unlawful and fraudulent proceeding. "An act may not expressly be forbidden by law, but if it is done with an unlawful purpose, and succeeds in accomplishing that purpose, the act is thereby made unlawful." Under such circumstances the votes found in the wrong boxes should be counted. "It is no answer to say that the counting of such ballots is prohibited by statute (even admitting that the statute is a reasonable regulation, which, under the peculiar circumstances in South Carolina, we do not) when the mistaken deposit has resulted from the active deception of the managers. It is a crime at common law to enter into a conspiracy to commit an offense against the purity and fairness of a public election." (Paine on Elections, section 496, and authorities cited.)

Miller vs. Elliott, 51st CongRowell, 520

Shifting of boxes justified and ballots in wrong boxes not counted.

The section of the election law of South Carolina which provides for a number of ballot boxes, plainly labeled, for the different offices, and requires that the voter shall be separated from others and not spoken to by anyone except the judges while at the polling place depositing his vote, is well calculated to carry out the provisions of the constitution that the voter shall be protected from "an undue influence from power, bribery, tumult, or improper conduct," and to protect him in his right to a secret ballot. If the voters were found to be receiving information from outsiders which they were required to receive from the judges, "if the wise

provisions of this law were being interfered with and rendered nugatory by any outsider at any poll, or if it came under the observation of those selected to supervise the execution of this law that its letter or intention or spirit was being violated, we submit it was the duty of the managers to shift the boxes or perform any other legal act to subserve its proper execution."

Miller vs. Elliott (minority report), 51st Cong......Rowell, 541

Placed in wrong box by inspector, counted.

A ballot accidentally placed in the wrong box by the inspector (in New York) was counted by the committee.

Noyes vs. Rockwell, 52d Cong......Stofer, 35

Should have been counted.

Ballots for Congress mistakenly deposited in the wrong box (in Georgia) should have been counted.

Felon vs. Maddox, 54th Cong......Report 1743, p. 5

Counted on proof aliunde of contents.

Where ballots which it was alleged should have been counted were destroyed, it is clearly the right of the party claiming them "to prove by the testimony of the judges, or of any witness, the exact condition of the ballots, and he is entitled to the benefit of any that he can show were cast for him."

Yost vs. Tucker, 54th Cong......Report 1636

Counted.

Where there were six ballot boxes, and the various ballots were required to "be put in the proper box or boxes by said voter, or by the judges at the request of the voter," and the judges refused to deposit ballots, or were alleged to have deposited them wrong, and many ballots, all of the opposite party to the judges in charge of the contested boxes, were found in the wrong boxes, the committee counted the votes, where there was proof of them, or threw out the whole poll, where the fraud was such as to vitiate the returns and the true vote was not otherwise ascertainable.

Martin vs. Lockhart, 54th Cong......Report 2002

Should not be counted.

The minority held that the votes found in wrong boxes should not be counted, otherwise it would be possible for a voter to cast six votes for one candidate for one office by placing a ballot for him in each box. They asserted that this was in fact done in one precinct in this case.

Martin vs. Lockhart, 54th Cong......Report 2002, part 2

SECRECY OF (see also ELECTION BY BALLOT).

A secret ballot less important than true ascertainment of result.

"The committee are not prepared to admit that the policy which shields the vote of the citizen from being made known without his consent is of more importance than an inquiry into the purity and result of the election itself. If it is it can not protect the illegal voter from disclosing how he voted."

Cessna vs. Meyers, 42d Cong......Smith, 67

Important that it be preserved.

"The object of the adoption of the ballot was to afford the voter the means of preserving the secrecy of his vote, and to enable him to vote independently and freely without being subject to be overawed, intimidated, or in any manner controlled by others, or to any ill will or persecution on account of his vote. The secret ballot is justly regarded as an important and valuable safeguard for the protection of the voter, and particularly the humble citizen, against the influence which wealth and station may be supposed to exercise."

Finley vs. Bisbee, 45th Cong......I Ells., 102

Compulsory on voter, under Australian system.

"Under the Australian ballot system, secrecy is not merely permitted, it is enforced; it is not solely for the benefit of the voter, but for the benefit of the public as well. A compulsory secrecy, unknown to former systems of voting, is a fundamental and essential element of this ballot law."

Rinkaker vs. Downing (minority report) 54th Cong......Report 1400, part 2

For the protection of the voter, and not compulsory on him.

Where (in Virginia) a poll was objected to on the ground that the illiterate Republican voters whose ballots had been marked for them by a Democratic judge exhibited them to the Republican judge before depositing them. The committee held that this was not fraud nor a violation of the Australian ballot law. "The secrecy is for the protection of the voter, and is not compulsory as to him."

Brown vs. Swanson, 55th Cong......Report 1070, p. 4

Official ballots illegally circulated, not fatal if not used.

Under the law of Louisiana it was a misdemeanor for any person connected with the preparation of the official ballot to give out any information in regard to it except as provided in the act. There was proof that one official ballot was in unauthorized hands before the election, and inconclusive testimony that others may have been, but no proof that any such ballots were voted or misused. "In the absence of evidence that any official ballot, fraudulently or otherwise obtained prior to the day of election, was voted or attempted to be voted, it can not be held that the existence of such outstanding ballots in any way affected the result of the election."

Romain vs. Meyer, 55th Cong......Report 1521, p. 7

AS EVIDENCE OF VOTE.

See RECOUNT; RETURNS, *impeachment of*; RETURNS, *when rejected what votes counted.*

RECOUNT OF.

See RECOUNT.

BALLOT BOXES.**SHIFTING OF.**

See BALLOTS IN WRONG BOXES.

IRREGULARITY IN, AND CUSTODY OF.

See IRREGULARITY.

BRIBERY.

WHAT CONSTITUTES. (*See, also, CAMPAIGN FUND AND UNDUE INFLUENCE.*)

Employment in a Government navy-yard.

"We believe that bribery can be committed in the employment of voters in a navy-yard, but the mere fact of employment alone does not prove bribery. If employment is given to make men vote contrary to what they would do, it would be bribery, but there must be proof, first, that men were employed in order to cause them to change their politics, and, second, that they voted, and voted in favor of the party giving the employment. The presumption is in public service that Republicans employ Republicans, that Democrats employ Democrats, * * * and the employment does not change their politics. If any presumption arises

when a man obtains employment in a navy-yard it is that he is a Republican, and if that be so the employment does not affect either his vote or the result." The fact of employment might form a link in a chain of evidence, but standing alone it is not enough.

Platt vs. Goode (majority report not adopted by the House) 44th Cong....Smith, 658

Where it was charged that the patronage of the Norfolk Navy-Yard was used to corrupt the election in the interest of contestant, the minority report (approved on this point by a majority of the members of the committee) held that it was proved that there was an increase of from 900 to 1,400 made in the navy-yard force previous to the election; "that such new employees were generally introduced by the executive committee of contestant's party; that it was generally understood that they would be expected to vote the Republican ticket. The giving and the acceptance of such employment upon the terms and conditions stated constitute bribery in law. The *onus* of proving that such persons did not carry out in good faith the agreement made rests upon the contestant." It was also shown that assessments for political purposes were made on the employees; that they were furnished Republican tickets, and closely watched to see how they voted, and that the force was greatly reduced soon after the election. The members agreeing to this report held that votes obtained by such methods ought not to be counted, and there being no means furnished by the record to eliminate them, rejected the votes of the three precincts where the navy-yard vote was chiefly cast. On the whole case, which involved other issues, the House sustained the minority.

Platt vs. Goode, 44th Cong.....Smith, 678, 659

Where it was charged that voters had been bribed by giving them work in a navy-yard, but no attempt was made to prove that they had voted for contestee, or at all, the committee laid down the following rules:

"1. If the giving of employment to the voters immediately prior to the election was for the purpose of inducing them to vote for the contestee, and such object was in any manner made known to the voter, and he accepted or continued in such employment after obtaining such information, he thereby became a party to the transaction, accepted its terms, and the *onus* of showing that he did not carry it out in good faith is on the contestee.

"2. If it be shown that an elector enters into an agreement or understanding, direct or indirect, for a consideration to vote a specified party ticket or for a particular candidate, it is fair to presume that he casts his ballot in accordance with such agreement or understanding, and, unless the contrary is made to appear, such presumption becomes conclusive. Ballots thus obtained we hold to be illegal and ought to be disregarded."

Upon proof that an increase in the navy-yard force just before the election was for political purposes, that such was the general report, and was discussed in the newspapers at the time, and that the new men were employed on the recommendations of various prominent Republicans, the committee presumed that all men so employed had voted illegally for contestee, and deducted from his vote a number corresponding to the increase in the navy-yard force.

Abbott vs. Frost, 44th Cong.....Smith, 604

Distribution of Government supplies to flood sufferers not bribery.

Where Government bacon sent for the relief of flood sufferers was distributed by a United States deputy marshal to all comers and no questions asked, it was held that its distribution could not possibly have constituted bribery. And where, in another town, it was shown that a rumor was prevalent among the negroes that it was necessary to vote the Republican ticket in order to be entitled to bacon and that the Republican leaders made no attempt to deny or suppress the rumor, their conduct was severely condemned; but as the definite proof only showed that 10 or 12 persons had voted who otherwise would not, and as the increase of 300 over the vote of two years before was the outside limit of those who could have been influenced, and this number, if deducted, would have been insufficient to change the result, the committee made no ruling on the propriety of deducting any votes.

Bromberg vs. Haralson, 44th Cong.....Smith, 361-363

Appointment as United States deputy marshals not bribery.

The appointment of persons as United States deputy marshals is not bribery unless it be shown that they were thereby influenced to vote differently from what they otherwise would have done.

Frost vs. Metcalfe, 45th Cong.....I Ells., 293

Mere paying of poll tax not in itself bribery.

The mere furnishing and accepting of a poll-tax receipt paid for by a party committee is not a corrupt act or proof of bribery.

"It must appear that such payment of a tax by another than the voter and delivery to him of the receipt therefor was done as an inducement or consideration for the vote or for the purpose of influencing the choice of the voter."

Patterson vs. Carmack, 55th Cong......Report 895, p. 26

Expenditure of money by party committee for halls, carriages, etc., not fatal, even if prohibited by statute.

Where it was shown that part of the money contributed by contestee to the committees of his party was used in conveying voters to the polls who were neither "sick, poor, or infirm," and in paying the expenses of public meetings and speakers, neither of which purposes was included in the language of the statute of New York defining the purposes for which money might be expended, the committee held that even if these expenses were construed to be prohibited by the statute it could not affect the result. There was nothing to connect the contestee with the expenditure of the money in these ways, and he could not be held responsible for illegal acts of his agents. "That the contestee had the right to contribute and pay to these committees money to be used by them for purposes authorized by the statute is not controverted by the contestant, and in the absence of opposing proof the presumption exists that he did not authorize its expenditure for purposes prohibited by the statute. If the statute was violated, its offenders are by the provisions of the statute subject to punishment." And certainly the votes of legal voters who may have attended meetings in halls paid for by party committees, or gone to the polls in carriages provided by party committees, even if they were able to walk or pay for their own rides, are not on that account to be rejected without reference to whether their votes were influenced or not.

Duffy vs. Mason, 46th Cong......I Ells., 368

EVIDENCE OF.**Remote inference insufficient.**

Where it was charged that the patronage of the Norfolk Navy-Yard was used to corrupt the election in the interest of contestant, the majority report (approved on this point by only a minority of the committee) held that while it was proved that assessments were levied on the employees for campaign purposes, and that the force had been largely increased previous to the election, the assessment could not affect the result; the increase was less than during the preceding autumn, when there had been no election; some Democrats had been employed, and employees had voted for contestee without losing their places; though most of the employees were Republicans it was in accordance with the general custom in all departments of the public service; the presumption was that these employees were Republicans already and the employment had not changed their votes. There being no proof that the employment was given for the purpose of changing votes, and no proof that the employees had voted for contestant, or at all, the charge of bribery was not sustained. On the whole case, which involved other issues, the House agreed with the minority.

Platt vs. Goode, 44th Cong......Smith, 657

Must be specifically proved.

The burden is upon the party charging bribery to prove that the voter was bribed by the opposing candidate or his agent, that he voted, and that he voted for the candidate bribing him.

Abbott vs. Frost (minority report), 44th Cong......Smith, 629

Where it was proved that two persons were given money for peddling tickets, by a person in regard to whom a witness testified, that it was common report that he was distributing money to secure the election of contestee by corrupt means, the evidence was held to be insufficient to sustain the charge of bribery.

Cox vs. Strail, 44th Cong......Smith, 436

As to the amount of evidence necessary to establish bribery, see also:

Kidd vs. Steel, 49th Cong......Mobley, 514

Must generally be proved by circumstantial evidence.

"In a great majority of cases it is impossible to prove a charge of bribery by direct and positive evidence. From the very nature of the case the only sources from which such testimony can come is from the briber and the bribed, both of whom are criminals." But circumstantial evidence, especially when strengthened by declarations of confederates, may be so strong as to exclude all other reasonable theories than that of guilt.

Abbott vs. Frost, 44th Cong Smith, 606

When some cases proved, existence of others may be presumed.

"It must not be forgotten that bribery is a secret crime; both the parties to it are equally interested in keeping it secret, and when detected both are ready to give ingenious explanations of it. If they have acknowledged to third parties the receipt of the bribe, they are ready to declare, when called to the witness stand, that they were in favor of the bribe giver before the money was offered, or that they voted for his opponent, or that the money was paid by someone else, some nameless party, for some other purpose. Under these circumstances, when it is shown that in an election over 300 cases of bribery and attempted bribery are proven, the presumption is not violent that for every case that was, by accident or the indiscretion of the parties, brought to the light, there were others that were never revealed."

Donnelly vs. Washburn (majority report), 46th Cong I Ells., 453

"General evidence," approaching hearsay, admissible to prove "general bribery."

"General bribery" is proved in the same way as general character, by the general statements of persons and general reputation. Evidence which would be hearsay to prove particular cases is competent to prove general bribery.

Hurd vs. Romeis (minority report), 49th Cong Mobley, 438

Proved by circumstantial evidence.

Where (in New York under the Australian-ballot system) a name was scratched on 16 ballots, and the fictitious names "A. Doyle," "B. Doyle," "C. Doyle," etc., substituted, all in the handwriting of a party worker in regard to whom there was evidence indicating that he had bribed 1 vote, two members of the committee held that the 16 votes should be thrown out as bribed. Their conclusion was sustained by the House.

The committee refused to reject them, on the ground that there was only one very doubtful unsigned deposition against one of them and no testimony at all in regard to the others.

Noyes vs. Rockwell, 52d Cong Stofer, 31-35; 43

EFFECT OF.**Bribed votes rejected.**

"Where a voter is shown to have been bribed by a candidate, or by a duly authorized agent, to vote for him, and he has so voted, such vote ought to be struck from the ballots cast for such candidate."

Abbott vs. Frost (minority report), 44th Cong Smith, 628

Where voters were proved to have been bribed to vote for contestee, their votes were excluded.

Bowen vs. Buchanan, 51st Cong Rowell, 196

A bribed vote not void unless made so by law.

Under the laws of Ohio, in which there is no provision to make void a bribed vote, and whose general policy is to punish the briber and not the bribed, there is no authority to reject a bribed vote.

Deluno vs. Morgan (minority report), 40th Cong 2 Bart, 203

If committed without knowledge of the candidate, immaterial unless result affected.

"A candidate can not and ought not to be held responsible for all the imprudent and censurable acts of indiscreet friends, who, in the zealous advocacy of his election, resort to improper means of securing that result without his knowledge, and which he, if consulted, would condemn, unless the voters affected by such means are sufficient in number to change or render uncertain the result of the election."

Duffy vs. Mason, 46th Cong I Ells., 375

Must be shown to have affected the result.

Fraud or bribery does not vitiate what it does not impregnate. Votes obtained by bribery should be rejected; if a precinct be so corrupted by bribery that it is impossible to purge the result, it may be rejected, but the untainted precincts are not affected. If bribery were proved against the sitting member, it might have been a ground for expulsion, but not for declaring the election void.

Donnelly vs. Washburn (minority report), 46th Cong......1 Ells., 490-495

Where contestant charged that an increase in the navy-yard force was in the nature of bribery, the minority held that contestant was bound to show that in consequence of the increased force he lost votes which he otherwise would have received, or that the contestee received votes which he otherwise would not have received.

Abbott vs. Frost (minority report), 44th Cong......Smith, 630

Effect of, when committed by contestee personally.

Where it was charged that the sitting member had procured the abandonment of a contest by the payment and promise of money, and the committee found the charge sustained, but that the proposition was made by contestant, and the payment made to escape the inconvenience of a contest, and not for the purpose of corruptly securing a seat in Congress, and that the contest would in any case have been decided in favor of the sitting member, the testimony showing his election by a larger majority than the returned majority, the committee expressed its disapproval of the acts both of sitting member and contestant, but recommended no action and asked to be discharged from further consideration.

Bradley vs. Hynes, 43d Cong......Smith, 240

Effect of, when committed by contestant personally.

Where counsel for contestee had been bribed by contestant to act for him, and to refuse to surrender testimony in his possession, part of the committee were of the opinion that the act of contestant "which would furnish ground for the expulsion of the contestant, if he were a member, would justify a refusal to permit him to proceed with the contest."

Bowen vs. De Large, 42d Cong......Smith, 99

Committed by a successful candidate should invalidate his election.

"The law ought to be held as follows: Where the friends of a successful candidate, without collusion or combination with such candidate, engage in fraud, bribery, intimidation, or other violations of law to influence the election, and the number of votes affected thereby is insufficient to change the result, the election will not be invalidated thereby; but if such candidate takes part in such wrongs, or confederates with those engaged therein, and it does not appear that the election has been changed in its results thereby, the election should be held void and a new election ordered. * * * In order to give the seat to the contestant it should be necessary to prove that the results were changed by the transactions in question, but to unseat the participant a less amount of proof should be sufficient."

Hill vs. Catchings (views of Mr. Lacey), 51st Cong......Rowell, 811

Committed by contestee or his agent renders election void.

"It is a clearly established principle of law, both in England and the United States, that bribery committed by the sitting member, or 'by any agent of the sitting member, with or without the knowledge or direction of his principle [sic], renders the election void.'"

Donnelly vs. Washburn (majority report), 46th Cong......1 Ells., 453

Committed by contestee a cause for expulsion, but not for vacating the election, unless result affected.

The English rule that bribery committed by a candidate vacates his seat, even though the result of the election was not affected by the bribery, can have no application to this country. The English rule depends on the English statute, by which a candidate committing bribery is disqualified from holding office by virtue of the election at which the offense was committed. Such is not the rule of the common law, and there is no such statute in this country. The House, by a two-thirds

vote, may expel a member for bribery or any other cause, but in a contested-election case the sole question is, Which candidate received the majority of legal votes, legally cast and returned, and whether he possesses the qualifications prescribed by the Constitution?

Donnelly vs. Washburn, (minority report), 46th Cong......I Ells., 491

Bribery to secure nomination is immaterial.

Testimony intended to show that a candidate secured his party nomination by bribery or other unworthy means ought not to be considered in a contested-election case.

Loury vs. White, 50th Cong......Mobley, 624

Election controlled by bribery void.

Where the result of an election is obtained by bribery it is null and void.

Page vs. Pirce, 49th Cong......Mobley, 491

Where there was a general conspiracy to bribe, whole polls rejected.

Where there was a conspiracy to bribe, the committee said: "Contestee insists that he should only lose those votes where individual instances of bribery are shown. We cannot accept this theory of the law when the evidence shows the existence of a conspiracy to corrupt voters by bribery." Either all the votes, or all the votes for contestee, in the polls where bribery was shown in his interest, should be rejected. The committee did not decide between these two courses.

Mitchell vs. Walsh, 54th Cong......Report 1849

Bribed votes deducted from vote of candidate for whom cast.

Two votes held to have been obtained by bribery were deducted from the vote of contestee.

Noyes vs. Rockwell, 52d Cong......Stofer, 35

Only bribed votes deducted.

Where \$11 or \$12 was expended for bribes at one precinct, and not more than 20 votes, probably less, were affected, the committee refused to reject the poll, but provisionally deducted 20 votes from the vote of contestee.

Watson vs. Black, 53d Cong......Report, 1147, p. 7

Only bribed votes rejected.

Where one of the judges of election bribed 25 voters to vote for contestee, the committee deducted these votes, but refused to reject the return.

Robinson vs. Harrison, 54th Cong......Report 1121, p. 2

BRITISH PENSIONER.

ELIGIBILITY OF, AS REPRESENTATIVE. *See* QUALIFICATIONS OF REPRESENTATIVES.

BURDEN OF PROOF.

On contestant, even to the proof of a negative.

"The distinction between the controversy at the polls and that before the committee is manifest. At the polls the voter is a party. When the polls are closed and an election is made, the right of the party elected is complete. He is entitled to the returns, and when he is admitted to his seat there is no known principle by which he can be ejected except upon the affirmative proof of a defect in his title. Whoever seeks to oust him must accomplish it by proving a case. The difficulties in his path can form no possible reason why the committee should meet him half way. The rule of reason requires that he should fully make out his case, even though it involve the proof of a negative."

New Jersey case, 26th Cong......I Bart., 26

On contestant to show that county returns improperly rejected.

Where the seat had been given to the sitting member by the action of the State canvassing board in rejecting the vote of a number of precincts and counties, and of the House in deciding the governor's certificate *prima facie* evidence of the right to the seat, the committee, in examining into the merits of the case, presumed that the rejections in each case were proper until the contrary was proved.

Giddings vs. Clark, 42d Cong Smith, 94

On contestant.

The returned member is presumed to have been duly elected. This presumption should be maintained unless repelled by conclusive evidence.

Biabe vs. Finley (minority report), 47th Cong 2 Ells., 203

On party attacking returns.

"The burden of proof is always upon the contestant or the party attacking the official returns. The presumption is that the officers charged by law with the duty of ascertaining and declaring the result have discharged that duty faithfully."

Bromberg vs. Haralson, 44th Cong Smith, 357

On each party to show that voters voted illegally for opposing candidate.

The burden is upon the party attacking the legality of a vote to prove that the person whose vote is in question voted, that the vote was for the competitor, and that the voter was lacking in some legal qualification.

Cessna vs. Myers, 42d Cong Smith, 61

Ought not to be on contestant any more than on contestee.

It would be preferable to regard both parties as standing on an equal footing, rather than to give to the returned member superior advantages. Then, if it is impossible to decide between their rights, a new election should be ordered.

Vallandigham vs. Campbell (Mr. Harris), 35th Cong Report 380, p. 29.

Allegations involving charge of crime must be established beyond a reasonable doubt.

When a contestant makes a charge of incorrectness of returns, which involves a direct charge of crime against the election officers, he would in strict law be required to establish the charge by the same degree of proof required in a criminal case.

Butler vs. Lehman (minority report, sustained by House), 37th Cong I Bart., 360

Shifts to contestee when contestant shown to be elected on the face of the returns.

When the certificate of contestee did not show on its face that he had received a majority of all the votes, and the House refused to give the seat to either party until the case could be decided on its merits, and it appeared that the petitioner had a majority of votes on the face of the returns, the burden of proof was held to be with the opposing party.

Letcher vs. Moore, 23d Cong C. and H., 814

Where the contestant had the majority on the face of the returns, and the contestee holds the seat only by virtue of the unlawful act of a ministerial officer in throwing out the vote of a county, the burden of proof is on contestee.

Shields vs. Van Horn (minority report), 41st Cong I Bart., 932

Where the contestant is shown to have been elected on the face of the returns, the burden is on the sitting member to show by other evidence that he was himself elected.

Garrison vs. Mayo, 48th Cong Mobley, 56

When it is conceded that the counting for contestant of a number of votes which should have been counted for him would change the result, the *onus* is cast on contestee, and *nunc pro tunc* the contestant is assigned his true position.

Wallace vs. McKinley, 48th Cong Mobley, 186

Where sufficient evidence is introduced to impeach the integrity of the ballot box, the burden of proof shifts to the contestee.

McDuffie vs. Davidson, 50th Cong......Mobley, 596

Where it was shown that the contestant had received a majority on the face of the returns, the committee held that "Such being the case, the contestant is now to be treated as if he had received the certificate, and the onus is cast on the contestee to show that the returns, if truly made, would elect him. (*Wallace vs. McKinley, Forty-eighth Congress.*)"

Smith vs. Jackson, 51st Cong......Rowell, 20

Contestant being shown to have been elected on the face of the returns, the burden shifts, and it devolves upon contestee to establish his right to the seat which he occupies by affirmative evidence.

Atkinson vs. Pendleton, 51st Cong......Rowell, 55

When it is shown that the contestant was elected on the face of the returns, the burden is cast upon the contestee to overcome the *prima facie* right which the returns give to the contestant.

McGinnis vs. Alderson, 51st Cong......Rowell, 635

Contestant received the majority of votes according to the numbers written on the face of the returns, but the county canvassers in one county counted the numbers written across the sample ballots on the back of the returns instead, which gave the majority to contestee. The supreme court of New York, in special session, ordered the votes counted according to the face of the returns, but pending appeal from this decision the certificate was issued to contestee. The supreme court and the court of appeals afterwards sustained the decision. The committee held, on these facts, that contestant was *prima facie* elected, and the burden of proof shifted to contestee.

Noyes vs. Rockwell, 52d Cong......Stofer, 28

Not necessarily on contestee when contestant apparently elected on face of returns.

"It is erroneous to assume that the burden shifts from the contestant to the contestee by proving one item of his claim, which alone considered might change the result."

Wallace vs. McKinley (minority report), 48th Cong......Mobley, 192

Upon party attacking the votes, but may be shifted by agreement to follow State law to the contrary.

The committee held that votes received by the election officers were *prima facie* good, but where the parties had not only taken testimony upon the assumption that the burden of showing the legality of a vote attacked lay upon the party claiming the vote, but had entered into written stipulations admitting that all votes contained in the charges of both parties were bad, but reserving the right in two counties to prove votes good, the committee provisionally rejected all the votes admitted, and then restored all the votes whose legality was proved, whether in the two stipulated counties or not, and caused the parties to procure further testimony on the subject. But where an agreed state of facts was presented, the committee counted or rejected the votes upon the facts thus stipulated, without other evidence.

Draper vs. Johnston, 22d Cong......C. & H., 706, 707

"Every voter admitted by the regular officers authorized to decide the question at the polls ought to be considered legally qualified, unless the contrary is shown." But in a particular case, where the State law required each candidate to establish the legality of votes attacked by his opponent, and the parties had taken testimony upon this assumption, and had taken no testimony at all in regard to votes known to be illegal, the committee were from necessity forced to proceed upon the assumption on which the testimony was taken.

Botts vs. Jones, 28th Cong......I Bart., 74

Burden to show that election officers not sworn may be shifted if oath not properly filed

"The legal presumption is that the oath required has been taken, every officer being presumed to have done his duty, and * * * the *onus* is thrown upon the party taking the objection to show the neglect or omission; but as the law of Virginia requires that the oath shall be duly returned by the magistrate before whom it is taken and filed in the clerk's office, a certificate from the clerk that no such oath is filed will be sufficient *prima facie* (notice of the objections being previously served upon the opposite party) to throw the burden of proof upon the party claiming the vote."

Draper vs. Johnston, 22d Cong. C. & H., 712

Where election affidavits not filed, burden on party claiming they were made to show this fact.

Where election affidavits required (in Pennsylvania) to be made by nonregistered voters were not found on file in the prothonotary's office, where the law required them to be filed, the committee held that certificate of this fact "is sufficient proof to raise the *prima facie* conclusion that they were never taken." "We insist that the presumption is that if these affidavits had been executed they would have been found where the law provides they should be filed and that on failure of the officer to produce them the burden of proof was cast on the contestee to show that they were in fact executed."

Craig vs. Stewart, 52d Cong. Stofer, 9

The minority held that the presumption was in favor of the validity of the ballots after they had been accepted by the election officers, especially as these officers were required by law to challenge unregistered voters, and that the failure to find some of these affidavits, at a subsequent date, in the prothonotary's office did not remove the burden from contestant to show that they were not in fact made.

Craig vs. Stewart (minority report), 52d Cong. Stofer, 17

Where oath of election officers not returned as required by law, the burden is on party sustaining the returns to show it was taken.

Where the law provided that a certificate of the taking of the oath should be returned with the votes, and there was no such certificate as showed that the oath was taken, and contestant charged that it was not, the committee held that the burden of proof was on contestee to show that it was.

Blair vs. Barrett, 36th Cong. I Bart., 314

To show that foreign-born voters had not been naturalized.

Where it was proved that votes were cast by foreign-born persons, the majority of the committee held that the burden was on the party attacking the vote to show that the voter had never been naturalized. The minority held that on proof of foreign birth, the burden of proof to show naturalization shifted to the other party.

New Jersey Case, 26th Cong. I Bart., 24, 31

Burden to show that result of election changed by illegal voting, on contestant.

When contestant has shown *prima facie* a number of illegal votes cast which if cast for contestee would wipe out his majority, the burden does not shift to contestee to show that they were not cast for him, but remains with contestant.

Curtin vs. Yocum (minority report adopted by the House), 46th Cong. I Ells., 422

Where county canvass illegal, burden on contestee to show correctness of precinct returns if fraud charged.

Where the county canvassing board was not constituted as required by law and the contestant charged that the precinct returns were incorrect, the committee held that the burden of proof was on the contestee to establish the correctness of the precinct returns by a recount of the ballots.

Donnelly vs. Washburn, 46th Cong. I Ells., 466

On contestant to show precinct returns incorrect, even if county canvass illegal.

The contestant charged that certain precinct returns were illegal and illegally canvassed. *Held*, That the burden of attacking the validity of the precinct returns would be on him, even if he successfully attacked the county canvass.

Donelly vs. Washburn (minority report), 46th Cong......1 Ells., 512

May be easily shifted to contestee when all the officers of election were his partisans.

"When the whole of the election machinery was in the hands of contestee's friends, the burden of showing the fairness of the count should be upon him when a reasonable doubt of fairness has been established by the proof." (*See Officers of Election.*)

Buchanan vs. Manning (minority report), 47th Cong......2 Ells., 306

CAMPAIGN FUND (see also Bribery).

Excessive expenditure not conclusive of wrong.

When contestee had expended \$9,500 in the canvass, but accounted for all the various sums so spent compatible with his innocence, and there was testimony that such expenditures were "rather in conformity to the custom as practiced in Luzerne County," the committee refused to disturb the result.

Reynolds vs. Shonk, 52d Cong......Stoer, 50

CANVASSING BOARD.

Returns rejected by, counted by committee. (*See Irregularity in canvass.*)

Are ministerial officers. (*See Ministerial officers.*)

CENSUS.

As EVIDENCE.

A city census prima facie evidence of the facts contained in it.

Where a city census contained information as to age, birth, naturalization, length of residence, etc., the committee held that it was *prima facie* evidence of the facts it contained, and rejected the votes of persons shown by it not to be qualified voters.

Blair vs. Barrett, 36th Cong......1 Bart., 316

Not evidence of facts not legally required to be contained in it.

The minority held that facts in regard to the qualifications of voters not required to be ascertained by the ordinance providing for the census were not proved by the introduction of the census returns. If the census were evidence, it would be necessary to prove by outside evidence the identity of the voters with the persons named in it.

Blair vs. Barrett (minority report), 36th Cong......Rept. No. 563, 1st sess., 36th Cong., p. 41.

Charges of intimidation rebutted by the census.

When it was alleged that at least 2,000 voters had been prevented from voting in a district by intimidation, but the testimony was indefinite, and by comparing the number of votes cast with the number of males over 21 in the district, as shown by the census of 1870 taken the year before, it appeared that an unusually large per cent (88) had voted. This was held to show that extensive and successful intimidation could not have existed. "If the proof of intimidation were much stronger and more conclusive than it is, it could not stand in the face of these statistics."

Norris vs. Handley, 42d Cong......Smith, 77

To rebut inferences of fraud.

Where it was argued from the size of the Republican vote that illegal votes must have been cast, the committee said, "It may be safely inferred that each race voted about equally solid for the candidate of its own color and blood," and compared

the Republican vote with the colored population and the Democratic vote with the white population, as shown by the census of 1870. The comparison showed that a slightly smaller proportion of the colored vote than of the white was cast, and this was taken, among other things, as indicating that the evidence of illegal voting and repeating by colored voters could not have been true.

Bromberg vs. Haralson, 44th Cong......Smith, 360

As evidence of fullness of vote.

Where there were disturbances and collisions between white and colored persons the night before the election and at the polls, but there was no definite testimony that anyone was deterred from voting, the committee compared the vote with the number of males over 21, as shown by the census of 1870 just taken, and it appearing from this comparison that a very full vote was cast concluded that many persons could not have been intimidated and refused to reject the votes.

Niblack vs. Walls, 42d Cong......Smith, 105, 106

Too many votes cast not evidence of fraud.

Where the census of 1870 gave the population of a county as 3,831, and in 1872 2,183 votes were cast, the committee held that this was not sufficient proof of fraud, and the minority only "invited attention" to it as "strongly indicating fraud."

Gause vs. Hodges, 43d Cong......Smith, 300, 322

Too many votes cast not conclusive of fraud.

Where it was shown that a large number of colored voters had removed from a county between 1870 and 1874, and that the vote for contestee in 1874 was a suspiciously large percentage of the colored population of 1870 after deducting for emigration, the committee said: "At most it can only raise an inference, and a weak one, that there may have been nonresident votes cast."

Bromberg vs. Haralson, 44th Cong......Smith, 366

As corroborative evidence of fraud.

Where the returns showed more votes cast than, according to the census taken the same year, there were males over 21 in the county, and contestee, whom the testimony showed to have received few or no colored votes, was returned as receiving twice as many votes as there were white voters, the committee called attention to these facts as corroborative of the other evidence of fraud.

Smalls vs. Tillman, 47th Cong......2 Ells., 435, 462, 464, 476

Not evidence of the political division of the vote.

The mere fact that the Republican candidate is returned as receiving less than the colored vote and the Democratic candidate more than the white vote, as shown by the census, is not sufficient ground for rejecting a return.

Strobach vs. Herbert, 47th Cong......2 Ells., 7

CERTIFICATE.

To DOCUMENTARY EVIDENCE. *See* EVIDENCE, DOCUMENTARY.

CERTIFICATE OF ELECTION.

See CREDENTIALS AND PRIMA FACIE RIGHT.

CITIZENSHIP (see also Mexican Citizens; Naturalization).

Not abandoned by foreign residence.

A youth sent to Europe for his education before the Revolution, and not returning until after the war, held not to have forfeited his citizenship.

Ramsay vs. Smith, 1st Cong......C. and H., 23

Leaning in favor of claimant.

In questions of citizenship the leaning should always be in favor of the claimant.

Lery's case, 27th Cong......1 Bart., 41

Original status of alienage presumed to continue.

The original status of a foreign-born person is presumed to continue until the contrary is shown.

Lourey vs. White, 50th Cong......Mobley, 625

Difference between citizen and inhabitant. (See Inhabitant.)

COMMITTEE ON ELECTIONS (see also House of Representatives).**PRECEDENTS OF.****A continuing body; should follow its own precedents.**

"The Committee on Elections is as much a continuing body in contemplation of law as a court, and should have as much respect for its own rulings as a court has for its decisions, and '*stare decisis*' should be our rule."

Lynch vs. Chalmers (minority report), 47th Cong......2 Ells., 377

A well-considered precedent, having become the settled law, ought not to be overturned except for the most cogent reasons.

Cannon vs. Campbell (Mr. Atherton), 47th Cong......2 Ells., 653

POWERS OF.**Report by less than a majority.**

Where a report was ordered submitted by a vote in committee of a majority of a quorum, but the report, when presented, was signed by less than a majority of the whole committee, objection was made in the House to its reception, but the House voted leave to the signers to print it, and it was printed in the usual form of a committee report. The report of the remainder of the committee, presented later, was presented as the "views of the majority."

Brown vs. Swanson, 55th Cong.

Committee report can not be amended by the House.

Where the author of the report, when the case was called up in the House, moved to strike one item from the report, the point of order was made and sustained that a committee report can not be amended by the House.

Pearson vs. Crawford, 56th Cong.

Can act only on the evidence submitted.

"The committee can only report cases on the evidence furnished by the parties. We can neither make the evidence, nor improve the quality, nor supply the deficiency of that furnished us."

Goode vs. Epes, 53d Cong......Report 1952, p. 11

JURISDICTION OF.**A special resolution of reference confers only limited jurisdiction.**

Where one election had been held in October and another in November, and the person receiving the majority at the October election had received the certificate of election and held the seat, and the candidate receiving the majority of the votes at the November election petitioned for the seat, claiming that the November election had been held at the legal time, but did not in his petition mention any other election, or ask that the election of any other person be inquired into, and the petition was referred to the Committee on Elections, the committee held that this reference only conferred a limited jurisdiction to examine into the questions raised by the petition, and not a general jurisdiction to inquire into the election of any member.

Holmes and Wilson, 46th Cong......1 Ells., 322

Will not in an ordinary contest investigate charges of personal unfitness.

After a member has been sworn in without reservation, and his case has been referred to the Committee on Elections as an ordinary contested-election case, the committee will consider no questions except whether he was duly elected, properly returned, and possessed of all the qualifications prescribed by the Constitution. If it be alleged that he is ineligible or not entitled to membership on account of other disqualifications than those prescribed by the Constitution, it is a matter to be considered in proceedings looking toward expulsion, and beyond the jurisdiction of the Committee on Elections except by special reference.

Maxwell vs. Cannon, 43d Cong. Smith, 188

Except by special resolution, it has no jurisdiction of questions of expulsion.

The Committee on Elections has jurisdiction only of cases involving the "elections, qualifications, and returns" of members, and, unless by special reference, it has no power to inquire into the fitness of a member for membership or to report a resolution for expulsion.

Donnelly vs. Washburn (minority report), 46th Cong. 1 Ells., 494

Ordinary jurisdiction does not include the right to investigate abated cases.

The ordinary resolution referring contested-election cases to the Committee on Elections can not revive a case already abated by the death of one of the parties. "An order of reference places a paper before the committee for what it is worth. It imparts no new legal character or quality to the paper."

Mackey vs. O'Connor (minority report), 47th Cong. 2 Ells., 600

CONSPIRACY (see also Fraud).**Where registry fraudulent, as result of conspiracy, whole county thrown out.**

The minority of the committee threw out the vote of a county on the ground that the registration included the names of very many disqualified persons, and that it was procured to be so fraudulently made as the result of a corrupt conspiracy. The House sustained the minority.

Switzler vs. Dyer (minority report), 41st Cong. 2 Bart., 792

Where conspiracy shown, fraud presumed from suspicious circumstances.

Where there was proof that a conspiracy was entered into to have a fraudulent election, that the officers of election were willing to carry out the conspiracy, and the circumstances and irregularities were such as to indicate fraud, the vote was thrown out. The minority held the proof of fraud (which was hearsay and circumstantial) to be insufficient.

Finley vs. Walls, 44th Cong. Smith, 382-389, 401-406

A conspiracy covering a whole county shown.

Where, during the summer previous to the election, the county officials of a county were violently deposed and forced to leave the State and their positions were filled by members of the opposing party, the appointments of election judges made by the county judge before his removal were illegally revoked and new boards appointed, composed entirely of one party, in violation of law, the sheriff procured and distributed to these election officers ballot boxes so constructed as to facilitate fraud, and the county clerk refused to certify the returns of certain precincts on account of irregularities in the poll books, in spite of the statute forbidding him to consider such irregularities, the committee held that these circumstances, among others, constituted proof of a conspiracy to carry the election by fraudulent means.

Featherston vs. Cate, 51st Cong. Rowell, 77-99

May be proved by circumstantial evidence.

"The difficulty of establishing, by legal evidence, the existence of a conspiracy, generally great, is increased rather than lessened by an intermingling of politics. That this is so is apparent from the well-known fact that even where an entire community is convinced to a moral certainty that gross frauds have been perpetrated in an election, in the execution of a studied effort to defraud, a sufficient amount of legal evidence to convict the suffrage assassins is rarely found, and usually enough of such evidence can not be procured to indict them. All text writers and other law

authorities treating of the subject recognize the difficulty of proving a conspiracy by direct evidence; and, as in the case of fraud in general, recognize also the propriety, as well as the necessity, of proving distinct facts, many of them insignificant in themselves, from all of which, however, when sufficient, a firm belief in the existence of the conspiracy or fraud may safely be deduced and the conclusion may be as safely acted upon. In many cases circumstantial evidence is the only evidence which can be obtained, and it is also not infrequently of the most satisfactory and convincing character."

Moore vs. Funston, 53d Cong Report 1164, p. 2

Shown by circumstances.

Where the registration lists were stuffed, the law for nonpartisan appointments of election officers was disregarded, the challengers of contestant's party excluded from the polls, and wholesale repeating, fraud, and ballot-box stuffing practiced at the election, these facts were taken together as showing conspiracy.

Van Horn vs. Tarsney, 54th Cong Report 355

Shown by a combination of circumstances.

The committee held that a conspiracy to control the election of one county by fraud was shown by the organization of the election boards all in the interest of one party, by the conduct of these election boards at the election, and the conduct of the registration officers before the election.

Aldrich vs. Plowman, 55th Cong Report 284, p. 4

General bribery shown.

Where bribery was carried on in an organized manner, and was shown to have been systematically planned and generally carried out and understood, the committee found that a conspiracy to commit general bribery was shown.

Mitchell vs. Walsh, 54th Cong Report 1849

Taints the whole returns.

Where the fraudulent violation of the law was very general, the committee summarized the varieties of fraud, and said that these facts "furnish conclusive evidence of a conspiracy on the part of the election officers to defraud the voters, which destroys the integrity of their acts and taints the returns so as to render them wholly unreliable, and devolves upon the contestee the duty of proving what was the true state of the poll."

Thorpe vs. McKenney, 54th Cong Report 1531, p. 21

CONTEST.

ABANDONMENT OF. (*See* ABANDONMENT.)

DISMISSAL OF

for insufficiency of notice, *see* Notice of Contest;
for failure to appear or to take testimony, *see* Abandonment;
for failure to take testimony before proper officer, before wrong officer, *see* Evidence;
for lack of time to investigate, *see* Mode of Procedure;
for failure of proof when application for time to take further testimony refused, *see* Evidence, additional.

PROCEDURE IN. (*See* MODE OF PROCEDURE.)

STATUTE REGULATING. (*See* LAW FOR TAKING TESTIMONY.)

Who are parties to, when contestee dead and his successor sworn in. (*See* Vacancy, and House of Representatives.)

Jurisdiction over. (*See* House of Representatives, Jurisdiction of, and Committee on Elections, Jurisdiction of.)

COUNSEL.

HEARING OF, BY HOUSE. (*See* MODE OF PROCEDURE.)

COUNTY COURT.

Power of, in West Virginia, to make a record. (*See Evidence, Documentary.*)

COURTS.

When decisions of State courts binding on the House. (*See State Laws.*)

CREDENTIALS (*see also Prima Facie Right*).**Proof of facts, without certificate, received.**

A member admitted to his seat without a governor's certificate, on proof of facts.

Richards, 4th Cong C. and H., 95

Informal letter insufficient.

Two letters, one from a resigned member informing the Speaker of his resignation and the election of his successor, and the other from the clerk of the council of the State to the member-elect, informing him that his certificate of election had been forwarded to the Speaker, *held* not to be sufficient to enable the member to take his seat in advance of the arrival of the certificate.

Edwards, 3d Cong C. and H., 92

Not based on canvass of votes, give no prima facie title.

The effect of a governor's certificate as proof "rests upon the presumption that it is the official declaration of an official canvass of the votes." A certificate conceded to have been issued before any canvass of the vote had been had was not received as evidence, either of a *prima facie* title or in the case on the merits.

Sheridan vs. Pinchback, 43d Cong Smith, 198

A certificate of election known to be based on the returns of a board which it was a notorious fact of public history had never had possession of the returns, and hence could not have canvassed them, was unanimously held to be of no effect.

Sheridan vs. Pinchback, 43d Cong Smith, 197, 227

Not based on legal evidence, of no effect.

If a certificate is based on anything else than the legal evidence, "or only upon a portion of the data prescribed by law, it is without legal validity as regards the election of a member of Congress; and this, wholly independently of the question as to whether this is done fraudulently, ignorantly, or is a mere *casus omissus*. The party relying upon such a certificate must prove his vote *aliunde*."

Smalls vs. Tillman, 47th Cong 2 Ells., 432

In extraordinary cases certificate may not be conclusive.

"Except in extraordinary cases and in rare instances we find that the commission or certificate concludes all inquiry as to which of the claimants of a seat shall occupy it until the contest on the merits is determined. And every consideration of prudence and safety admonishes us to adhere to this practice." But in a case where contestee had declined to claim the seat on the certificate alone, and the House had referred all the papers of both parties to the Committee on Elections, "with instructions to report immediately whether upon the *prima facie* case as presented by said papers said Manning or Chalmers is entitled to be sworn in as a member pending the contest on the merits," and on these papers it appeared that contestant had a large majority of the votes as actually returned to the secretary of state, the committee reported that neither party ought to hold the seat pending the investigation.

Chalmers vs. Manning, 48th Cong Mobley, 8

Where certificate based on a partial canvass, and did not show on its face who received a majority of the votes, neither party admitted.

The law of Kentucky required the sheriffs of the various counties of a Congressional district to assemble at a specified time and place, "and there, by faithful comparison and addition, ascertain the person elected in their districts." They were then

to make out a certificate of election "which shall be signed by all the sheriffs of the district." A certificate was presented signed by only three of the five sheriffs, and with the words "The vote of Lincoln County not taken into calculation" written above the signatures, and it was asserted in the House that if all the votes had been counted a different candidate would have had the majority. The House referred the case to the Committee on Elections and refused to admit either claimant to the seat until the committee should have reported.

Letcher vs. Moore, 23d Cong......C. and H., 715-747

Where based on partial canvass, no presumptions in favor of contestee.

"A certificate of election showing upon its face that nearly 8,000 votes were wholly ignored in the count can have no binding force and effect in a contest of this character. * * * When his title is assailed in a direct proceeding by way of a contest, we think that a certificate showing the above facts gives the contestee no superior standing over the contestant as to burden of proof. For the purposes of the contest a certificate which, on its face, shows that a large vote was wholly ignored, and giving no data from which the true results could be ascertained, ought not to be considered as binding upon anybody."

McGinnis vs. Alderson, 51st Cong......Rowell, 634

Refusal of governor to grant certificate does not prejudice rights.

The refusal of the governor to grant a certificate of election to one entitled to it can not prejudice his right to it. It may put him to the trouble of substantiating the fact of his election by other evidence before he can take his seat.

Clements, 37th Cong......1 Bart., 367

Two certificates issued, candidate last certified admitted.

Where the governor first gave the certificate of election to the candidate having the majority of the votes on the returns, but afterwards, alleging the discovery of fraud, issued another certificate to the opposing candidate, the House admitted the candidate having the second certificate to hold the seat pending the contest.

Morton vs. Daily, 37th Cong......1 Bart., 402

Certificate may be revoked and a new one issued.

The certifying authority may revoke a certificate and issue a new one. "The question is entirely within the control of the State canvassers or the governor of the State (as the case may be under the law) until the roll of the House is made up by the Clerk. There is no vested right under a certificate that would prevent the canvassers from rectifying any error or mistake that may have occurred in their deliberations or action, until the holder of the same has been awarded his seat by the Clerk of the House."

Hoge vs. Reed, 41st Cong......2 Bart., 541

Power to revoke a certificate limited (if it exists at all).

If it be conceded that any member of a canvassing board has the right to withdraw his signature from a certificate once given, there must be a limit of time beyond which that right can not be exercised. That limit is either reached on the day on which the board, being required to adjourn, becomes *functus officio*, or on the date of the first subsequent official action based on the former action.

Wallace vs. Simpson (minority report sustained by House), 41st Cong....2 Bart., 562

Certificate of election can not be revoked.

The power to issue a certificate of election, "having been once exercised by the proper officer, can not be again exercised by his successor."

Colorado case, 40th Cong......2 Bart., 165

Conflicting certificates presented.

Two conflicting certificates, dated the same day, and each bearing the signatures of the required number of members of the canvassing board, were presented, but one of the members signing the first certificate subsequently withdrew his signature, and the committee held that this invalidated this certificate and gave the *prima facie* title to the holder of the other certificate.

Hoge vs. Reed, 41st Cong......2 Bart., 540

Certificate of commanding general sufficient under reconstruction laws.

The commanding general in Louisiana acted properly under the reconstruction laws in issuing certificates of election, and his certificates properly gave a *prima facie* title.

Jones vs. Mann, 40th Cong......2 Bart., 474

Minority candidate not elected, even though certified.

Where nearly all the county returns were thrown out by the canvassing board for alleged informalities which the committee found to be not even informalities, and the certificate of election was thus given to a candidate who received only a small minority of the votes returned, the committee were unanimous in the opinion that he was not elected.

Hunt vs. Menard, 40th Cong......2 Bart., 477-499

Candidate elected on face of returns entitled to be sworn in.

If a certificate certifies that a certain candidate was elected, and also certifies the facts on which the conclusion is based, and these facts show that another candidate received the majority, "the facts must stand, and the conclusions which the facts contradict must fall."

(Clark (minority report), 42d Cong......Smith, 13

Certificate of governor sufficient in absence of statute.

"In the absence of any express provisions of the State law authorizing any officer to certify to the due election of members of Congress, it is presumed that, under the usages of the House, a certificate under the great seal of a State, signed by its chief executive officer, would constitute sufficient credentials within the meaning of the statute of 1867."

Clark, 42d Cong......Smith, 7

Where canvassing board has judicial powers, its certificate conclusive of *prima facie* right.

The Texas statute of 1870, in which judicial powers are given to the governor, secretary of state, and attorney-general to decide upon and reject votes under certain circumstances, held to apply also to Congressional elections, and a certificate showing that, after the deductions had been made by the State officers, W. T. Clark had received a majority of the votes, held to be sufficient *prima facie* evidence of his right to a seat, although the certificate showed upon its face that if the votes rejected had been counted his opponent would have had the majority.

Clark, 42d Cong......Smith, 7

In absence of statute, returns prevail over certificate.

The Texas election statute of 1870 held not to apply to Congressional elections and that the governor had no power under it to certify who was elected, but merely to certify the returns. If these returns show a majority for one candidate, and the governor accompanies them by a certificate that the other candidate was elected, the returns should prevail.

Clark (minority report), 42d Cong......Smith, 13

Party holding certificate entitled to be sworn in.

When one party appears to have had a certificate of election, and the other party certified copies of the returns showing that he received a majority of the votes, and the name of neither party was placed on the rolls by the clerk, but the credentials were referred to the Committee on Elections, the committee reported that the party holding the certificate was entitled to the seat pending the contest.

Boles vs. Edwards, 42d Cong......Smith, 18

Where the governor of Texas issued a certificate to the contestee, but accompanied it with a statement that he believed investigation would show that contestant was elected, the committee reported that contestee had a *prima facie* right to the seat.

Whitmore vs. Herndon, 42d Cong......(Not reported; see Congressional Globe, May 24, 1872.)

The credentials presented consisted of a certificate from the governor containing no statement that either candidate was elected, but certifying to the correctness of a tabular abstract of votes showing a certain number of votes cast for each candidate, and a number of scattering votes larger than the difference between the vote of the candidates. The majority of the committee held that the certificate was sufficient evidence of the right of the person having the largest number of votes according to it to hold the seat pending the contest. The minority held that inasmuch as part at least of the votes returned as scattering were evidently intended for the contestant, and for aught that appeared enough of them may have been so cast to give him the majority, and as the contestant asserted, and presented testimony to prove that such in fact was the case, the seat ought to remain vacant until the case could be decided on the merits. The House sustained the majority.

Gunter vs. Wilshire, 43d Cong Smith, 130-143

A certificate of election issued by the governor of a Territory gives a *prima facie* right to a seat as Delegate, and unless overthrown by competent evidence must stand.

Cannon vs. Campbell (Mr. Thompson), 47th Cong 2 Ells., 617

In determining the *prima facie* right to a seat the committee can not go behind the face of the certificate.

Chalmers vs. Manning (views of Mr. Cook), 48th Cong Mobley, 22

Certificate issued in obedience to writ of mandamus valid.

A certificate of election made in obedience to a writ of *mandamus* has the same legal force as in any other case.

Bisbee vs. Hull, 46th Cong 1 Ells., 317

DEAF AND DUMB.

Their votes received at a viva voce election. (*See Election Viva Voce.*)

DECEPTION (see also Ballots, Wrong Emblem, and Wrong Name in Party Column).

Must be specifically proved.

Where contestant charged that a large number of voters intending to vote for him were deceived into voting for his opponent by the circulation of tickets headed "Republican ticket," but bearing the names of the Democratic candidates, and the evidence presented was insufficient to establish the charge, and especially to show the number of votes affected, the way in which the proof should have been made was thus described: "He should have proven the number of votes cast, and for whom cast, by the returns or a certified copy thereof. He should have shown the names of the persons who voted by the poll list, and he should have called the voters themselves, or some of them, to prove how many and who intended to vote for him, and were defrauded by being furnished a ticket resembling the Republican ticket, but containing the name of the sitting member as a candidate for Congress."

Norris vs. Handley, 42d Cong Smith, 75

Votes procured by deception ought not to be counted.

Where the original count showed that contestee had substantially his full party strength, and a recount showed a difference of over 1,000 votes in five precincts, and the difference was claimed to be accounted for by the fact that tickets purporting to be straight Republican tickets, but containing the name of contestant, were circulated and voted without the knowledge of the voters, the minority held that even if the evidence had established conclusively the correctness of the recount, it ought not to be received to give contestant the seat, "because it is clear beyond dispute that his claim rests upon the fact that fraudulent tickets were, against the knowledge and will of the voters, clandestinely procured to be voted, and thereby a fraud was perpetrated upon the voters," to which the House ought not to give effect.

Acklen vs. Durrell (2d minority report), 45th Cong 1 Ells., 188

Votes obtained by deception counted as intended to be cast.

Where tickets were circulated bearing the name of contestee, but all the other names of the party ticket of contestant, and twelve such tickets were voted and counted for contestee: *Held*, that they should be counted for contestant.

English vs. Peelle, 48th Cong. Mobley, 169; 173

Where a voter was deceived into voting for contestee under the supposition that he was voting for contestant, such deception being a criminal offense under the laws of Ohio, "his vote should be deducted from the poll of contestee and added to that of contestant."

Campbell vs. Morey, 48th Cong. Mobley, 227

Where voters were induced by deception to vote a party ticket containing the name of the opposing candidate for Congress: *Query*, Whether the poll should be rejected or the vote corrected.

Frederick vs. Wilson, 48th Cong. Mobley, 404

If fraudulently instigated by contestee himself, election void.

The circulation of fraudulent posters a few days before an election announcing another person as the candidate of a party for Congress is dishonorable, and if the evidence established the complicity of the contestee, and its effect on the voters produced a different result than otherwise would have occurred, the election should be set aside.

Bradley vs. Slemons, 46th Cong. 1 Ellis, 310

Committed by county officials does not prove fraud in precinct elections.

Where the names on the ballots had been "alternated" by the county electoral boards, for the obvious purpose of confusing the voters, but there was no direct prohibition of this practice in the law, the committee refused to throw out the vote of these counties, on the ground that this conduct was not committed by the precinct officers, and the precincts ought to be considered separately.

Yost vs. Tucker, 54th Cong. Report 1636

Where part of a conspiracy invalidates elections.

Where the names on the ballots were "alternated," or printed in German or script letters, for the obvious purpose of confusing voters, and the general conduct of the election officers indicated a conspiracy to deceive and defraud illiterate voters, the minority threw out the votes.

Yost vs. Tucker (minority report), 54th Cong. Report 1636, part 2

DECLARATIONS OF VOTERS.**WHETHER ADMISSIBLE AS EVIDENCE.**

See EVIDENCE; res gestæ, hearsay, and declarations of voters.

DE FACTO OFFICERS.

See OFFICERS OF ELECTION, Disqualification of, and not sworn.

DELEGATE (see also Election, when set aside).**Office not derived from Constitution, but from ordinance of 1787.**

The office of Territorial Delegate "is one which is not provided for in the Constitution. It grew out of the ordinance of Congress for the government of the North-western Territory, passed anterior to the adoption of the Constitution of the United States, and [which] has formed the basis of all the Territorial governments which have since existed."

Biddle vs. Richard, 18th Cong. C. and H., 407

A Delegate is a member of Congress.

A Delegate is a member of Congress. A Representative is a member with full powers. A Delegate is a member with limited powers.

Cannon vs. Campbell (Mr. Atherton), 47th Cong 2 Ells., 652

House has authority to inquire into the election of.

In a contest for a seat as Territorial Delegate it was objected that as a Delegate was not a member the House had no authority to question the election. But the House proceeded to the investigation, and declared the seat vacant.

Easton vs. Scott, 14th Cong C. and H., 283

Seat may be contested under the law, like that of a member.

A Territorial Delegate is so far a member that the spirit of the law in regard to contested elections and the constitutional provisions under which it is enacted apply to him.

Cannon vs. Campbell (Mr. Ranney), 47th Cong 2 Ells., 645

The House has arbitrary power to admit whom it chooses.

The office of Territorial delegate is not created by the Constitution, but delegates are admitted as a matter of favor. The House may admit whom it chooses, but except in most extraordinary cases it should only admit those regularly chosen under the law. But in an extraordinary case, where the sitting member had not been elected under any valid law, and the contestant had not been elected under any law, but more legal voters had expressed their choice at the election at which contestant was voted for than at the election at which contestee was voted for, and it appeared that to declare the seat vacant would be to produce a repetition of the same circumstances, and that no legal or fair election could be held, the committee recommended that the contestant be seated. But the House declared the seat vacant.

Reeder vs. Whitfield (first case), 34th Cong 1 Bart., 204

His admission a question of expediency.

The minority held that the question of the admission of a Delegate was a question of expediency, to be determined by the House upon the particular facts in a case, and that if the House deemed it expedient a Delegate should be admitted from a Territory not yet organized under the laws of the United States.

Smith (minority report), 31st Cong 1 Bart., 112

His right guaranteed by law.

The House can not annul the acts of Congress providing for the admission of Territorial Delegates.

Cannon vs. Campbell (Mr. Atherton), 47th Cong 2 Ells., 650

Cannon vs. Campbell (minority report), 47th Cong 2 Ells., 664

A mere creature of law.

Delegates are so far the mere creatures of law that their term of service may be long or short, and may commence and terminate at such periods as Congress, in their wisdom, may direct.

Doty vs. Jones, 25th Cong 1 Bart., 18

Ought not to be expelled except by a two-thirds vote.

While the House has, no doubt, the power to expel a Territorial Delegate by a majority vote, his case ought to be considered after the analogy of that of a member, and he ought only be expelled by a two-thirds vote, and for causes which would be sufficient to justify the expulsion of a member.

Cannon (minority report), 43d Cong Smith, 270

May be excluded by majority vote if for any reason deemed unfit to hold seat.

Territorial Delegates are not members of Congress, but the creatures of the statute. Congress might at any time abolish the office. No law of Congress can bind the House by fixing the qualifications of Delegates, but the House may at any time, by a majority vote, exclude any Delegate whom it may judge for any reason unfit to hold a seat.

Cannon vs. Campbell (Mr. Calkins), 47th Cong 2 Ells., 613

Term of two years, but need not coincide with Congressional term.

The committee were (but somewhat doubtfully) of the opinion that the act of 1817, requiring Territorial Delegates to be elected "every second year for the same term of two years for which members of the House of Representatives of the United States are elected," did not require the terms to begin at the same time as the terms of Representatives, but merely to be of the same length.

Doty vs. Jones, 25th Cong 1 Bart., 18

Seat not vacated by admission of State.

The erection of the Northwest Territory into the State of Ohio held not to vacate the seat of the Territorial Delegate.

Fearing, 7th Cong. C. and H., 127

The committee held that when the State of Wisconsin was admitted, the Territorial government still continued in the portion of the Territory outside of the limits of the new State, and recommended the admission of the Delegate. A minority held that the corporation of the Territory had ceased to exist. The House admitted the Delegate.

Sibley, 30th Cong 1 Bart., 105, and Report No. 10, 2d sess. 30th Cong., pt. 2

Seat vacated by admission of State.

Where a Delegate from the Territory of Michigan was elected for a term of two years, but at the expiration of one year the Territory became a State: *Held*, that the corporation of the Territory having been dissolved, all the offices connected therewith expired, including that of Delegate to Congress.

Doty vs. Jones, 25th Cong 1 Bart., 17

The majority of the committee held that when a State is admitted into the Union, the seat of the Delegate is not vacated, but he holds it to represent that portion of the Territory not included within the limits of the State. The minority recommended the seating of the contestant, who was elected at a separate election held by the people of the Territory outside the limits of the new State. The House passed the following resolution: "Resolved, That the admission of the State of Minnesota into the Union with the boundaries prescribed in the act of admission operates as a dissolution of the Territorial organization of Minnesota; so that so much of the late Territory of Minnesota as lies without the limits of the present State of Minnesota is without any distinct, legally organized government, and the people therefore not entitled to a Delegate in Congress until that right is conferred upon them by statute."

Fuller vs. Kingsbury, 35th Cong 1 Bart., 251-257

From Territory not yet organized, not admitted.

Delegates have never been admitted except from Territories duly organized under the laws of the United States, and it would be inexpedient to admit a Delegate from territory organized without reference to the laws and not yet recognized by Congress.

Smith, 31st Cong 1 Bart., 109

Babbett, 31st Cong 1 Bart., 116

Messervrey, 31st Cong 1 Bart., 148

A Delegate elected from Wyoming before the Territory was organized as a separate Territory, and at an election called by a mass meeting, not in accordance with any law, was refused admission.

Casement, 40th Cong. 2 Bart., 516

Delegate from Southwest Territory admitted to the House.

By virtue of the ordinance of 1787 for the government of the Northwest Territory, and the act of 1790 extending its provisions to the territory southwest of the Ohio, said Territory, through its general assembly, is entitled to elect a "Delegate to Congress," with the privilege of debating, but not of voting. The Delegate was admitted to a seat in the House. Not required to be sworn, and pay and franking privilege granted by special bill.

White, 3d Cong C. and H., 85

Delegate from Mississippi Territory admitted to the House.

By virtue of the ordinance of 1787 for the government of the Northwest Territory, and the acts of 1798 and 1800 extending its provisions to Mississippi Territory, said Territory is entitled, through its general assembly, to elect a "Delegate to Congress." He was admitted to a seat in the House.

Hunter, 7th Cong......C. and H., 120

Wisconsin entitled to immediate representation.

The first Delegate from the Territory of Wisconsin qualified at the beginning of the second year of the Twenty-fourth Congress and served until the middle of the Twenty-fifth Congress. Another candidate, duly elected, then presented himself, and it was held that under all the laws under which Michigan became a State, and the Territory of Wisconsin was formed, the term of the first Delegate had expired, and that of the second began immediately.

Doty vs. Jones, 25th Cong......1 Bart., 16

Citizenship at time of election in Michigan.

Under the law for the government of the Territory of Michigan which provided "that every free white male citizen of said Territory above the age of 21 years, who shall have resided therein one year next preceding the election," etc., should be entitled to vote for Delegate to Congress, and be eligible to office in the Territory, the Committee, with outdeciding the question whether the office of Delegate to Congress was an office in the Territory, held that the law did not require a year's citizenship, but only residence for a year, with citizenship at the time of the election.

Biddle vs. Richard, 18th Cong......C. and H., 409, 410,

Congress may prescribe qualifications of.

Congress has the power to add the qualification of loyalty to the qualifications for membership prescribed by the Constitution. Much more has it the power to prescribe qualifications for a Territorial Delegate.

Cannon vs. Campbell (Mr. Bellzhoover) 47th Cong......2 Ells., 639

Must be a citizen and should have similar qualifications to those of a Representative.

If a "Delegate can not be regarded as strictly and technically a Representative, yet, considering the dignity of his office, the important functions which he may exercise, and the high privileges he enjoys, the strongest reasons of public policy would seem to require not only that he should not be an alien, but that he should possess qualifications similar to those required in a Representative. * * * An alien can not exercise the office of a Delegate to Congress."

Levy, 27th Cong. (first report).....Report No. 10, 1st sess., 27th Cong., p. 5.

Qualifications same as those of Representatives.

Whether Congress has the power to extend the Constitution over a Territory or not, it certainly has the power to make the Constitution a part of the statute law of the Territory, and where the Constitution has been declared the law of a Territory, so far as applicable, and no laws have been passed prescribing qualifications for the office of Territorial Delegate, the qualifications are the same as those prescribed by the Constitution for members of the House of Representatives.

Maxwell vs. Cannon, 43d Cong......Smith, 188

DEMURRER.

See NOTICE OF CONTEST.

DEPOSITIONS.

See EVIDENCE.

DESERTERS.

See QUALIFICATIONS, OF ELECTORS.

DILIGENCE.

Due diligence required. (*See* Evidence, additional, and also under Contest, dismissal of.)

DIRECTORY LAWS.

See LAWS, MANDATORY AND DIRECTORY.

DISMISSAL OF CONTEST.

See under CONTEST, DISMISSAL OF.

DISQUALIFYING OFFICE.

See QUALIFICATIONS OF REPRESENTATIVES.

DISTRICT (*see* also Apportionment Act, and Election by General Ticket.)

After redistricting, election to fill vacancy to be held in new district.

Where a member had resigned, and the election to fill the vacancy had been held in a district established since the former election, and containing additional towns whose vote determined the result of the election, the committee held that the new district was the only one in legal existence, and that the election was properly held therein.

Perkins vs. Morrison, 31st Cong. 1 Bart., 142

The minority held that an election to fill a vacancy held in a new district, differently constituted from the district in which the original election was held, was valid, on the ground that the new district was the only one then having legal existence. But in this case if all the votes cast in the newly added parts of the district were rejected, and the maximum possible vote in the excluded parts of the old district added, the result would be the same.

Hunt vs. Menard (minority report) 40th Cong. 2 Bart., 497

Where a State had been redistricted, and a vacancy occurring by virtue of the death of a member elected from one district was filled by a special election held in a district differently constituted, *held*, that Representatives represent States and not districts, and the action of the governor of the State should be acquiesced in.

Pool vs. Skinner, 48th Cong. Mobley, 66

After redistricting, election to fill vacancy to be held in old district.

A vacancy "is the occurrence of an event by which a portion of the people are left unrepresented," and it ought to be filled by the people in whose representation the vacancy occurs, even when the State has been redistricted since the former election.

Perkins vs. Morrison (minority report), 31st Cong. 1 Bart., 146

Where the State was redistricted after the election, and an election to fill a vacancy was held in a new district, comprising part of the old district and part of another, the committee held that the election should have been held in the district in whose representation the vacancy occurred, and that the election in the new district was void.

Hunt vs. Menard, 40th Cong. 2 Bart., 481

"We are of the opinion that the right of representation for the full term of the Forty-eighth Congress inhered in the people of the old district as an accrued or an established right, and that they alone had the right to fill the existing vacancy. This right was secured to them on a fundamental principle of our representative government and by positive law, both Federal and State. We hold these principles and these propositions to be radical and fundamental in our government: (1) No portion of the people or territory of a State can be rightfully deprived of a representation in Congress; (2) no portion of the people or territory are rightfully entitled to a double district representation in Congress."

Pool vs. Skinner (minority report), 48th Cong. Mobley, 68

When State redistricted, old districts last through Congress already in existence.

"When a State has been divided and Representatives elected for a certain Congress, each district must be regarded as an existing fact for and through that entire Congress; and as the person elected from a particular district has the right to hold the office during the legal term of that Congress, so his office must be held to exist in law and in fact for the entire term of the Congress of which he is a member." The only people who have a right to participate in an election to fill a vacancy are the people of the old district, and all votes cast outside of this district are void.

Pool vs. Skinner (Mr. Cook), 48th Cong. Mobley, 77

Disputed boundary.

Where the districting act provided that certain counties and the unorganized territory south of a certain line should constitute the first district, and the remaining counties and the unorganized territory north of the same line should constitute the second district, but by a prior law certain of the unorganized territory north of the dividing line was attached to a county in the first district for election purposes, the committee held that the voters in this territory could vote for Representative in Congress from the first district. The minority held that they were residents of the second district, and could only vote in that district. On the whole case the House refused to adopt the conclusions of either majority or minority.

Miller vs. Thompson, 31st Cong. 1 Bart., 124, 132

Disputed division of districts in Minnesota.

Where the legislature had prescribed that certain counties should constitute the first district, certain others the second, and the remainder of the State the third, it must be assumed that the counties specified for the first and second districts were intended to include the territory which the legislature itself had determined should belong to those counties. And even if it were conceded that territory made a part of one of the counties of the second district by an act of the legislature could not properly be made a part of it, it did not follow that the territory thus improperly included was made by the legislature a part of the third district, or was not properly a part of the second district.

Cox vs. Strail, 44th Cong. Smith, 430

State not apportioned under apportionment act; no legal district.

Where the State had not yet been redistricted under the new apportionment act giving it five representatives instead of four, and the alleged election was held in the old first district, the committee held that "if, therefore, there was no other difficulty in the way of giving effect to this alleged election, it could not be said to have been held in conformity with, but in contravention of, law."

Field, 38th Cong. 1 Bart., 580

Established by seceding legislature not recognized.

Where the State had been redistricted for the Confederate Congress, and claimant claimed to have been elected to the United States House of Representatives from a district composed of parts of two districts already represented in the House, he was not admitted.

Rodgers, 37th Cong. 1 Bart., 462

DOMICILE.

See RESIDENCE.

ELECTION.

Adjournment of. (*See Adjournment.*)

Officers of. (*See Officers of Election.*)

Notice of. (*See Notice of election and Irregularity in notice.*)

Place of. (*See Irregularity in place of election and Polling place.*)

Right of House to inquire into election. (*See House of Representatives.*)

When election at any poll void. (*See* Returns, impeachment of, and when impeached, what votes counted; and *see* also Fraud, Intimidation, Bribery, Deception, Undue influence, Irregularity, Officers of election, disqualification of, etc.)

WHAT CONSTITUTES.

Must be by the people.

"The term election must mean the act of choosing performed by the qualified electors, in conformity with the requisitions of the Constitution and laws regulating the manner in which the choice shall be made. If, therefore, the legal electors, on the day appointed, should fail to make a choice, it is confidently believed that no other authority of the State can, at any other time, make good this defect." *Held* that a law providing that in case of a tie the governor and council should determine by lot who should be representative was unconstitutional.

Reed vs. Coeden, 17th Cong. C. & H., 354

Whomsoever the people choose to select.

"The people are supreme, and whomsoever they choose to select as their representative they are entitled to be represented by that person. And no class of public officers can lawfully disregard their will."

Goode vs. Epes (minority report), 53d Cong. Report 1952, pt. 2, p. 19

Free choice of the majority fairly determined.

"The true question is not whether every officer appointed to give security and convenience to the exercise of the right of suffrage has done everything that by law he ought to do, but whether everything has been done that was in fact necessary to secure the full and free exercise of the right; whether the right has been, in fact, so exercised. If it has been so exercised, and the suffrages of a majority of qualified electors have been given in favor of any individual, an election has been made and that individual is the person elected. His right is identified with the election itself and the rights of the electors; all must be sustained or sacrificed together."

Letcher vs. Moore (minority report), 23d Cong. C. & H., 823

Must be full expression of the will of the people.

Where members not elected at the regular time were unseated, the members elected at the regular time were also refused seats apparently on the ground that, owing to misunderstanding, only about one-half of the voters who voted at the election voted for anyone for Congress, and there was consequently no full expression of the will of the people.

Gholson and Claiborne, 26th Cong. 1 Bart., 16

There must be a free expression of the popular will.

"It is a fraud, a cheat, to hold anything an election which is not the freely expressed will of the whole body of electors acting intelligently, unbought, and unintimidated." * * * "An election is the free choice by those who have the right to make it, and who desire and seek to make it, uncompelled, unawed, and unintimidated." An election controlled by violence should be set aside.

Whyte vs. Harris (majority report), 35th Cong. 1 Bart., 258, 262

Free choice of the people, fairly determined.

Elections are simply the method whereby citizens may manifest their choice; and when they have proceeded in accordance with law, and manifested their choice through legal forms, their right so to do shall not be taken away from them as long as their choice can be ascertained. There are three questions to be answered: Did the electors express their choice in accordance with law? Was the election free and fair? Can the choice be ascertained from the evidence?

Spencer vs. Morey (minority report), 44th Cong. Smith, 486

Votes legally cast, counted, and returned.

"To validate an election there must be votes legally deposited by legal voters, and legally counted, and the result legally declared."

Sheridan vs. Pinchback (minority report), 43d Cong. Smith, 227

Must be a full expression of the will of the people.

Where an election was held in October, under proclamation of the governor, at which over 30,000 votes were cast, and another election was held in November, without proclamation, and, so far as appeared, without general notice to the voters, at which only 171 votes were cast, and these votes were never canvassed by any county or State officer, and the candidate who received the majority of the votes at the November election petitioned to be admitted as a member, alleging that the election in November was held at the legal time, the committee held that, without regard to the legal time of election, the election in November was not such an expression of the will of the people as to entitle any candidate to a seat under it.

Holmes and Wilson, 46th Cong 1 Ells., 322-344

Will of the people fairly and honestly expressed.

"The whole theory of a government which is to be managed and controlled by the people exercising the elective franchise is that their will when fairly and honestly expressed shall be the law, and shall be respected by all the authorities."

English vs. Peelle (minority report), 48th Cong Mobley, 179

Contestant receiving majority of votes seated.

Where the contestant had a majority of 2 votes outside of a county attacked by the contestee, and the evidence on which this county was attacked was inadmissible, and even if it were admitted and the vote of the county rejected or recounted in either of the ways suggested the contestant would still have a majority, he was unanimously given the seat.

Boles vs. Edwards, 42d Cong Smith, 59

WHEN WHOLE ELECTION SET ASIDE.**When no election, legality of votes immaterial.**

"Only two questions can ever arise touching an election: (1) Was there an election? If there was, then (2) Who had the majority of votes? If there was no legal election, it is wholly immaterial how many votes were cast, whether they were legal or illegal, or who had a majority of them."

Harrison vs. Davis, 36th Cong 1 Bart., 345

If void when held, can not be made legal.

The legislature can not by subsequent enactment make legal an election not legal at the time it was held.

McKenzie, 37th Cong 1 Bart., 462

When result changed by rejection of a precinct.

Where by the rejection of the vote of a precinct for fatal irregularities the result of the election was changed, the sitting member contended that the election should be set aside, as to give the seat to the petitioner would be to give it to the minority candidate. The committee recommended the seating of the petitioner, but the House set the election aside, and so seems to have sustained the objection.

Easton vs. Scott, 14th Cong C. and H., 282

When whole result in doubt.

Where testimony had been taken upon the false assumption that the burden of establishing the legality of a vote lay upon the party for whom it was cast, and, so far as could be ascertained from such testimony, a majority of the legal votes were cast for petitioner, but a considerable number of votes rejected under the testimony were subsequently shown to be legal, and many more may have been, and where this majority for petitioner was overcome by rejecting a number of polls on technical grounds, leaving the sitting member a majority of the remainder, a majority of the committee held that it was impossible to determine which party was justly entitled to the seat and recommended that a new election be ordered. A minority held that however just such a decision might seem in this particular case, yet as the sitting member, upon the principles adopted by the whole committee, had a majority of the legal votes, he was entitled to the seat. The House sustained the conclusions of the minority.

Draper vs. Johnston, 22d Cong C. and H., 714

When impossible to ascertain true result.

A case was referred to the Committee on Elections, from which two reports were presented, one in favor of each candidate. The House, disregarding both reports, proceeded to a detailed examination of the evidence; but after a month of discussion, having considered only part of the evidence, declared the seat vacant, it being impossible to arrive at a decision.

Letcher vs. Moore, 23d Cong C. and H., 844-858

When impossible to determine who was elected.

Where the frauds and irregularities proved were such as to render it impossible to determine who was elected, the seat was declared vacant.

Bowen vs. De Large, 42d Cong Smith, 100

When whole result rendered doubtful by illegal voting.

Where a number of illegal votes was shown, ten times greater than the returned majority of contestee, and three times greater than the majority claimed by him after all eliminations possible under the evidence had been made, but it could not be ascertained from the evidence for whom these votes were cast, the majority of the committee held (but they were not sustained by the House) that it was impossible by any method of elimination to ascertain the true result of the election, and that the safest and most equitable rule would be to declare the election void and refer the question to the people by a new election.

Curtin vs. Yocum (majority report), 46th Cong 1 Ells., 434

Not to be set aside for uncertainty resulting from the negligence of the parties.

"The burden of proof, even if the doctrine of declaring an uncertain election void be adopted, is, we think, * * * on the contestant to show that more illegal votes than the returned majority of the sitting member were cast, and either that they were cast for the sitting member or that it is impossible to ascertain for whom they were cast; and that this impossibility is an actual impossibility arising from the circumstances of the case, and which could not have been remedied by the use of due diligence, and not an impossibility arising wholly from the absence of evidence that could have been taken. The party having the burden can not by his own neglect create the impossibility."

Curtin vs. Yocum (second minority report), 46th Cong 1 Ells., 437

If held without authority of law, void.

If an election is held without authority of law it is void without regard to irregularities. The act dividing the Territory of Indiana provided that a new legislature of at least nine members and a Delegate to Congress should be elected at an election to be ordered by the old legislature of the Territory, which had consisted of eight members, though at the time of the passage of the act there was no legislature in existence. The act was held by the committee to be fatally defective and the election was recommended to be set aside, but the House took no action.

Randolph vs. Jennings, 11th Cong C. and H., 243

First election in Hawaii valid, though no law passed to provide for it.

Under the laws of the Republic of Hawaii provision was made for the election by the people of only two sets of officials. Under the organic act these laws of the Republic were continued in force and a Delegate was required to be elected, the times, places, and manner of holding elections to be "as fixed by law." No new laws were passed, but an election was held under the forms of the law for electing members of the Hawaiian legislature. As there was no provision in this law for an election for Delegate it was claimed that no valid election could be held under it, but the committee did not concur, and reported in favor of the right of the sitting Delegate to his seat.

Wilcox, 56th Cong Report 3001

Before admission of State, valid.

Where members were elected before the admission of the State, under a proposed constitution providing for the election of three members, and the constitution as subsequently ratified by Congress provided for the election of only two members, and only two persons presented certificates, it was held that they were entitled to be sworn in.

Phelps and Cavanaugh, 35th Cong 1 Bart., 250

Before admission of State, void.

The minority held that a State not yet in existence could not elect Representatives "to represent her nonentity."

Phelps and Cavanaugh (minority report), 35th Cong..... Report No. 408, pp. 5-7.

Of three members under an organic law providing for only two, void as to all three.

Where members were elected before the admission of the State, under a proposed constitution providing for the election of three members by general ticket, and the constitution as subsequently ratified by Congress provided for only two members, the minority held that even if the admission of the Territory related back to and legalized the acts of the Territorial officers, no valid election could be held under this law, as the election of two members would be in conflict with the law under which the election was held, and the election of any other member would be in conflict with the organic law. The person having the third from the highest number of votes was as much elected as the other two, and the House had no more authority to select two of the three than it would have to choose between two candidates having an equal number of votes.

Phelps and Cavanaugh (minority report), 35th Cong..... Report No. 408, pp. 5-11.

No legal election in most of the district.

If "the election was invalid in eleven out of the twelve counties, rendering it impossible to count but 737 votes out of 8,941, no other alternative would be left but to set aside altogether such an election, and remand the case back again to the people, that they might have an opportunity to give expression to their choice in conformity to law."

Blakey vs. Gollady, 40th Cong 2 Bart., 419

When election void in one-third of the district.

Where the vote of a city casting one-third of the vote of the district had to be thrown out for repeating, bribery, and intimidation, and contestant had a large majority in the remainder of the district, the seat was declared vacant, the committee unanimously concluding that it was impossible to tell for whom the majority of the legal votes was cast.

Buttz vs. Mackey, 44th Cong Smith, 689

Ought not to stand on the vote of two out of five counties.

Where, in a district of five counties, the vote of three is thrown out, the vote of the other two ought not to determine the choice of the five.

McFarland vs. Culpepper, 10th Cong C. and H., 223

No election in part of county.

The failure of the sheriff to appoint deputies to hold the election at two precincts was alleged as a reason why the election should be set aside, but the committee decided the case on other grounds.

Randolph vs. Jennings, 11th Cong C. and H., 240

Fraud, violence, and intimidation in ten out of fifteen parishes.

Where there was widespread fraud, violence, and intimidation in ten out of the fifteen parishes of the district, the committee held that the election was void. The minority held that there was evidence enough to reject only two entire parishes and nine polls in two others. Contestee having still a majority of the remaining polls, they held that the election was good and he was entitled to retain the seat. The House vacated the seat.

Benoit vs. Boatner (first case), 54th Cong Report 867

Fraud and violence in one-third of district, election valid.

Where there was flagrant fraud and violence in one-fifth of the parishes of the district, casting one-third of the vote, but the committee were not sure that the fraud and intimidation were so general throughout the district as to render it certain that there was not a free and fair expression by the great body of the electors, the committee reported in favor of the validity of the election.

Benoit vs. Boatner (second case), 54th Cong Report 2808

Where election fair in three-fourths of district, election valid.

Where there was no evidence of fraud, violence, or intimidation in most (more than three-fourths) of the district, and the general charge of suppression of negro votes was rebutted by the fact that contestant was the candidate of a new white Republican party expressly opposed to "negro domination," the committee held that the claim that the election was invalid was not sustained.

The minority claimed that there was intimidation in the majority of the parishes, and that the election should be declared void.

Beattie vs. Price, 54th Cong Report 2812

Thousands of voters prevented from voting, but tender insufficient to count them.

Where thousands of voters, many more than the returned majority or contestee, had been deprived of their votes by the partisan and unfair enforcement of an unconstitutional registration law, one member of the committee, holding that the testimony did not show such a tender of votes on the part of the excluded voters as would justify counting them, recommended that the seat be declared vacant. The House agreed and vacated the seat.

Johnston vs. Stokes (Mr. McCall), 54th Cong Report 1229, p. 14

When major part of votes unaffected.

It was stated as the opinion of the committee that if partial corruption were proved, but the major part of the votes remained unaffected, the result should be determined from such major part.

Van Rensselaer vs. Van Allen, 3d Cong C. and H., 75

New election ought not to be ordered if result can possibly be ascertained.

"In all cases of contested elections, where the question depends upon matters of fact which are controverted by the parties, much difficulty is to be expected in coming to a decision; and where there is room for doubt, a disposition is often felt to return it to the people. This, however, ought not to be done when it is possible to ascertain what the true result has been." When people have honestly and fairly gone through the process of election, "no doubts which are capable of being solved ought to be permitted to operate against them. Indeed, nothing short of the impossibility of ascertaining for whom the majority of votes have been given ought to vacate an election."

Biddle and Richard vs. Wing, 19th Cong C. and H., 506

If election in part of district void, result decided from remainder.

Where the election in two parishes, casting a majority of the votes in the district, was vitiated by violence and intimidation, the result was decided from the votes in the peaceable parishes.

Hunt vs. Sheldon, 41st Cong 2 Bart., 534

"When a portion of the people of any district, in a peaceable and orderly manner, and in strict compliance with all the forms of law, manifest their will at the ballot box, we can see no good reason why that will should be disregarded on the ground that there were other people in the district who did not choose to obey the law, nor submit to its requirements."

Wallace vs. Simpson, 41st Cong 2 Bart., 743

Where the election in six out of nine counties was void on account of violence and intimidation, and contestant received a majority in the other three counties, the committee reported this as one of three grounds for seating contestant. The House seated contestant, but perhaps on one of the other grounds.

Wallace vs. Simpson, 41st Cong 2 Bart., 735-746

If election in small part of district void, result decided from remainder; but if void in large part of district, whole election void.

The committee adopted the rule that in counties where the electors generally had not an opportunity to vote freely and without restraint, fear, or influence of fraud the vote should be thrown out and the result declared from the vote of the peaceable parishes. This rule was to be applied even when there was no actual violence on the day of the election at the polls, but where there had been such a condition of violence preceding the election that a large number or class of voters

refrained from voting in the reasonable fear that the scenes of violence would be repeated if they should attempt to vote. In the first case reported under this rule (*Hunt vs. Sheldon*) the House sustained the report of the committee, but in this case about half the votes were cast in the peaceable parishes, and contestee had a very large majority of them. In the next case (*Sypher vs. St. Martin*) the House refused to sustain the report of the committee. In the third case (*Morey vs. McCranie*) the committee reported that they preferred not to take this action of the House as a reversal of the rule, but "we accept the decision of the House in Sypher's case not as a reversal but as a limitation of the rule adopted in Sheldon's case, and interpret the action of the House in Sypher's case to mean that the rule should not be so far extended as to apply to such a case where less than one-fourth of the legal electors of the district resided, and one-fifth of the registered vote was cast, within the peaceable parishes and precincts, and the claimant received but a small majority of that vote." In the last case (*Morey vs. McCranie*) the peaceable parishes contained about one-third of the registered vote, and in these parishes contestant received a small plurality, but not a majority of the votes. If the election in the other parishes had been peaceable, it was evident that he could not have been elected. Contestee was ineligible aside from the question of intimidation. The committee reported against both claimants and the House unanimously agreed.

<i>Hunt vs. Sheldon, 41st Cong</i>	2 Bart., 703
<i>Sypher vs. St. Martin, 41st Cong</i>	2 Bart., 699
<i>Morey vs. McCranie, 41st Cong</i>	2 Bart., 719

When void in less than half the district, result declared from remainder.

Where the election was not contested in seven parishes, casting considerably over half the votes of the district, but was vitiated by violence and intimidation in the other five parishes, and contestant had a majority of 245 votes in the seven uncontested parishes, he was seated.

<i>Darrell vs. Bailey, 41st Cong</i>	2 Bart., 754
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When election void in one-third of district, result declared from vote in other two-thirds.

Where the election in four out of ten parishes, casting about one-third of the vote of the district, was void for violence and intimidation, and contestant had a large majority of the vote of the other six parishes, casting two-thirds of the vote of the district, contestant was seated.

<i>Newsham vs. Ryan, 41st Cong</i>	2 Bart., 731
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Not set aside when contestee's majority not overcome by most liberal construction of evidence.

Where it was charged that contestee had been deprived of votes by the abolition of voting places, but there was no definite proof how many votes he had been deprived of, the committee considered the amount of increase in the vote at the unquestioned election of two years later as a means of estimating the possible number. And where fraudulent voting was charged in other parts of the district, but the proof was indefinite, the committee estimated from various considerations the largest possible number that could thus have fraudulently voted. Adding to the vote of contestee the amount of the first estimate and subtracting from that of contestant the second, the latter was found still to have a majority, and the committee reported in his favor. The minority reported that the title of both claimants was so tainted with fraud that the seat ought to be declared vacant.

<i>Lawrence vs. Sypher, 43d Cong</i>	Smith, 340-355
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Void in four counties, should stand on result in fifth.

Where returns are shown to be fraudulent and there is no proof *aliunde* as to the actual vote, the fraudulent polls should be thrown out and the result stand on the unimpeached polls. Where the election was shown to be fraudulent in four of the five counties of a district, the election should stand on the result in the fifth county.

<i>McDuffie vs. Davidson (minority report), 50th Cong</i>	Mobley, 622
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Where not specifically shown invalid in half the district, election should stand.

Where widespread fraud was shown in seven of the nine counties in a district, but the testimony as to individual precincts did not show a large enough number of votes affected to overcome all of the majority returned for contestee, the committee

held that the vote of the two unimpeached counties, and the presumption of fairness in favor of the unassailed boxes in the other counties, must save contestee his title to the seat. Mr. Houk, in a dissenting report, contended that three-fourths of the majority having been overcome by an examination of one-fourth of the boxes, a general conspiracy being shown, and contestant having been prevented from taking testimony in regard to the other precincts, there was no "presumption of fairness in favor of the unassailed boxes."

Chalmers vs. Morgan, 51st Cong......Rowell, 329-433

When held under a law passed by a legislature not freely elected, invalid.

Where the legislature of a Territory was found not to have been freely elected by the people, but to have been imposed upon them by an armed invading force, the seat of the sitting delegate was declared vacant on the ground that it was not held under a valid law, this legislature having no power to pass valid laws.

Reeder vs. Whitfield (first case), 34th Cong......1 Bart., 203

Invalid when electors under duress.

"Voters may voluntarily stay away from the polls, and they are thereby taken and deemed to have acquiesced in what was done by those who are present. But no such presumption rests upon those who are under duress."

Pigott, 37th Cong......1 Bart., 463

Can not well be held under martial law.

"Martial law and military discipline, if not incompatible with, are certainly, at least, poor instrumentalities for ascertaining the choice of freemen."

McKenzie vs. Kitchen, 38th Cong......1 Bart., 472

Void if held under martial law.

"Any election for a civil office held under *martial law*, where the qualifications of voters are prescribed by military officers, is not such an election as the founders of this Government intended should be held under the Constitution which they framed, and should be declared void in all cases by the Congress of the nation."

McHenry vs. Yeaman (Mr. Voorhees), 38th Cong......Report 70, pt. 2, p. 2.

FAILURE TO HOLD.

Where election not held, votes that would have been cast not counted.

Where the law provided that if the regularly appointed officers of election failed to hold the election, three freeholders might organize and hold the election, and contestant asked that votes be counted for him that would have been cast but for the failure of the officers of election to open the polls, the minority of the committee rejected the claim, and as it is not mentioned in the majority report it was probably rejected by the whole committee.

Sloan vs. Rawls (minority report), 43d Cong......Smith, 161

"Outside polls" not legally organized not counted.

"The national law provides a way in the election of Congressmen and Presidential electors by which persons having the right to vote can make that right available to them when it is denied them at the regular poll." Where persons did not pursue this course, but organized irregular "outside polls" in addition to those provided by law, the committee refused to count the votes. The minority held that the so-called outside polls were regularly organized by the electors present, under the law of Arkansas, and were, strictly speaking, the only legal polls. The minority, however, proposed to count both polls.

Gause vs. Hodges, 43d Cong......Smith, 305, 319

Two polls held, and both counted.

Where the officers of election refused to open the poll at the proper time, and the friends of contestant organized other polls, at which they cast their votes, and the officers of election later opened polls at the regular place, the committee in one case counted both polls, and in the other only the poll first opened. In cases, however, where the friends of contestant simply declined to vote, their votes were not counted.

Patterson vs. Carmack, 55th Cong......Report 895

But one lawful election can be held at the same time and place.

There can be but one lawful election held at the same time and same place for the same office. It is well settled that there is no law which authorizes electors who believe that their votes would not be counted at the regular poll to resort to holding an election for themselves at an outside poll.

Patterson vs. Curmack (minority report), 55th Cong Report 895, pt. 2, p. 2

Failure to open polls not necessarily fatal to whole election.

Unless the failure to open polls can be traced to contestee, or it appears that such failure was the result of a design on the part of his political supporters to deprive legal voters of an opportunity to vote for contestant, it will not of itself justify the ordering of a new election.

Smalls vs. Elliott, 50th Cong Mobley, 672

If organized by electors, under the law, valid.

Where it was provided that if the regularly appointed officers of election do not appear before 9 o'clock any three electors may hold the election, and the regular officers not appearing the electors held the election under the law, but the regular officers opened another poll after 9 o'clock, *held* that only the votes cast at the first poll should be counted.

McDuffie vs. Davidson, 50th Cong Mobley, 596

Where the Federal polls were not opened, by reason of the failure of the managers to act, but the electors, under the law, improvised an election board and cast their votes, the committee unanimously counted the vote.

Murray vs. Elliott, 54th Cong Report 1567

Unless voters organize under the law, no remedy.

Where the officers of election in certain precincts hold no election and the voters neglect to exercise their right to organize and hold the election, the votes that would have been cast can not be counted, nor can the general result be affected.

Bradley vs. Slemons, 46th Cong 1 Ells., 312

Where no election is held votes can not be counted.

Featherston vs. Cate, 51st Cong Rowell, 111

Electors declining to vote, result not affected.

Where, in consequence of a dispute over the ejection of a person claiming to be an election officer, some members of one party refused to vote, but they could have voted and were encouraged to vote, and there was no definite proof of their number, the committee held that the result could not be affected.

Myers vs. Moffett, 41st Cong 2 Bart., 570

BY BALLOT (see also BALLOTS, SECRECY OF).**Election "by ballot" implies a secret ballot.**

Where the election is required to be by ballot it is intended "to insure to each elector the privilege of a secret vote," and he can not be compelled to disclose the name of the candidate for whom he voted. Without such disclosure it would be in vain to inquire into his qualifications with a view to purge the polls.

Easton vs. Scott (committee, overruled by House), 14th Cong C. and H., 276

Viva voce election illegal when required to be by ballot.

Where the election was required to be by ballot and the officers sworn, *held* that the votes cast at an election *viva voce*, held by fewer officers than the law required, and they not sworn, rejected by the county returning board and a return of them irregularly forwarded to the governor, and by him counted, should be rejected.

Easton vs. Scott, 14th Cong C. and H., 276

Where, on account of the failure of the election officers to hold an election, the electors did not vote by ballot, but organized and expressed their preference *viva voce*, *held* that such election could not be considered.

Smith vs. Shelley, 47th Cong 2 Ells., 32

VIVA VOCE (and see all early cases from Virginia and Kentucky.)

Votes of deaf and dumb received.

By the constitution and laws of Kentucky all votes were to be given "personally and publicly *viva voce*." Votes had been cast by persons who were deaf and dumb, but were intelligent and could read and write. Of course they could not literally vote "*viva voce*." The Kentucky senate had (in the case of Williams and Mason, printed in C. and H., 802-811) rejected such votes, and the committee at first, by a majority vote, rejected them, but subsequently reconsidered the decision and allowed the votes.

Letcher vs. Moore, 23d Cong......C. and H., 751, 826

BY GENERAL TICKET (see also ELECTION LAWS.)

By general ticket, valid.

The majority of the committee held that the provision of the apportionment act under the Sixth Census requiring that Representatives should be elected by districts was void because it could not be executed of itself and Congress had no power to command the State legislatures to pass the regulations necessary for its enforcement. The minority held that it was a valid alteration of the election laws of the States, and that if the election laws as so altered could not be enforced without further legislative regulations, the command to the legislatures to enact such regulations came from the words of the Constitution and not from the law of Congress. Four States had elected their Representatives by general ticket, and the majority held that these elections were valid, the minority that they were void. The House, without sustaining the reasoning of either report, retained the sitting members in their seats.

Members elected by general ticket, 28th Cong......1 Bart., 47-69

The fact that members were elected by general ticket instead of by districts, held not to invalidate their election.

Phelps and Cavanaugh, 35th Cong......1 Bart., 249

TIME OF HOLDING (see also IRREGULARITIES IN HOURS OF HOLDING ELECTION).

Held on wrong day, invalid.

The committee held that if the allegation that an election had been held on a different day from that required by law had been sustained the election would have been void; but under a proper interpretation of the law it had been held on the right day, and was legal.

Tennessee election, 42d Cong......Smith, 3

Where the election in a precinct was held the day before the legal day, the committee threw out the vote.

Manzanares vs. Luna, 48th Cong......Mobley, 63

Provisions prescribing, mandatory.

"It will not be pretended that the proper construction of an act of Congress is to be determined by the voters of a particular district. The provisions of law which fix the time and place of holding elections are mandatory. As to the time of election, the day can not be changed even by the consent of all the voters (McCrary, sec. 114). Ignorance of the proper time or a misunderstanding of the law on the part of a portion of the electors will not deprive those who do understand the law and who so act upon the day prescribed by law from their right to vote and control the election."

Patterson vs. Belford, 45th Cong......1 Ellis, 59

Not ordinarily to be changed by general consent.

"It is no doubt the rule of the law in regard to elections that the expressed will of the people shall be followed if it be reasonably practicable to construe legal provisions so as to carry it out. It has, however, never been claimed that unofficial committees of political parties could abrogate the official proclamations of State officers, or, in the presence of such official notice to the contrary, condense two elections into

one. In order to do this it would be necessary to find that the law was clearly in accord with the action of the people contrary to the proclamation, and that the people themselves clearly intended at that time to make their action final and conclusive."

Patterson vs. Belford (Mr. Cox), 45th Cong......1 Ells., 72

Members can not sit in two Congresses on same election.

Where Representatives were elected to Congress in anticipation of the restoration of the right of representation to the State, and that right became effective while the Fortieth Congress was still in session, and the claimants were admitted to that Congress, it was held that they could not under the same election be admitted to seats in the Forty-first Congress.

Georgia cases, 41st Cong......2 Bart., 596

In Iowa, on day of Presidential election.

The committee found that under the constitution and laws of Iowa (in force in 1860) the day of the Presidential election was the legal day for holding elections for Representatives in Congress in the years when there was a Presidential election.

Byington vs. Vandever, 37th Cong......1 Bart., 396

In West Virginia, in August.

The old code of West Virginia fixed the election of Representatives in Congress on the same day with the general election, viz, the fourth Thursday in October. The constitution of 1872 was submitted to the people on August 22, 1872, for ratification, and in a schedule it was provided that at the same time and places an election should be held "for senators and members of the house of delegates, and all officers, executive, judicial, county, or district, required by this constitution to be elected by the people." After 1872 general elections were to be held on the second Tuesday in October. Congressional elections were held both on August 22 and on the fourth Thursday in October. A majority of the committee were of the opinion that the October election was valid; a minority held that the Congressional election was attached to the general election and that the election of August 22, 1872, was a general election. Another minority were of the opinion that the election of August 22 was a special election, and that the Congressional election should have been held on the second Tuesday in October, the day provided for holding general elections in the future. The House admitted the claimants elected at the August election.

Davis vs. Wilson }
Hagans vs. Martin } 43d Cong.....Smith, 108-130

In Colorado, according to section 25, Revised Statutes.

"The act of March 3, 1875, which modified the twenty-fifth section of the Revised Statutes so as not to apply to any State whose constitution must be amended in order to effect a change of the election of State officers in such States, in no way related to the State of Colorado."

Patterson vs. Belford, 45th Cong......1 Ells., 55

"If Congress could confer on any other body power to repeal an act of Congress, in its discretion, and if such body should fail or refuse to make the repeal, the act would continue in force, just as if the authority had not been given." If it be conceded that the constitutional convention of Colorado had power to fix the time for the election of a Representative in Congress by virtue of the enabling act, yet the said convention not having exercised that power, the act of Congress fixing the election in November must stand and be applicable to the State of Colorado.

Patterson vs. Belford, 45th Cong......1 Ells., 57

In Colorado, November 7, 1876.

The committee found that under the Constitution and statutes of the United States the enabling act admitting the State of Colorado, and the constitution of that State, the legal time for holding an election for Representative in the Forty-fifth Congress was November 7, 1876, and that the candidate receiving the majority of the votes cast on that day was elected. The minority found that the legal day was October 3, 1876. Mr. Cox, in a dissenting report, held that no legal election had been held or could be held without further legislation by the State legislature.

Patterson vs. Belford, 45th Cong......1 Ells., 52-73

Iowa excepted from section 25, Revised Statutes.

The committee held that the State of Iowa was within the exception created by section 6, chapter 130 of the acts of 1875, excepting from the provisions of section 25 of the Revised Statutes (fixing Congressional elections in November) those States "whose constitution must be amended in order to effect a change in the day of election of State officers in said State," and that the election held in October, 1878, was legally so held.

Holmes and Wilson, 46th Cong 1 Ells., 329-344

IN STATE IN REBELLION.**Claimant admitted.**

Where the loyal citizens of a State in rebellion cast their votes for Representatives in the Congress of the United States, and a claimant showed that he had received some 2,000 votes—all that were cast in his district—and that there was no such armed force in possession of the district as to prevent the loyal citizens from voting, he was admitted to his seat.

Clements, 37th Cong 1 Bart., 367

Where the election was held in form of law in three counties, containing a little over one-fourth of the population of the district, but the rest of the district was within the rebel lines, the committee came to no conclusion, but the House admitted the claimant.

Segar (second case), 37th Cong 1 Bart., 414

Claimant not admitted.

Where the State was in rebellion, and the only legal votes claimed to have been cast in the district for Representative in Congress were 10 votes in one precinct, and these votes were not cast in form of law, and what purported to be the return was not certified or properly proved, the claimant was not admitted.

Upton, 37th Cong 1 Bart., 368

Where the whole district, except one precinct, was in the armed occupation of rebels, and the election in that precinct was not held in accordance with law, the claimant was refused admission. If the loyal voters of the district could have freely expressed their choice, the committee would not have held the election invalid because the law was not complied with. But most of the voters had no opportunity for voting or knowledge of the election and could not be held to have acquiesced in the result, for "acquiescence presumes liberty to protest. In this instance that liberty did not exist."

Beach, 37th Cong 1 Bart., 395

Where nearly all the district was in armed occupation by the rebels and there was no formal election anywhere, but a few citizens signed a paper favoring claimant for Congress, he was refused admission.

Foster, 37th Cong 1 Bart., 425

Where the election was held under the proclamation of military officers, prescribing different qualifications for voting than those prescribed by the constitution and laws of the State, and many of the forms of law were not observed and the election could only be held in four of the eleven counties, the claimants were not admitted.

McCloud and Wing, 37th Cong 1 Bart., 455

Where the whole district was in the possession of the contending armies and only a few precincts were so situated that votes could be cast in them, and the only proof possible of the votes cast at these were unsworn statements and letters, the claimant was not admitted.

Hawkins, 37th Cong 1 Bart., 466

Where the election was held in only two of the nine counties of the district and at a time different from that fixed by the governor, the claimant was not admitted.

McKenzie, 37th Cong 1 Bart., 460

Where the counties in which the election was held contained a little less than half the territory and population of the district, and parts of some of these counties were still disputed territory, so that elections could not be freely held, the claimant was not admitted.

McKenzie vs. Küchen, 38th Cong......1 Bart., 468

"Where the vote actually polled was such a minority of the whole vote that it could not be determined that the person selected by that minority was the choice of the whole district, and the absent majority were not voluntarily staying away from the polls, but were kept away by force, then no such selection thus made could be treated as an election."

Segar, 38th Cong......1 Bart., 579

Where the election had been suppressed in nineteenth-twentieths of the district by the orders of the military governor, enforced by the troops under his command, the committee held that the few votes cast in the remainder of the district could not constitute an election. They, however, strongly condemned the action of the military governor.

Field, 38th Cong......1 Bart., 581

Reconstruction by military authorities.

The majority favored and the minority opposed the admission of claimants elected in pursuance of a reorganization of the State government, initiated and partly directed by the military authorities. The cases were not reached by the House.

Bonanzo, Field, and Mann, 38th Cong......{1 Bart., 583-597
2 Bart., 1-16

ELECTION LAWS (see also United States Supervisors and Registration Laws).

Power of Congress to alter State election laws for Congressional elections.

"The privilege allowed Congress of altering State regulations or of making new ones, if not in terms, is certainly in spirit and design, dependent and contingent. If the legislatures of the States fail or refuse to act in the premises, or act in such a manner as will be subversive of the rights of the people and the principles of the Constitution, then this conservative power interposes, and upon the principle of self-preservation, authorizes Congress to do that which the State legislatures ought to have done." The committee argued that it was never intended that Congress should use its power except in these contingencies, but conceded that the power existed without reference to them.

Members elected by general ticket, 28th Cong......1 Bart., 49-52

While Congress possesses the power to alter the regulations of the States in regard to elections of Senators and Representatives, it has no power to command the State legislatures to make such regulations, and any attempted alteration by Congress which can not be carried into effect except by auxiliary State legislation is void.

Members elected by general ticket, 28th Cong......1 Bart., 52

An alteration of the State election laws made by Congress becomes a part of the laws of the States, and has the same validity as if made by the legislatures themselves. If the laws as so altered can not be executed without further regulations, the State legislatures are commanded by the Constitution, and not by the law of Congress, to enact such regulations.

Members elected by general ticket (minority report), 28th Cong......I Bart., 61-63

Laws of Congress engrafted on State laws.

"From the moment of the passage of the act of Congress [fixing elections in November] it became and was engrafted upon the statutes of every State in the Union, and it required no auxiliary State legislation to give effect to the national statute. But the election laws of the several States which fixed the places and prescribed the manner of such elections were not affected, altered, or repealed; and the national statute fixing the time and the State statutes fixing the places and prescribing the manner of holding the Congressional elections formed a complete election machinery for the election of Representatives in Congress."

Patterson vs. Belford, 45th Cong......1 Ells., 58

State laws for Congressional elections do not become Federal laws.

State election laws do not become Federal laws when Representatives in Congress are elected under them. "Such an idea is wholly repugnant to the Constitution; which expressly provides that the States may make laws for the election of Congressmen, while Congress may make, alter, or amend them."

Lynch vs. Chalmers (minority report), 47th Cong......2 Ells., 378

State laws must not be such as to prevent the execution of the United States supervisors law.

The United States supervisors law was enacted by Congress in pursuance of its constitutional power to make regulations as to the times, places, and manner of holding elections for Representatives in Congress, or to alter State regulations on these subjects. From the moment of the enacting of these provisions (February 28, 1871) they became a part of the election law of the State of Massachusetts, overriding all opposing State statutes made or to be made by the State, and the passage of the State law of April 20, 1876, authorizing an aldermanic count, so far as it provided for the taking of the final count of the votes for the Representative in Congress out of the supervision and scrutiny of the United States supervisors of election, was an evasion, if not a nullification, of the Federal law. After Congress had provided for the appointment of two supervisors of election for each voting place, and had required such officers to count the vote for Representative in Congress, and to remain with the ballot boxes until the count was wholly completed and the certificates made out, it is not competent for any State to provide another board of canvassers, who may take possession of the ballot boxes, exclude the Federal officers, and secretly count the votes, and declare a different result.

Dean vs. Field, 45th Cong......1 Ells., 194

United States supervisors law not an alteration of State laws.

The United States supervisors law was not enacted by Congress in pursuance of its power to "make or alter" regulations as to the manner of holding elections for Representatives in Congress. Under it the manner of holding the election is in no way regulated. The supervisors are appointed by the courts as instruments in the process of "enforcing the right of citizens of the United States to vote in the several States." They are not managers of an election, but guardians and scrutinizers of an election managed by others, officers of the States. Their duties are confined to the day of election, and the places of holding an election, and a statute providing for a subsequent recount by a board of aldermen is not an interference with the performance of their duties, and is not in conflict with the Federal law.

Dean vs. Field (minority report), 45th Cong......1 Ells., 221

Election law of South Carolina condemned.

In regard to the South Carolina election law approved March 1, 1870, the committee said: "The law under which the election was held seems to be well calculated to cover, if not to encourage, fraud, inasmuch as it neither requires registration of the voters nor a public canvass of the votes at the close of the polls, but allows the managers of each precinct, or one of them, to retain possession of the boxes containing the ballots uncounted for three days, at the end of which time they are required to deliver them over to the commissioners of election for their county, together with the poll list, and these latter officers may retain the boxes for ten days longer before making the canvass. But the committee, having no power over the law, must content itself with simply calling attention to it."

McKissick vs. Wallace, 42d Cong......Smith, 99

Held unconstitutional.

The provision of the election law of South Carolina which provides for several ballot boxes, distinguished from each only by the labels, and that no ticket found in the wrong box shall be counted, is practically an educational test, and is hence in direct violation of the constitution of the State.

Miller vs. Elliott, 51st Cong......Rowell, 515

Validity of Mississippi constitution not decided.

Contestants claimed that section 241 of article 12 of the constitution of Mississippi, adopted in 1892, was void, as being in conflict with the Federal Constitution and of the act of Congress of February 23, 1870, by which Mississippi was readmitted to

representation in Congress. The committee reported: "As the committee are of the opinion that a decision that the constitution of Mississippi was invalid would not necessarily deprive the State of Mississippi of representation in Congress, they do not attempt to decide said question."

<i>Newman vs. Spencer, 54th Cong</i>	Report 1536
<i>Ratliff vs. Williams, 54th Cong</i>	Report 1537
<i>Brown vs. Allen, 54th Cong</i>	Report 1538

Election law of New York constitutional.

Contestant claimed that the election law of New York requiring a candidate for Congress to be nominated by a party convention or be petitioned for by a certain per cent of the voters before having his name printed on the ballots was in violation of section 1 of article 14 of the Constitution of the United States, but the committee said that if this were the case the election laws of nearly all the States were unconstitutional. They held the law constitutional.

<i>Campbell vs. Miner, 54th Cong</i>	Report 106
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ELECTIVE FRANCHISE (see also Qualifications of Electors).

A political, not a natural, right.

"The elective franchise is a political, not a natural, right, and can only be exercised in the way, at the time, and at the place which may be designated by law."

<i>Miller vs. Thompson, 31st Cong</i>	1 Bart., 120
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May be withdrawn by the power which gave it.

The Supreme Court of the United States had decided that the portion of the constitution of Missouri prohibiting persons from practicing law who could not take an oath that they had not committed acts of disloyalty was unconstitutional, as being an *ex post facto* law. The committee held that the same objection would not apply to the provision depriving these persons of the right to vote, as this provision was not in the nature of a punishment. "Suffrage is a political right or privilege which every free community grants to such number and class of persons as it deems fittest to represent and advance the wants and interests of the whole. No State grants it to all persons, but with such limitations as the interests of all and the interests of the State require. When once granted it is not a vested, irrevocable right, but it is held at the pleasure of the power that gave it, and the State may, by a change of its fundamental law, restrict as well as enlarge it."

<i>Burch vs. Van Horn, 40th Cong</i>	2 Bart., 209
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ELECTOR.

See QUALIFICATIONS OF ELECTORS.

ELIGIBILITY.

See QUALIFICATIONS OF REPRESENTATIVES AND INELIGIBILITY.

ENABLING ACT (see also Utah).

Relates back to and legalizes acts of Territorial authorities.

"The act of admission into the Union, upon being consummated, relates back to and legalizes every act of the Territorial authorities exercised in pursuance of the original authority conferred. As the election of Members of this House looks directly to the end in view contemplated by the enabling act of Congress, the committee think it entirely within the scope of action conferred upon the people of the Territory, and should be respected by Congress." Members thus elected before the admission of the State, and at the election at which the proposed constitution was submitted to the people, were admitted.

<i>Phelps and Cavanaugh, 35th Cong</i>	1 Bart., 249
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ESTOPPEL (see also Agreement, Admission, Waiver, and Suppression of Evidence).

Should not prevent investigation of important matters.

The principle of estoppel ought not to be applied by the House to prevent the investigation of matters of public importance.

Reeder vs. Whitfield (first case), 34th Cong 1 Bart., 189

A party can not object to evidence introduced by himself.

A tabulated statement of returns, certified by the Secretary of State to the governor, having been put in evidence by the contestant, he was held by the minority to be bound by the whole of it, and could not be heard to object to the counting of certain returns included in it, on the ground that they were not made by the proper officers, though returns of the same sort not included in this statement were rejected.

Brockenbrough vs. Cabell (minority report) ... Rept. No. 35, 1st sess. 29th Cong., p. 15

By swearing in of contestee.

No sort of estoppel can arise from the fact that contestee was sworn in with other members at the beginning of the session.

Clayton vs. Breckinridge, 51st Cong Rowell, 692.

EVIDENCE.**ADDITIONAL.**

Extension of time not to be granted without strong reasons.

Without very strong reasons to show the necessity of further proof, the right of contesting a seat in Congress would be useless and nugatory if postponements and protracted appointments for taking additional evidence after the meeting of Congress should be allowed, especially when the parties have already had an equal and sufficient time for taking testimony.

Newland vs. Graham, 24th Cong 1 Bart., 6

Applications for extension of time looked upon with disfavor.

"The House has always discountenanced propositions which favor delay in controverted elections, for the reason that this course is harassing and vexatious to the rightful claimant, and encourages parties to look for compensation in proportion to their address in prolonging the contest,¹ while at the same time inducements are multiplied for the prosecution of contests upon frivolous grounds."

Williamson vs. Sickles (minority report), 36th Cong 1 Bart., 296

Extension of time by agreement of parties discouraged.

"One purpose of the statutes of the United States above cited (in regard to the time of taking testimony) was to compel parties to a contested election seasonably to prepare their case, so that it might have an early determination by the House. The practice which has arisen of permitting parties by agreement between themselves to postpone the time of taking testimony without any previous authority of the House of Representatives, or any express ratification of it by the House, is an indefensible one, and has, in the opinion of the committee, been carried too far. * * * It may happen, indeed, that from unforeseen causes an extension of time may be necessary, and the House of Representatives may not be in session, and therefore no previous application can be made to it, but in such cases, if the parties agree to an extension of time, the agreement should be in writing, signed by the parties or their attorneys, and application should be at once made to the House of Representatives when in session for a ratification of such agreement. The evils resulting from permitting the parties, at their own convenience, to regulate the time of taking testimony, without regard to the statutes or the public inter-

¹It was customary at this time to allow the contestant, if unsuccessful, the mileage and *per diem* of a member until the decision of the contest. A sitting member or a successful contestant received no extra allowance for expenses.

est, are too serious and obvious to require comment. * * * We think it of great importance in election cases that parties should understand absolutely that all agreements in contravention of the statutes of the United States, in regard to the taking of testimony, to be considered at all should be in writing, properly signed, and made a part of the record itself. Even then the policy of the law requires that they should not be regarded unless it appears that they were *bona fide* entered into for an adequate and reasonable cause to be determined by the House of Representatives, either before or at the time of deciding the election case." Where all the testimony was taken long after the time, the contestant alleging and contestee denying an oral agreement, the committee reported that the case should be dismissed. But they called attention to the fact that the evidence, if considered, would not establish contestant's case.

O'Hara vs. Kuchin, 46th Cong. 1 Ells., 378-383

Application for extension of time should be specific.

Where application, supported by affidavits, was made by the sitting member for an extension of the time to take testimony, it was refused on the ground, among others, that "the affidavits relied on are fatally defective in this, that they do not state the names of the witnesses whose testimony is wanted nor the particular facts which can be proven by their testimony."

Giddings vs. Clark, 42d Cong. Smith, 94

An affidavit accompanying an application to take further testimony should state specifically the facts expected to be proved, and the witnesses by whom they are to be proved. After the committee has decided against an application and reported the grounds for its decision, it is too late to put in a new application avoiding the decision.

Mabson vs. Oates, 47th Cong. 2 Ells., 11

Probable showing must be made.

"A case should not be reopened unless it appears to the House that on a new hearing the contestant would probably be able to produce evidence which would entitle him to his seat."

Thobe vs. Carlisle, 50th Cong. Mobley, 525

A prima facie case for reopening not to be rebutted by ex parte affidavits.

Where a *prima facie* case is made for the reopening of an election case it can not be rebutted by *ex parte* affidavits. But a reasonable showing having been made by contestant, he should be permitted to establish his allegations by legal evidence.

Thobe vs. Carlisle (minority report), 50th Cong. Mobley, 531

Allegation that returns in same handwriting refuted by returns themselves.

A *prima facie* case for reopening made by contestant can not be rebutted by *ex parte* affidavits, but where the chief charge was that a large number of returns were in the same handwriting and the original returns were presented and by their appearance effectually refuted the charge, their presentation was not of the same character as a counter affidavit on a disputed question of fact.

Thobe vs. Carlisle (Mr. Rowell), 50th Cong. Mobley, 534

Reasonable diligence required.

Parties should be bound by a reasonable rule of diligence, and unless it is shown that due diligence has been used an application for an extension of time to take additional testimony will be refused.

Mabson vs. Oates, 47th Cong. 2 Ells., 8

Where the contestant fails to show due diligence in the use of the time allowed him by statute, the committee is not justified in allowing further time.

Thobe vs. Carlisle, 50th Cong. Mobley, 525

Contestant asked for leave to take further testimony, but as he failed to show that he had been reasonably diligent in procuring testimony within the time, the committee recommended that the application be denied.

Vanderburg vs. Tongue, 55th Cong. Report, 437

Leave to take more testimony refused.

Contestant applied for leave to take further testimony on the grounds stated in his notice, and one other, alleging that he had been impeded in taking testimony and his witnesses intimidated by his own arrest for contempt of court, but the committee refused the leave, as contestant had made no attempt to take testimony until the last five days of his time, and had not been arrested until the time had expired, and was then detained only for a few moments, and as it was very doubtful whether he could establish the facts alleged even if the case were reopened.

Campbell vs. Miner, 54th Cong Report 106

Leave to serve notice denied.

The committee denied the application of petitioner for leave to serve notice of contest, on the grounds that with reasonable diligence notice could have been served in time; that it did not appear that there was any substantial ground of contest, and that petitioner, not being an inhabitant of the State of Virginia at or near the time of the election, was ineligible.

McDonald vs. Jones, 54th Cong Report 568

Insufficient showing made; leave refused.

Where there appeared to be no reason for making an exception of the case, and it appeared from contestant's own showing that if the case were reopened the result of the contest would not be different, the committee refused to open the case for the taking of further testimony.

Hoge vs. Oley, 54th Cong Report 1530

Sitting member should make stronger showing.

Where contestee applied for time to take further testimony, but did not state the names of his informants, the sources of their information, or the parties to an alleged agreement sought to be shown, the committee refused the leave. The sitting member, as the one who would be the beneficiary of the delay, should make a stronger showing.

Van Horn vs. Tarmey, 54th Cong Report 355, pt. 1

The minority favored reopening the case.

Van Horn vs. Tarmey, 54th Cong Report 355, pts. 2 and 3

If allegation of intimidation of witnesses had been sustained, it would have been good ground for reopening.

Where contestant asked for a reopening of the case, and that a subcommittee be sent to take the testimony, on the ground that he had been prevented from taking it by riotous and tumultuous conduct, the committee stated that this ground, if sustained, would justify granting the petition, but in this case it was not sustained, and they recommended that the application be denied.

Hudson vs. McAleer, 55th Cong Report 354

Proper manner of procedure if Congress not in session.

"The committee are of opinion that if either party to a case of contested election should desire further time, and Congress should not be then in session, he should give notice to the opposite party, and proceed in taking testimony, and present the same and ask that it be received, and, upon good reason being shown, it doubtless would be allowed."

Vallandigham vs. Campbell, 35th Cong 1 Bart., 224

Extension of time to take testimony.

Where the sitting member was notified that his seat would be contested, on May 7, but testimony was not taken by petitioner until October 10-22 and there then remained too little time for the sitting member to procure testimony before the session of Congress, the committee held that he could not have been expected to take testimony until the petitioner had taken his, and recommended that he be given further time. (There was no law for taking testimony in force at the time.) But the House refused the request and gave the seat to the petitioner.

Tuliaferro vs. Hungerford (first contest), 12th Cong C. and H., 248

Additional time granted.

Where the taking of testimony was interfered with by the presence of the enemy's cruisers, further time was granted. (There was no general law in force for taking testimony at the time.)

Bassett vs. Bayley, 13th Cong......C. and H., 255

Case already decided, extension unnecessary.

Where the sitting member applied for time to procure further evidence, but the committee decided the case in his favor on the evidence already produced, the application was rejected as unnecessary.

Washburn vs. Ripley, 21st Cong......C. and H., 683

Where notices to take testimony insufficient, additional time granted.

Where notice to take testimony was by inadvertence served on the contestee only nine days, instead of the required ten days, before the taking of the testimony, but under such circumstances that it was impossible for him to appear at its taking, the committee passed a resolution granting further time to take testimony.

Archer vs. Allen (first report), 34th Cong......Report 8

Application for extension of time granted.

Where notice of contest and answer had been served, but contestant gave no notices to take testimony until the time was more than half gone, and the sitting delegate had gone to Washington and knew nothing of the testimony, the committee were of the opinion that the sitting delegate erred in not having an attorney to represent his interests in the contest of which he had been notified. But as the question was "not simply what these parties have done or omitted to do, but what was the expressed wish of the people of Nebraska," the committee recommended and the House granted an extension of sixty days.

Chapman vs. Ferguson, 35th Cong......1 Bart., 268

Where the county canvassers certified votes as cast for "Member of Congress" instead of "Representative in Congress," and the State canvassers in consequence refused to determine the result in the usual manner or to issue certificates of election, the contestant, believing that he could not proceed under the act of 1851 until there had been some further determination of the result, did not prosecute his case, but on the meeting of Congress petitioned to be allowed time to procure testimony. The committee, without deciding whether or not the case came within the act of 1851, but believing that contestant had proceeded in a bona fide belief that it did not, recommended that the extension be granted. The minority held that the contestant should have proceeded under the law. The House agreed with the committee and granted the extension.

Williamson vs. Sickles, 36th Cong......1 Bart., 288

Where none of the Representatives from a State had been admitted until near the close of the first session, and the contestant had not served notice of contest on account of an understanding with contestee, the committee recommended that further time be given to serve notice and answer and take testimony. The House took no action.

Thomas vs. Arnell, 39th Cong......2 Bart., 163

Where counsel for sitting member had been bribed by contestant to act for him and to refuse to surrender testimony in his possession, the sitting member was given further time to take testimony, and part of the committee were of the opinion that the act of contestant, which would furnish ground for his expulsion if he were a member, would justify a refusal to permit him to proceed with the contest.

Bowen vs. De Large, 42d Cong......Smith, 99

Where the registration, election, and returns were fair and honest "in some if not in a majority of the parishes of the State," the committee did not feel at liberty to declare the seat vacant, though neither contestant had furnished sufficient evidence to establish his right to the seat. The parties were given time to procure further evidence.

Sheridan vs. Pinchback, 43d Cong......Smith, 206

Additional time refused.

Where five months after the election and three months after the inception of the contest, the sitting member asked for time to procure the poll books of several townships, alleging that they were irregular, *held* that he had already had sufficient time, and the application refused.

Easton vs. Scott, 14th Cong C. and H., 282

The committee held that the fact that the sitting member was a member of the previous House and in attendance on its sessions during most of the time that testimony was being taken was no ground for an application for time to take further testimony, as the law (of 1851) plainly contemplated that the parties might be represented by agents. The fact that contestant had occupied the entire sixty days was also insufficient, as, while the law prevented either party from taking testimony in two places at once, it did not prevent both parties from taking testimony at the same time.

Vallandigham vs. Campbell, 35th Cong 1 Bart., 224

Where contestee applied for further time to take testimony, on the ground that the contestant had introduced his testimony during the last few days of the sixty days, and the most important of it on the last day, and presented *ex parte* affidavits to show that he could impeach and contradict this testimony, the committee held that he might have taken his testimony within the time, especially as he had ten days' notice of the witnesses to be examined, and recommended that no extension of time be allowed, saying: "To grant such postponements and protracted appointments for taking additional testimony after the meeting of Congress, and after both parties have had equal and sufficient opportunity to present their full case, is practically to nullify the law, to render the right of contesting a seat in Congress useless and nugatory. If such application rests upon no stronger reason than the laches of the party making the same, it should be promptly rejected. To do otherwise is to disregard the rights of parties and constituents, to trifle with the privileges of the House, and to make the labors of your committee interminable and useless. It is due to every interest concerned that the rights in dispute should be settled and parties held to reasonable diligence, under the laws of the land, in the prosecution and presentation of their respective claims." The minority recommended that the application be granted, but the House agreed with the majority, and refused to extend the time.

Howard vs. Cooper, 36th Cong 1 Bart., 277

Where contestant applied for further time to take testimony, he having taken none, alleging as a reason that there were but two judges of the district court in the Territory and that one of them was inaccessible and the other a violent political opponent, but he had given notice to take testimony before a probate judge, and no reason was assigned for not doing so, the extension asked for was refused.

Gallegos vs. Perea, 38th Cong 1 Bart., 482

The law of 1851 permitting both parties to take testimony at the same time, it was not a sufficient ground for an extension of time that the contestant had occupied the entire sixty days, and in this case, it appearing that the sitting member had attended at the taking of testimony only a few minutes and had made no attempt to take testimony himself, the application for an extension of time was refused. The law allowing the House to extend the time for taking supplementary testimony "clearly relates to cases in which the applicant has taken some evidence." * * * "The policy of the House has been adverse to granting extensions. Procrastination in these cases diminishes the object of the investigation and cheapens the value of the final decision. The law is intended to furnish ample opportunity for taking testimony. Parties should be held to a rigid rule of diligence under it, and no extension ought to be allowed where there is reason to believe that had the applicant brought himself within such rule there would have been no occasion for the application."

Boles vs. Edwards, 42d Cong Smith, 19

In a contested-election case the thing in controversy grows daily less, and an extension of the time to take testimony is often practically equivalent to a decision of the case in favor of the sitting member. "It does not follow from these considerations that a sitting member can in no case be allowed an extension after the time allowed by law for taking testimony expires, but your committee thinks it

does follow that no such extension should ever be granted to a sitting member unless it clearly appears that by the exercise of great diligence he has been unable to procure his testimony, and that he is able, if an extension be granted, to obtain such material evidence as will establish his right to the seat, or that by reason of the fault or misconduct of the contestant he has been unable to prepare his case."

Giddings vs. Clark, 42d Cong Smith, 92

Where application was made by the sitting member for an extension of the time to take testimony, on the ground that by a combination among the friends of contestant to procure indictments of the election officers and others his friends had been made afraid to testify, it was refused on the grounds (1) that it was so late in the Congress that an extension would practically decide the case in favor of the sitting member; (2) the affidavits merely set forth the conclusions of the affiants that certain indictments were malicious, and not the facts on which the conclusions were based, and did not assert that any witnesses had been imprisoned or otherwise placed beyond the reach of subpoena; (3) it did not appear that contestee had made any attempt to take testimony; (4) no affidavits were produced from the witnesses themselves stating that they had been afraid to testify; (5) intimidation was alleged in only part of the district, and no attempt had been made to take testimony in the remainder, and (6) the names of the witnesses and the facts to be proved were not given.

Giddings vs. Clark, 42d Cong Smith, 92-94

ADMISSIBILITY OF.

Reference of a paper does not make it competent evidence.

"The reference of a paper is not decisive in one way or the other of its competence as evidence. That question is always to be decided by the committee and by the House."

Foster vs. Covode (prima facie case, minority report, sustained by the House), 41st Cong 2 Bart., 525

Not taken within time required by State law, admitted.

Where (at a time when there was no law of Congress in force on the subject) testimony was not taken by petitioner until four months after he had given notice of his intention to contest, and the testimony was objected to by the sitting member on the ground that it was not taken within the time prescribed by the State law for contests in the State legislature, and also that the delay of four months was unreasonable, the committee overruled the objections.

Porterfield vs. McCoy, 14th Cong C. and H., 268

The rules of evidence, and of construction of the Virginia statutes regarding the qualifications of voters, as adopted in *Porterfield vs. McCoy*, adopted and applied in the case of—

Loyall vs. Newton, 21st Cong C. and H., 523

Taken according to State law, admitted.

Where (at a time when there was no law of Congress in force upon the subject) notice was served and depositions taken in accordance with the provisions of the State law, and the depositions were similarly taken by both parties, upon due notice, and in the presence of representatives of both sides, the committee held that they should be admitted.

Newland vs. Graham, 24th Cong 1 Bart., 6

Taken after the time fixed, rejected.

Where the committee had fixed January 1, 1834, as the time for closing the taking of testimony, they unanimously decided to reject all testimony taken after that time.

Letcher vs. Moore, 23d Cong C. and H., 750, 826

Taken after the time, inadmissible.

Where testimony had been taken after the expiration of contestant's forty days, and over the protest of contestee, the committee held it to be inadmissible, but called attention to the fact that it would not change the decision of the case if admitted.

Bell vs. Snyder, 43d Cong Smith, 257

Where all the testimony was taken by contestant out of time, against the protest of contestee, and not cross-examined, the case should be dismissed, and if the election needed investigation such investigation should be undertaken by the House.

Page vs. Pirce (minority report), 49th Cong......Mobley, 476-479

Taken out of time, rejected, even where objection waived.

Contestant took testimony more than forty days after the date of service of contestee's answer on him, claiming that the forty days commenced to run with the first day of taking testimony. The committee held that the act approved March 2, 1875, conclusively showed that the forty days commenced to run from the day of the service of the answer. "The law is intended to and does furnish ample opportunity for taking testimony if ordinary diligence is used," and the time should not be extended except for good reasons. In this case no good reason was shown, and it appeared that contestant had in fact only consumed eighteen days in taking testimony. Contestee had cross-examined the witnesses, and had only entered objection after all the testimony was taken, and had in his oral argument expressed his willingness to have it considered, but the committee, with only one dissenting vote, excluded it.

Bradley vs. Slemons, 46th Cong......1 Ells., 296

IN CHIEF, IN TIME FOR REBUTTAL.

Testimony in chief taken in time for rebuttal excluded.

Where testimony was taken under a specification too vague and uncertain to be good, and was taken during the last ten days in a county where contestant had taken no testimony during his time for taking testimony in chief, and the notices to take testimony specified that it was to be testimony in rebuttal, but it was plainly testimony in chief, and was objected to at the time, the committee rejected the testimony on these two grounds.

Bromberg vs. Haralson, 44th Cong......Smith, 364

Where a return was recommended to be rejected for fraud, and only votes proved aliunde counted, the minority held that votes proved by the contestant during his ten days for rebuttal, no testimony having been taken in regard to them during the taking of testimony in chief, or by the contestee, should not be counted.

Le Moine vs. Farwell (minority report), 44th Cong......Smith, 423

Testimony in chief taken in the time for rebuttal should not be considered. So of testimony which it does not appear was taken on due notice, and in regard to matters not mentioned in the notice of contest.

Bisbee vs. Finley (minority report), 47th Cong......2 Ells., 229, 231, 242

Testimony in chief taken in the time for rebuttal ought not to be received.

Page vs. Pirce (minority report), 49th Cong......Mobley, 507

Where contestant, during his testimony in chief, had sought to establish the vote of two precincts by the testimony of United States supervisors, and contestee had introduced testimony to show the correctness of the returns, and contestant, during the time for rebuttal, called the individual voters to testify to their votes, the minority held that this was testimony in chief taken in time for rebuttal, and should be excluded.

Miller vs. Elliott (minority report), 51st Cong......Rowell, 573

Testimony in chief taken in time for rebuttal should not be considered.

McDuffie vs. Turpin (minority report), 51st Cong......Rowell, 305

In chief, taken in time for rebuttal, protested against.

Where testimony in chief was offered during the time for rebuttal, "when the contestee had no opportunity to contradict the same," the committee said that it "was offered in open violation of every known principle of the laws of evidence, and we hereby offer our protest against such practice before this committee in the future."

Lynch vs. Vandever, 50th Cong......Mobley, 659

Testimony in chief, taken in time for rebuttal, not to be received without cause.

The rights of the House under the Constitution are not abridged by the act regulating the manner of taking testimony in contested election cases, but each Congress in enforcing those rights will not depart from the terms of the act except for cause. Where no reasons are presented for taking testimony in chief during the time for rebuttal, the committee will not consider such testimony.

Posey vs. Parrett, 51st Cong Rowell, 189

Not considered.

Testimony in chief, taken in time for rebuttal, in regard to one county, was not considered by the committee.

Williams vs. Settle, 53d Cong Report 337, p. 16

Evidence claimed to be in chief was taken in the time for rebuttal. The committee seems to have considered it properly rebuttal evidence. The minority strongly objected to receiving this testimony, and brought the matter formally before the House by a motion to recommit, but the motion was lost by a vote of 60 to 131.

Goodwyn vs. Cobb, 54th Cong Report 1122

Testimony in chief, taken in time for rebuttal, was not considered.

Aldrich vs. Robbins, 56th Cong Report 327

BEFORE WRONG OFFICER. (See also LAW FOR TAKING TESTIMONY.)**Taken before disqualified officer, inadmissible.**

Where the testimony in one county was taken before a notary who was a minor, the minority held that it should have been excluded. The majority did not consider it, but left the question open whether it might have been considered as taken before a de facto officer.

Williams vs. Settle, 53d Cong Report 337, pt. 1, p. 21; pt. 2, p. 8

Before officer not named in notice, not admitted.

Depositions taken under the act of 1797 were excluded, among other reasons, because taken before magistrates not named in the notification and not properly certified.

McFarland vs. Purviance, 8th Cong C. and H., 132

Must be taken before the officer named in the notice.

Where notice was given to take testimony before the chief justice of the Territory, and it was taken before a judge of probate, the majority of the committee were of opinion that the evidence ought to be rejected.

Otero vs. Gallegos, 34th Cong 1 Bart., 184, and Rept. 90, p. 13

Must be taken within the time and before proper officer.

Where a deposition was taken a month after the expiration of the time allowed under the law of 1851, and before a judge in the District of Columbia, instead of before an officer resident in the District, as required by the law, the committee rejected the deposition.

Todd vs. Jayne, 38th Cong 1 Bart., 556

May be taken before probate judge.

The probate court in Nebraska Territory is a court of record, and testimony may be taken before a probate judge under the act of 1851.

Daily vs. Estabrook, 36th Cong 1 Bart., 306

Where all testimony taken before unauthorized officer, case dismissed.

A case was dismissed because the testimony of contestant was taken before an officer not authorized by law, without the written consent of the parties. "It is insisted that the House of Representatives, in judging of the elections, qualifications, and returns of its members is not bound by the rigid rules of judicial procedure. This is true, but applies only to exceptional cases, not provided for by the 'rules prescribed.' It would be worse than idle to prescribe rules if they may be willfully and unnecessarily disregarded."

Stolbrand vs. Aiken, 47th Cong 2 Ells., 603

Taken before officer not authorized by law, inadmissible.

Depositions were held to be inadmissible because taken before a county clerk, an officer not authorized by law to take them, and others because taken in one county before a notary from another county.

Stovell vs. Cabell, 47th Cong......2 Ells., 668, 674

Officer named in the law derives authority from it and not from State laws.

Testimony was objected to because taken before a mayor outside of the city of which he was mayor, the statutes of Indiana empowering the mayor to administer oaths only in the city or town of which he is mayor. "But the committee were of opinion that the authority to take these depositions was derived, not from the statutes of Indiana, but from the statute of the United States already cited, the mayor of a city being one of the persons designated in that statute to take such depositions, and that he would have been authorized, as such designated person, to take these depositions had the statutes of Indiana conferred upon him no power to administer oaths."

Washburn vs. Voorhees, 39th Cong......2 Bart., 56

The minority held that the above objection was good, but did not press the point.

Washburn vs. Voorhees (minority report), 39th Cong......2 Bart., 66

Testimony had been taken before a notary resident of the district, but not of the county in which the testimony was taken, and not authorized by the laws of Alabama to act in that county. The committee held that under the terms of the act of Congress any notary resident of the district was empowered to take any of the testimony, and that the authority of the notary was derived from this act and not from the State law.

The minority held that he had no power to act.

Aldrich vs. Robbins, 54th Cong......Report 572

The same ruling made.

Goodwyn vs. Cobb, 54th Cong......Report 1122

Taken before disqualified notary, received where objection not made.

Evidence was taken outside the district before a notary resident of the district, but objection was made on this ground at the taking of the testimony of only one witness. The committee considered the testimony of the others. "As to the others, the absence of objection warrants the inference of consent, and their evidence is legally before the House."

Goodwyn vs. Cobb, 54th Cong......Report 1122, p. 5

Taken before disqualified notary, received when not objected to in time.

Testimony had been taken in New York County before a notary who, by his recent removal from Kings to New York County, had probably technically vacated his office, but no objection to his competency was entered until the taking of testimony in rebuttal. The committee held that objection to the testimony in chief was therefore waived, and considered it in evidence.

Mitchell vs. Walsh, 54th Cong......Report 1849

TRANSCRIPTION, AND SIGNING OF.**Must be written in presence of magistrate.**

Testimony which did not appear to be written in the magistrate's presence was not received by the House.

Jackson vs. Wayne, 2d Cong......C. and H., 58, 62

Must be subscribed by the witness.

The committee unanimously adopted as a rule of decision "that all depositions not subscribed by the witness be excluded unless the certificate of a magistrate be sufficient according to the laws of Kentucky." The House, which discussed this case in detail, does not appear to have ruled on the point.

Letcher vs. Moore, 23d Cong......C. and H., 749, 826

Not signed by the witness.

A deposition which the witness refused to sign was disregarded by the committee on this ground among others.

Noyes vs. Rockwell, 52d CongStofer, 33

Written out by one of the parties, excluded.

Under the act of 1797 providing that depositions should be reduced to writing *in the presence* of the parties or their agents, depositions written out by one of the parties should be excluded.

McFarland vs. Purviance, 8th CongC. and H., 132

Tampered with by contestant, should be suppressed.

Where the testimony as fast as transcribed was given into the possession of one of the attorneys for contestant, who made marginal suggestions in pencil on it chiefly in regard to the spelling of proper names, and the stenographer afterwards, in some instances, corrected the testimony in accordance with these marginal suggestions, the minority held that a motion to suppress the testimony should have been granted. (The majority had held that there was no evidence that the depositions had been in any sense tampered with.)

Seasinghaus vs. Frost (minority report), 47th Cong2 Ells., 403

Testimony transcribed by contestant, and altered by him, should be suppressed.

The minority held that the testimony of contestant should be suppressed on the ground that it was not written out in the presence of the notary, nor forwarded as directed by law, but was copied by contestant and his agents and altered in such a way as to destroy its integrity.

Mackey vs. O' Connor (minority report), 47th Cong2 Ells., 581-592

Immaterial by whom transcribed, if correctly done.

"The provisions of the statute in regard to the form and manner of taking and forwarding testimony in contested-election cases are merely directory" and the only question which the committee deemed it necessary to consider was "whether the essential provisions of the law had been complied with; that is, had the testimony of the witnesses been correctly reported, and had that testimony been forwarded to the House?" When the evidence was taken down in shorthand the stenographic notes were the original evidence of what the witnesses deposed, but it having been agreed that they should be afterwards transcribed, it was immaterial how or by whom they were transcribed, providing it was correctly done, "since the notary public accepted the work as done by the copyists, and certified to the same as being the depositions taken by him. The fact that the contestant assisted in making transcripts of this evidence does not detract from its correctness."

Mackey vs. O' Connor, 47th Cong2 Ells., 566

Depositions must be written and certified as required by law.

Depositions must be properly certified, and it must appear that they were reduced to writing in the presence of the proper officer or they can not be considered.

Lowe vs. Wheeler (minority report), 47th Cong2 Ells., 111

NOTICES TO TAKE TESTIMONY.**Name of witness omitted from notice to take testimony.**

Where, by clerical mistake, the name of a witness was left out of the list of notices to take depositions, and the depositions were taken too late to renew the notice and give the required ten days' notice, and contestee insisted on his objection for lack of notice and refused to cross-examine the witness, the committee sustained the objection and excluded the testimony.

Dodge vs. Brooks, 39th Cong2 Bart., 83

Taken upon insufficient notice, not admitted.

Notices to take testimony under the act of 1797 were left at the house of the sitting member, but did not reach him (he being at the seat of government) in time for him to attend or appoint an agent. Notices were also left with a person who had previously acted as voluntary agent for the sitting member, but he did not attend. Held, that the depositions should be excluded.

McFarland vs. Purviance, 8th CongC. and H., 132

Notices to take testimony should specify the names of the voters attacked, and the disqualification charged.

General notice that testimony would be taken to prove the disqualification of voters held to be insufficient. It should have specified the names of the voters, and the particular qualifications they were alleged to lack.

Easton vs. Scott, 14th Cong C. and H., 284

Taken on due notice admitted, though not cross-examined.

When there was no law in force providing a method of taking testimony in contested-election cases, depositions taken on due and reasonable notice were received, though the sitting member had refused to attend at their taking, believing the proceeding to be illegal.

Turner vs. Baylies, 11th Cong C. and H., 237

Where taken on due notice, before officers authorized to administer oaths, received.

When there was no law of Congress providing a method of taking testimony in contested-election cases, and a petitioner in Virginia had taken testimony after the analogy of the method provided for contests in the State legislature, before a commission appointed by the court, composed of three justices of the peace or notaries public, and the sitting member had objected to the testimony and refused to attend at its taking, on the ground that the commission, being appointed under a law providing for a different class of contests, had no authority, but had himself taken testimony before two justices of the peace in their capacity as justices, the committee received the testimony of both parties, on the ground that it had been taken on due notice and before officers authorized to administer oaths. (This case has been generally quoted as receiving the testimony of petitioner, because taken according to the law providing for contests in the legislature; but this question seems not to have been considered. The testimony taken by the commission was received because its members were justices of the peace, without reference to the question of its authority as a commission.)

Loyall vs. Newton, 21st Cong C. and H., 522

LAW FOR TAKING TESTIMONY.

Law (of 1851) substantially complied with.

Where the sitting member took his evidence before two justices of the peace, the other officers named in the act of 1851 refusing to take his evidence, on the ground that their other official duties would not permit them to do so, it was held that the law was complied with. (The law permitted testimony to be taken before justices of the peace only when no other officer named in the act resided in the district.)

Harrison vs. Davis, 36th Cong 1 Bart., 341

The law of 1851 permitted testimony to be taken before justices of the peace only when there were no other officers named in the law resident in the district. In a case from Dakota Territory contestant took his depositions before two justices of the peace, alleging that the only other officers named in the law were the chief justice and associate justice of the Territory, and that as the families of these officials were domiciled in Iowa, and they themselves only came into the Territory to hold court, they were not residents. "The committee were of opinion that the two justices of the peace, residents of the Territory, were competent to take the depositions."

Todd vs. Jayne, 38th Cong 1 Bart., 557

Law (of 1851) not strictly followed.

The act of 1851 gave jurisdiction and authority to justices of the peace only in case none of the other officers mentioned in the act were resident in the district. There were at least three such officers resident in the district, but contestant had had subpoenas *duces tecum* issued by two justices of the peace, which had not been obeyed. The committee held that he had taken no legal steps to procure the testimony.

Curigan vs. Thayer, 38th Cong 1 Bart., 576

The chief justice of the Territory being required by law to be a resident of the Territory and being actually in the Territory during part of the time that depositions were being taken, the minority held that contestant could not take his testimony before justices of the peace on the pretext that no other officers named in the law were resident in the Territory.

Todd vs. Jayne (minority report), 38th Cong 1 Bart., 564

EX PARTE.

Testimony taken upon unreasonable notice, and *ex parte*, rejected.

Where, at a time when there was no law of Congress in force providing a method of taking testimony, a candidate was notified that, in the event of his being declared elected, his election would be contested, and that depositions would be taken at certain specified times and places, and depositions were taken pursuant to the notices before the declaration of the result, and in the absence of contestee, the committee held that, while the proceeding was extraordinary, they would, nevertheless, have examined the depositions were it not that the times and places of taking testimony were such as to render it physically impossible for the sitting member to attend, testimony being even, in some cases, taken in two remote places at the same time. Under these circumstances the committee rejected the testimony as *ex parte*.

Allen, 23d Cong Report 110

Ex parte admitted.

Ex parte evidence filed by petitioner was excluded by the committee, but appears to have been considered by the House.

Lyon vs. Smith, 4th Cong C. and H., 103, 111

Ex parte admitted where objection substantially waived.

Where testimony had been offered by the petitioner and not objected to by the sitting member, though he had not attended at its taking, and the testimony, with additional testimony, was lost, the committee permitted it to be retaken, and admitted the second copy, though the sitting member had not attended.

Reed vs. Cosden, 17th Cong C. and H., 356

Where both sides present *ex parte* testimony neither can object to it in the other.

Where, on the first trial of the case before the Territorial board of canvassers, the sitting member had presented *ex parte* testimony, and time being granted to the petitioner to procure testimony, he presented *ex parte* testimony also, and the case came before the committee, in part at least, on the same testimony, held that petitioner could not be heard to object to its *ex parte* character.

Biddle and Richard vs. Wing, 19th Cong C. and H., 508

Ex parte affidavits admitted on question of integrity of transcript of depositions.

Where it was alleged that the transcript of evidence had been altered by contestant, the committee received *ex parte* affidavits on both sides and decided the question upon the preponderance of affidavits.

Mackey vs. O' Connor, 47th Cong 2 Ells., 565

Ex parte affidavits of little weight, even when admissible.

Where the State canvassing board had rejected returns, acting upon *ex parte* affidavits, which were legal evidence before it under the statute, and when the case came before the committee to review the action of the State canvassers these affidavits were presented as part of the testimony, the committee said: "These affidavits, if admissible as evidence on the trial of this case upon the merits at all—of which there is great doubt—are entitled to much less weight than testimony regularly taken in the presence of both parties, and where the witnesses may be cross-examined."

Giddings vs. Clark, 42d Cong Smith, 96

Ex parte affidavits may be taken as offers of proof.

Where petitions, accompanied by *ex parte* affidavits, were presented, the committee said: "In determining what should be done with the petitions the undersigned were of the opinion that the affidavits and certificates accompanying the petitions should be regarded as offers of proofs—that is, statements by the petitioners of the facts which they propose to prove—and that the committee should consider whether, if all these statements of facts were taken to be true, the petitions could be maintained; that if they could not it would not be worth while to ask this House for authority to take testimony on the subject or to take any other action than to dismiss the petitions."

Holmes and Wilson, 46th Cong......1 Ells., 324

Ex parte inadmissible.

Testimony taken *ex parte* and without legal notice rejected by the committee.

Spaulding vs. Mead, 9th Cong......C. and H., 158

Where there was no law providing for taking testimony in contested-election cases testimony taken *ex parte* was rejected by the committee.

McFarland vs. Culpepper, 10th Cong......C. and H., 222

Testimony taken *ex parte* held to be insufficient.

Sergeant, 19th Cong......C. and H., 516

Testimony taken *ex parte* and without sufficient notice was rejected by the committee as incompetent, but the parties were given time to retake the same, with additional evidence.

New Jersey Case, 26th Cong......1 Bart., 20

Testimony taken *ex parte* and without due notice, and after the time fixed by the House, ought to be rejected.

Levy (minority report), 27th Cong......Report 450, p. 24

Ex parte affidavits presented after the hearing of the case in the committee were not considered.

Blair vs. Barrett, 36th Cong......1 Bart., 314

An *ex parte* affidavit taken a year after the close of the time for taking testimony was not considered.

Knox vs. Blair, 38th Cong......1 Bart., 526

An *ex parte* affidavit taken before a justice of the peace, without notice, and after the death of contestee, was not considered.

Jones vs. Mann, 40th Cong......2 Bart., 474

Ex parte affidavits are not evidence and can not be made such by the mere fact of reference to the committee.

Foster vs. Covode (prima facie case, minority report, sustained by the House), 41st Cong......2 Bart., 524

Where a package of testimony was lost in the mails, and the contestant presented the *ex parte* affidavits of his attorney and the attorney for contestee reciting the substance of the lost testimony, the committee held that these affidavits could not be considered.

Wigginton vs. Pacheco, 45th Cong......1 Ells., 14

"There is no law, and no practice of the Committee on Elections, as we understand it, authorizing the use by the committee of *ex parte* affidavits to determine questions of facts in deciding the merits of an election case. * * * The importance of election cases demands that the testimony should be taken on notice to all persons interested, with the right on their part to cross-examine witnesses and to exhibit testimony in reply so far as their rights may be affected by the inquiry. This may be done (in a case to which the statute for taking testimony does not directly apply) under or after the analogy of the statute relating to contested elections, or by summoning witnesses before the committee, or in any other manner the House may direct."

Holmes and Wilson, 46th Cong......1 Ells., 323

Ex parte affidavits filed by the contestant were not considered by the committee, there being nothing in the record to justify the resort to this kind of proof.

Hill vs. Catchings, 51st Cong. Rowell, 806

RES GESTÆ. (See also DECLARATIONS OF VOTERS.)

Ex parte affidavits part of the res gestæ admitted.

"The law is settled that the declaration of a voter as to how he voted or intended to vote, made at the time, is competent testimony on the point." And under this principle the *ex parte* affidavits of rejected voters, made at the time, and declaring that the voters making them were qualified voters, had been registered and held registration certificates, and that their votes had been refused on account of non-registration, were received (as part of the *res gestæ*) in connection with testimony showing the fact of rejection, identifying the affidavits, and showing the circumstances under which they were made, and other testimony showing that the names had not been struck from the registry list by the board of review during the time that it had power to do so.

Bell vs. Snyder, 43d Cong. Smith, 251-253

Definition of res gestæ.

The rule for the admission of evidence as part of the *res gestæ* is "that when it is necessary in the course of a cause to inquire into the nature of a particular act or the intention of the person who did it, proof of what he said at the time of doing it may be admitted to show its true character."

Whyte vs. Harris (minority report), 35th Cong. 1 Bart., 265

Certificates signed by voters at the election received as part of the res gestæ.

Where, in addition to the votes proved by the testimony of the voters, others were proved by certificates given by the voters on the day of election immediately after voting to tally keepers of their own party, verified by the testimony of these tally keepers, the committee held that these certificates were admissible as part of the *res gestæ*.

Wise vs. Young, 55th Cong. Report 772, p. 13

"Certificates" violating the secrecy of the ballot should not be received.

"Certificates" given by the voters to unofficial tally keepers on the day of election ought not to have been received in evidence as part of the *res gestæ*. To do so is both contrary to law and public policy. The State of Virginia had passed an Australian ballot law to insure the voter a secret ballot and to free him from solicitations and annoyance. To permit him to be systematically made to disclose his vote after depositing it "is to continue the very evil the law was enacted to cure, to destroy the independence of the voter, and to make a delusion of the secrecy of the ballot box. Such considerations overcome the mere rule of evidence that testimony otherwise hearsay may be admitted as part of the *res gestæ*."

Wise vs. Young (minority report), 55th Cong. Report 572, pt. 2, p. 14

"Certificates" received.

"Certificates" similar to those received in the case of *Wise vs. Young* in the Fifty-fifth Congress were received in evidence in the case between the same parties in the following Congress.

Wise vs. Young, 56th Cong. Report 186

Evidence of "list keepers" inadmissible as part of the res gestæ.

Where the number of votes refused for nonregistration or imperfect registration was very large (over 7,000) contestant attempted to show the names and number of the rejected voters by the testimony of "list keepers," who were stationed at the polls, took the signatures of the voters, or wrote the names at the request of the voters, attached to a printed petition addressed to the House, reciting that the petitioners were legal voters, who attended at the polls, intending to vote for contestant, undertook to vote, and were refused.

The majority of the committee held that the testimony was inadmissible, being hearsay and not even a part of the *res gesta*, and asserted that in this case most of it fell short in one or more particulars of the above description. They refused to count the votes, and reported in favor of contestee. The minority held that the evidence was admissible as part of the *res gesta*, and that the introduction of it was merely the choice of weaker rather than stronger evidence, made necessary by the circumstances of the case. They counted the votes and reported for contestant. One member held that the evidence did not establish a sufficient tender to count the votes, but did establish the invalidity of the election. The House adopted the last conclusion, and vacated the seat.

Johnston vs. Stokes, 54th Cong Report 1229

Petitions signed by voters at the polls admitted.

Where the evidence that voters endeavored to vote and did not succeed consisted largely of petitions to Congress signed by these voters at the polls, the committee held that these lists were not per se evidence, but might be established as such by oral testimony identifying them as the actual declarations of the voters at the polls. When so established, "these declarations might serve a use beyond a mere list for verification."

Wilson vs. McLaurin, 54th Cong Report 1566

HEARSAY.

Secondary and hearsay inadmissible.

"It is well established that the common-law rules of evidence which govern in the courts of law obtain in the trial of cases of contested elections in this House." Evidence was thrown out on the ground that it was secondary where primary was obtainable, or was hearsay.

Whalley vs. Cobb, 53d Cong Report 267, p. 2

Hearsay not admitted to prove bribery.

Where a witness swore that he had heard a voter say that he had been hired to vote for the sitting member, the committee decided the evidence both inadmissible and insufficient.

Arnold vs. Lea, 21st Cong C. and H., 602

Hearsay, to show minority of voter, rejected.

Where a voter had sworn before the officers of election that he was of age, and his vote had been received, but a witness swore that he had, two years before, heard the grandmother of the voter say that he was only 16 years old, the testimony was held to be inadmissible and insufficient.

Arnold vs. Lea, 19th Cong C. and H., 603

Hearsay inadmissible.

"The rule upon which the committee reject all hearsay evidence they conceive too well settled and too clear and just to require any argument. If all experience has shown that in the administration of justice in the most petty and trifling matters between man and man there is no security for truth without the sanction of an oath, everyone must admit that in a controversy which enlists the strongest passions of our nature, often stimulated by ambition and partisan prejudice and animosity, we can not safely dispense with this great security. If evidence of this character were received, it might be manufactured with impunity to any amount, and no Representative would be secure of his seat for a single day."

Ingersoll vs. Naylor, 26th Cong 1 Bart., 34

Where the evidence as to the number of illegal or intimidated votes consisted of lists made by persons hired to canvass the neighborhoods, whose information was hearsay, often several times removed, and whose lists were not always sworn to by the men who made them, the committee were unanimous in disregarding the testimony.

Whyte vs. Harris, 35th Cong 1 Bart., 257-267

The minority (whose conclusions were substantially adopted by the House) in rejecting evidence as hearsay, said: "It is such testimony as would be held insufficient to establish a claim in the most inferior class of civil tribunals, and which, the undersigned think, ought not for a moment to be considered as influential in deciding a case of such magnitude as the seat of a member and the representation of a people."

Whyte vs. Harris (minority report), 35th Cong......1 Bart., 264

Where the testimony of a witness was excluded for lack of sufficient notice and contestant sought to prove the same facts by a witness who had learned them from the former witness, the committee excluded the testimony as hearsay.

Dodge vs. Brooks, 39th Cong.2 Bart., 84

Hearsay evidence should not be considered.

Donelly vs. Washburn. (minority report), 46th Cong.1 Ells., 472

"The vicious tendency of hearsay evidence in election cases needs no demonstration."

Wallace vs. McKinley, 48th Cong.Mobley, 189

Statements and declarations of other persons, and conclusions of witnesses from these statements or declarations, should be regarded as hearsay, and inadmissible for any purpose.

Hurd vs. Romeis, 49th Cong.Mobley, 425

Evidence of acts of a person is not hearsay.

"There is a marked distinction between proof of what a party said and proof of acts of the party or facts connected with what he did. In the one case it may be hearsay testimony, in the other it is testimony as to facts which the witness observed, which is just as competent as the testimony of the voter as to facts in which he was an actor."

Bell vs. Snyder, 43d Cong.Smith, 251

DECLARATION OF VOTERS.

Hearsay declarations of voters admissible.

The minority, in a case where voters had refused to testify how they voted, held that the testimony of a witness who had talked with them, or heard them talk with others, on political questions, and from these conversations believed them to be Whigs, was sufficient to show that they voted for the sitting member.

Farlee vs. Runk (minority report), 29th Cong.Report 310, p. 11

Where the same name appeared twice on the poll list, and a voter of that name, on the day of the election, told a witness that he had voted twice, one of his votes was deducted by the committee.

Monroe vs. Jackson, 30th Cong.Report 403, p. 10

Evidence consisting of the declarations of voters as to any matter concerning their own voting, is admissible. "It is sometimes treated as an exception to the rule, excluding the hearsay declarations of third persons; but generally it is put upon the ground that in elections, contested because of illegal votes being received, each voter challenged is a party to the proceeding, and, therefore, whatever he says about his own voting is an admission or confession."

Vallandigham vs. Campbell, 35th Cong.1 Bart., 230

The declarations of voters as to their disqualifications admitted.

Blair vs. Barrett, 36th Cong.1 Bart., 316

"The declaration of a voter as to his qualification or disqualification to vote is always received in evidence; he is regarded as a party to the proceedings. This is a well-settled and uniform practice."

Donelly vs. Washburn (majority report), 46th Cong.1 Ells., 449

The rule in legislative bodies is to admit the declaration of voters themselves, not on oath, as to how they voted. The common-law rule as to hearsay evidence can not be made to apply. (Fully discussed and authorities cited.)

Wallace vs. McKinley (minority report), 48th Cong.Mobley, 205, 206

Hearsay declarations of voters inadmissible.

The laws of New Jersey not requiring the poll lists to be preserved, the committee resorted to parol proof to show the fact that voters voted. Mere hearsay declarations of the alleged voter, as to the fact of his having voted, were rejected.

New Jersey case, 26th Cong......1 Bart., 24

Where the only evidence to show for which candidate voters alleged to be illegal voted was evidence of statements made by the voters after the election, and the petitioner contended that inasmuch as the election was by ballot and under the State law the voters could not be compelled to testify for whom they voted, this was the best evidence the case admitted of, "the committee deemed this species of evidence inadmissible, and did not, therefore, investigate the votes of the sitting member objected to under this head."

Newland vs. Graham, 24th Cong......1 Bart., 6

The committee unanimously adopted as a rule of decision "that all declarations or statements made by voters after the election, relative to their right of suffrage, be rejected." The House does not seem to have ruled on the point.

Letcher vs. Moore, 23d Cong......C. and H., 750, 826

The voter is not a party to the contest in any such sense that his declarations are admissible against his right to vote on that ground.

Cesena vs. Meyers, 42d Cong......Smith, 66

It is doubtful whether evidence of declarations made by a voter not under oath as to how he voted is competent; but if admitted it can only be when the fact that he voted has been shown *aliunde*.

Cesena vs. Meyers, 42d Cong......Smith, 67

Casual statements made by a voter, and proved by hearsay testimony, are not evidence of how he voted.

Cook vs. Cutts, 47th Cong......2 Ells., 251

The declarations of voters, made long after the election, are hearsay, and inadmissible for any purpose. If any other position were tenable, an unlawful vote might be cast for one party and then upon the unsworn statement of the voter it might be deducted from the other party.

Wallace vs. McKinley, 48th Cong......Mobley, 189

Hearsay declarations of voters inadmissible except when part of the *res gestæ*.

What the voter said at the time of voting is admissible as part of the *res gestæ*; but what he said after the day of the election either as to his qualifications, or how he voted, or whether he voted, is inadmissible. "If such testimony can be admitted at all, which we do not concede, it certainly ought not to be received when the statement of the voter is made after the legality of his vote has been called in question. To admit this kind of testimony is to place it in the power of one not entitled to vote to have his illegal vote counted twice against the party he desires to defeat, without subjecting himself to cross-examination, and without even the formality of testifying under oath."

Smith vs. Jackson, 51st Cong......Rowell, 27

Declarations of voters admissible as part of the *res gestæ*.

"The declarations of a voter, or one entitled to vote at a given election, made at or in the vicinity of the voting place immediately following his effort to vote, concerning his own acts and qualifications or disqualifications, are parts of the *res gestæ*, and are admissible in evidence. In voting, or in attempting to vote, or in being present at the polls with the desire to vote, the voter is discharging, or attempting to discharge, or desiring to discharge one of the most solemn and momentous duties of citizenship, and to us it seems clear that his every act and word calculated to show in any degree what his purposes or qualifications were, are clearly admissible in evidence as part of the *res gestæ*. This evidence may be furnished by the depositions of others, or by the written statements of others, made at the time, preserving and exhibiting the statements or declarations or admissions, either oral or written, made by the voter or the nonvoter, as the case may be."

Johnston vs. Stokes, 54th Cong......Report 1229, p. 27

MATTERS OF GENERAL KNOWLEDGE OR INFERENCE.

Printed campaign documents rejected.

Printed campaign documents having nothing to do with the issues of the case were rejected by the committee on the ground of irrelevancy, and also because there was no proof of their publication and no notice of an intention to use them as testimony. Being submitted by the House to the judiciary committee, they were also rejected by it.

Arnold vs. Lea, 21st Cong......C. and H., 604, 607

Newspaper articles, etc., considered for certain purposes.

The committee quoted from the governor's message, the proclamation of the mayor, and the accounts of the election given in nonpartisan newspapers, to show (preliminary to a detailed examination of the testimony) that it was a generally conceded fact that the election in question was marked by riots and violence.

Whyte vs. Harris (minority report), 35th Cong......Report 538, pp. 10-16

Facts of public notoriety taken notice of.

The committee took notice of facts of public notoriety showing that such a state of violence and intimidation existed at the time of the election as to render a free election impossible and declared the election void partly on this ground. The minority protested that these questions were not raised by either contestant or contestee, and were not properly before the committee. On the whole case the House sustained the committee.

Hunt vs. Menard, 40th Cong......2 Bart., 485

The House may take notice of a notorious fact of public history.

The committee unanimously decided that the House could take notice of a fact of public history so notorious as that the so-called "Lynch board" in Louisiana never had possession of the returns of the election of 1872, and hence could not have canvassed them. A certificate of election shown to be based on the returns of the said board was unanimously rejected.

Sheridan vs. Pinchback, 43d Cong......Smith, 197, 227

Change in political character of vote.

Testimony showing a decrease of the Republican vote since the previous election held not to be sufficient of itself to establish the charge that "illegalities were practiced," etc.

Norris vs. Handley, 42d Cong......Smith, 74

"Contemporaneous historical facts."

"The testimony in a case is to be taken in connection with contemporaneous historical facts."

Chalmers vs. Manning, 48th Cong......Mobley, 35

Vote inferred from other elections.

Where six parishes had been omitted from the returns as canvassed, and there were indications of fraud in the count in twelve others, and the contestant offered no testimony to sustain them, but offered to have the average vote at the previous and succeeding Congressional elections substituted in these parishes, the committee found that adopting this course would still leave a majority for contestant, and reported in his favor. A minority held that he should have offered testimony to rebut the presumption of fraud in these precincts, the report adopted at the previous session having been sufficient notice to him to do so.

Sheridan vs. Pinchback, 43d Cong......Smith, 325, 337

When fair proportion of both parties vote, great fraud not probable.

Where it was charged that large numbers of nonresidents had voted for contestee, but the proof was vague and general, the committee said: "It is clearly established that since the enfranchisement of the colored voters parties have been divided in this county very nearly on the color line." Comparing the vote for contestee with the number of registered colored voters, and that for contestant

with the number of registered white voters, it appeared that a reasonable proportion of both votes was cast for the respective candidates. "These facts leave no doubt upon the mind of the committee that the vote was not appreciably swelled by nonresidents voting."

Bromberg vs. Haralson, 44th Cong Smith, 366

HOW ILLEGAL VOTES CAST. (See also ILLEGAL VOTES.)

The fact of voting may be shown by parol evidence.

The poll books need not be presented to prove the fact of voting, but it may be proved by parol evidence alone. "The undersigned are of opinion that the poll lists are not only not the sole and best evidence to prove that a particular person voted, but that they are not themselves sufficient. Parol evidence of identity is always necessary; that the name of the voter is on the list is only corroborative evidence; it is only an item of evidence."

Vallandigham vs. Campbell, 35th Cong 1 Bart., 229

General reputation and declarations of voters admitted to show how they voted.

Where voters refused to testify how they voted, "the proof of general reputation as to the political character of the voter, and as to the party to which he belonged at the time of the election, has been considered sufficiently demonstrative of the complexion of his vote. Where no such proof was adduced on either side, proof of the declarations of the voter has been received, the date and all the circumstances of such declarations being considered as connecting themselves with the questions of credibility and sufficiency."

New Jersey case, 26th Cong 1 Bart., 28

How a voter voted may be shown by secondary evidence without first calling the voter.

It is not necessary to first call the voter and see if he will claim his privilege of refusing to answer before introducing other testimony showing how he voted. Where a witness can not be compelled to answer he need not be called.

Vallandigham vs. Campbell, 35th Cong 1 Bart., 231

Testimony of voter not the only evidence how vote offered to be cast.

Where it is charged that votes have been unlawfully rejected at the polls, the deposition of each particular voter is not the only competent evidence of the fact of rejection and of the candidate for whom the voter offered to vote.

Bell vs. Snyder, 43d Cong Smith, 251

Circumstantial evidence to show for whom illegal votes cast.

"With some diversity in the rulings of courts and of Congress on the subject, the better opinion seems to us to be that the highest and best evidence, outside the record, for whom any elector intended to vote is the testimony of the elector himself; but where the voting is by the secret ballot the elector can not be required to testify for whom he voted, and if he declines so to testify it is then competent to show by other evidence for whom he voted; but in the latter case the evidence should be of the highest order attainable under the circumstances, and, in legal effect, so clear and strong as to preclude any reasonable doubt as to the fact."

Delano vs. Morgan (minority report), 40th Cong 2 Bart., 178

Where Democratic tickets were distributed at the poorhouse the evening before the election, paupers were taken to the polls in conveyances furnished by the Democratic committee and in charge of Democratic overseers, and bystanders were of the opinion from the appearance of their tickets that they were Democratic tickets, the committee deducted their votes from the sitting member, who was the Democratic candidate.

Monroe vs. Jackson, 30th Cong Report 403, p. 8

If voters refuse to testify how they voted, secondary evidence may be admitted; but a foundation must first be laid by calling the voters.

Monroe vs. Jackson (minority report), 30th Cong. Report 403, p. 19.

Testimony that voters were urged to vote, and their right to vote supported, by the friends of contestee at the polls, and that their votes were challenged and strenuously opposed by the friends of contestant, was admitted and held to be sufficient to show that they voted for contestee.

Vallandigham vs. Campbell, 35th Cong. 1 Bart., 233, 234

"For whom a vote is given, by the laws of Ohio, is a secret properly known only to the voter himself, and he is never required to disclose it. This fact must therefore be often determined upon circumstantial evidence alone. To what political party a voter belonged, whose partisan he had been, whose friends claimed for him the right to vote at the time, what he said of his intention before and his act after voting are circumstances which * * * the committee have considered in making up their verdict."

Delano vs. Morgan, 40th Cong. 2 Bart., 169

Where an illegal voter had always claimed to be a Republican, and a witness testified that he took a Republican ticket from him, "and, to my honest belief, put it in," the committee deducted his vote from the Republican candidate. The minority held the evidence insufficient to show for whom the vote was cast.

Wigginton vs. Pacheco, 45th Cong. 1 Ells., 10, 29

When a voter refuses to testify for whom he voted, it is competent to resort to circumstantial evidence, such as that he was an active member of a particular political party.

Bisbee vs. Finley, 47th Cong. 2 Ells., 176

Where voters can not be found, or refuse to disclose for whom they voted, it may be shown by circumstances, such as previous political affiliations, who challenged them, who sustained their right to vote, who gave them tickets, etc.

Cook vs. Cutts, 47th Cong. 2 Ells., 250

It can not be presumed that because defendant's name was regularly printed on a class of tickets headed "Independent," that any such ticket offered to be voted contained his name un erased, especially when there is evidence that these tickets were very freely "scratched." There should be the evidence of persons voting, or other satisfactory evidence.

McLean vs. Broadhead, 48th Cong. Mobley, 384

When it appears that the name of a candidate was regularly printed on a certain class of tickets destroyed by the precinct officers, it will be presumed that his name was upon any such ticket voted, until the contrary appears.

McLean vs. Broadhead (minority report), 48th Cong. Mobley, 394

In the absence of direct proof as to how a voter voted, evidence showing to what political party he belonged, whose election he advocated, whose friends sustained his right to vote, and kindred testimony may be admitted.

Smith vs. Jackson, 51st Cong. Rowell, 27

Where voters "either testified themselves for whom they voted, or it was shown satisfactorily that they were pronounced in their political opinions at the time of the election, or that they declared on the day of election which ticket they had voted, or that they were accompanied to the polls by well-known party workers, or that their votes were challenged by the supporters of one and their right to vote defended by the supporters of the other ticket, or like circumstances, raising a strong and legal presumption as to the ticket they voted and the candidate for whom they voted," the minority held the evidence to be sufficient. But where the evidence was merely to the effect that the voters were reputed to be Republicans or Democrats, but it did not appear when they had expressed themselves, or what opportunities the witnesses had of knowing their preference, it was held not to be sufficient, especially as at the election of 1888 large numbers of voters had changed their preference from what they were at previous elections.

Atkinson vs. Pendleton (minority report), 51st Cong. Rowell, 64

Where colored vote generally cast for contestee, colored votes illegally cast presumed to have been cast for contestee.

Where there is general evidence that the colored vote of a county was cast for contestee, and a large number of names are found on the poll books as having voted, which are also found on the list of colored persons delinquent in the payment of the poll tax required by law as a condition of voting, there should be deducted from the vote of contestee a number equal to the number of such names less the number of legal tax receipts shown to have been issued and paid for subsequent to the preparation of such delinquent tax list.

O'Ferrall vs. Paul, 48th Cong......Mobley, 114

SECONDARY.

Where best evidence unavailable, secondary evidence admitted.

Where contestant showed that he had made a diligent effort to procure the parish returns, and failed, he was permitted to show their contents by other evidence. And proof that they were correctly tabulated in the returns of a State returning board of doubtful authority whose returns were before the committee, was considered sufficient, especially when the fact was conceded by contestee.

Sheridan vs. Pinchback, 43d Cong......Smith, 323, 324, 325

Secondary evidence not admissible to show what should be shown by poll books.

The primary evidence of the number of votes cast for the candidates and the fact of the casting of any particular vote is the poll books, and while these are in existence no secondary evidence of the facts can be received.

Vallandigham vs. Campbell (minority report), 35th Cong......1 Bart., 240

Parol evidence of contents of papers inadmissible when papers should be presented.

Where a witness testified that he had compared the poll lists, registry lists, and lists of persons struck from the registry lists of a county, and presented a list of names which he said were found on the poll lists but not on either of the other lists, the committee held that "these statements made by the witness are inadmissible. The papers themselves are the best and only evidence of what they contain, if they are admissible for any purpose. The committee must make the comparison, and can not take the statements of the witness as to the result of his comparison."

Finley vs. Bisbee, 45th Cong......1 Ells., 74-124

Testimony of persons who have examined the ballots not to be substituted for the ballots themselves.

Where votes were proved to have been illegal, but the evidence that they were cast for contestee was the testimony of persons who had compared the numbered ballots with the poll lists, the ballots themselves not being produced in evidence, the evidence was considered insufficient to justify the deduction of the votes from the vote of contestee.

Gooding vs. Wilson (minority report), 42d Cong......Smith, 87

Boundaries of city wards not proved by common repute.

Common repute and generally acknowledged boundaries are sufficient to prove the boundaries of country precincts, but the boundaries of city wards, when dispute arises about them, ought to be proved by better evidence.

Atkinson vs. Pendleton, 51st Cong......Rowell, 56

Best evidence required.

Each party should be required to produce the highest and best evidence attainable.

McDuffie vs. Turpin (minority report), 51st Cong......Rowell, 303

Testimony of inspectors competent to show mistake.

The testimony of inspectors is competent to show mistakes committed by them in making their returns.

Adams vs. Wilson, 18th Cong......C. & H., 375

Testimony of county canvassers best evidence of reasons for their action.

Where the commissioners of election in the various counties of the district had thrown out a large number of returns for irregularities, thereby changing the result of the election, the committee held that these commissioners should have been called to explain the reasons for their action, and that all other evidence was secondary and probably hearsay. The committee, however, considered the other evidence, and when it was clear enough to overcome the presumption of correctness of the commissioners' actions, counted the returns.

Goode vs. Epes, 53d Cong. Report 1952, p. 3

IN OTHER PROCEEDINGS.

Taken in another proceeding, inadmissible.

A judge having been impeached by the legislature of Georgia for fraudulent conduct affecting a county return, which fraud was also among the grounds of a contest for a seat in Congress, the House refused to receive the proceedings of the legislature as evidence.

Jackson vs. Wayne, 2d Cong. C. & H., 50, 65

"The contestant * * * is clearly entitled to have the contest decided on what is shown in the record in this case."

Sheridan vs. Pinchback, 43d Cong. Smith, 327

Where the record in a case between parties candidates at the same election with contestant and contestee, brought to test the validity of the election, but to which neither of the parties to the present case was a party, was offered in evidence, it was unanimously excluded by the committee.

Spencer vs. Morey, 44th Cong. Smith, 444, 461

The result of a trial in a criminal case where parties were charged with election frauds is not an adjudication binding on the House in a case involving the same frauds.

Clayton vs. Breckinridge, 51st Cong. Rowell, 689

The minority held that the fact that persons had been acquitted in the State courts of the charge of election frauds, and convicted only on the charges of technical violations of the law, while not an adjudication binding on the House or interfering with its exclusive jurisdiction in election contests, was yet, under the circumstances of this case, conclusive proof that the persons accused had committed no fraud.

Clayton vs. Breckinridge (minority report), 51st Cong. Rowell, 725

Reports of committee of State legislature not evidence.

The reports of a committee of the Arkansas legislature, and of a case in the supreme court of the State, were unanimously held not to be evidence, both as not being a proceeding between the same parties and as being inconsistent with the duty of the House to judge of the elections of its own members.

Boles vs. Edwards, 42d Cong. Smith, 58

Testimony taken before Senate committee considered.

The committee unanimously received as evidence testimony taken by the Senate Committee on Privileges and Elections during the preceding Congress, though neither of the parties to the present case was directly a party to that, and the question which of them was elected to Congress was not directly or indirectly before the Senate committee. The majority received it "for what it was worth," and the minority said, "We consider it not only as admissible evidence, but abundantly sufficient to determine the rights of the parties to this contest." The committee also received the President's message on Louisiana affairs to the preceding Congress, and the reports, with accompanying exhibits, of the chief supervisors of election in the State of Louisiana.

Sheridan vs. Pinchback, 43d Cong. Smith, 198-200, 232-235

Testimony in a proceeding before a State court partly admitted.

Where some of the issues in a case had been involved in preliminary proceedings before the courts of California, and much of the evidence presented consisted of transcripts of those proceedings, the committee excluded such portions as were *ex parte* affidavits. But one affidavit having been included by the contestee in a petition, sworn to by himself, for a mandamus on the secretary of state, it was claimed that he was estopped from objecting to its use as evidence. The committee did not decide this point, but discussed the effect the affidavit would have if admitted. Mr. Springer, in a dissenting report, held that the affidavit was admissible.

Wigginton vs. Pacheco, 45th Cong 1 Ells., 8, 20

DOCUMENTARY.**Such as proves itself, may be introduced at any time.**

Such documentary evidence as proves itself may be admitted at any time. The provision of the law of 1851 limiting the taking of testimony to sixty days "was intended to apply and does apply solely to the testimony of *witnesses*, or at most to such writing as can be proved *only* by the examination of witnesses; and that documentary evidence, at least that which proves itself, may be obtained at any time after the sixty days and produced before the committee at the hearing." An abstract of the votes returned in the district, duly certified from the office of the secretary of state, was received as evidence by that portion of the committee whose recommendations were adopted by the House, though not presented until the hearing before the committee. A minority held it to be inadmissible.

Vallandigham vs. Campbell, 35th Cong 1 Bart., 229

May be obtained at any time, without notice.

An abstract of votes, certified by the secretary of the Territory, is competent evidence of the result of the election. It may be obtained at any time, and no notice need to be given to the opposite party.

Daily vs. Estabrook, 36th Cong 1 Bart., 305

Authenticated by seal, may be introduced at any time.

Records duly authenticated by a seal may be received as evidence at any time, without being first introduced before the magistrate who takes and certifies the depositions.

Cannon vs. Campbell (Mr. Calkins), 47th Cong 2 Ells., 607

Informality in certification subsequently cured.

Where the returns, poll books, and other documentary evidence were objected to as not properly certified, or as certified by the wrong officers, the committee overruled most of the objections, and cured the rest by procuring other and more perfect certificates. "It is record evidence, and therefore admissible to correct any informalities in the proof previously made."

Goodwyn vs. Cobb, 54th Cong Report 1122, p. 4

Must be introduced like other evidence.

Documentary evidence (under the law of 1857) can only be introduced before the officers authorized by the law to take testimony, and within the legal time.

Vallandigham vs. Campbell (minority report), 35th Cong 1 Bart., 238

The statute in regard to taking depositions in election contests is mandatory and applies to record evidence attested under seal, as well as to depositions of witnesses and exhibits requiring identification.

Cannon vs. Campbell (Mr. Thompson), 47th Cong 2 Ells., 615

Extra-official note on returns, by county clerk, not evidence.

Where the vote of townships was objected to on the ground that the township returns were unsigned, or did not show that the officers were sworn, or were not dated, and the only evidence of these facts was an extra-official note made by the county clerk in the county abstract of votes, *Held*, that the evidence was insufficient.

Easton vs. Scott, 14th Cong C. & H., 280

Extra-official notes on papers not evidence.

The minutes of a county board of canvassers in Florida, or the reasons given by them in their certificate for rejecting the vote of a precinct, are not of such official character as to make them evidence.

Finley vs. Walls, 44th Cong. Smith, 376

Certificate of prothonotary, to election documents, as evidence.

The committee rejected a large number of votes upon the certificate of the prothonotary to copies of all the election papers in his office, such papers showing, by comparison, that the names of the voters in question were on the poll lists, but were not on the registration lists, and there being no affidavits of qualification on file. The minority denied that the certificate of the prothonotary to copies of the election papers on file in his office on a certain date was sufficient evidence that no other papers had ever been filed, and still less could it establish the conclusion that no such affidavits had been made by the voters at the polls.

Craig vs. Stewart, 52d Cong. Stofer, 9; 19

County clerk can certify to copies of papers, but not to matters of fact.

Where the law requires the oaths of election officers to be filed with the county clerk, the certificate of the clerk is competent to authenticate copies of these documents, but he should be examined on oath to show facts derived from these documents, or to negative their existence.

Goggin vs. Gilmer, 28th Cong. 1 Bart., 72

County clerk can not certify to a matter of fact.

Where the county clerk certified on his abstract of precinct returns that no poll books had been returned to him from certain precincts, the committee held that this certificate was not evidence of the fact. If it was a fact it was not a fatal irregularity.

Bennet vs. Chapman, 34th Cong. 1 Bart., 206

Must be certified by proper officer.

A transcript certified by the prothonotary of one county can not be admitted to prove the votes of another.

Fuller vs. Dawson, 39th Cong. 2 Bart., 132

Nothing but copies can be proved by certificate.

"A certified computation, and not a certified transcript of any official writing authorized by law" is not competent evidence.

Fuller vs. Dawson, 39th Cong. 2 Bart., 134

Only facts legally required to be certified to can be proved by certificate.

"The law is entirely settled that statute-certifying officers can only make their certificates evidence of the facts which the statutes requires them to certify; that when they undertake to go beyond this and certify other facts they are unofficial and no more evidence than the statement of any unofficial person."

Switzler vs. Anderson (majority report), 40th Cong. 2 Bart., 378

Certificates to copies of papers strictly construed.

Papers certified to be "true copies of the poll books, tally paper, and return of the election" on which the certificate of oath of judges and clerks was missing or irregular were not taken as evidence that the same irregularity existed on the original papers, as the words of the certificate did not exclude the idea that this certificate might have been omitted or incorrectly copied.

Koontz vs. Coffroth, 39th Cong. 2 Bart., 147

Only matters required to be of record can be proved by certificate.

The law of Florida required the county commissioners to strike off or erase from the registry list, before the election, the names of such persons as were known or should be proved to have died or ceased to reside permanently in the places where they were registered. Part of the evidence introduced in a case consisted of copies, certified by the county clerks, of the registry lists, and also of the names which had been struck off from the lists. The committee held that the names struck off had ceased to be a part of the record, and could not be proved by

certificate. A similar ruling was made as to the words "not sworn" found on the poll lists after the names of some voters. The minority held that as the names struck off were not obliterated, but were merely lightly struck through with a pen or had the word "died," "removed," etc., written after them, they were still so far a part of the record as to be capable of being proved by the certificate of the clerk.

Finley vs. Bisbee, 45th Cong......1 Ells., 94-96; 117

Muster rolls as evidence.

The committee held that the muster rolls on file with the Adjutant-General, at Washington, as well as those kept with the regiment and those in the office of the adjutant-general of Missouri, were each original copies, and that sworn copies of any of them were admissible. They were held to be *prima facie* evidence of the age of the soldiers, and, when made about the time of the election, of the persons constituting the regiments, but not to be evidence of residence, and, when made a year or two before the election, not to be evidence of the persons forming the regiments.

Knox vs. Blair, 38th Cong.1 Bart., 528

Land lists in Virginia.

Under the Virginia law, permitting only freeholders of six months' standing to vote, the land lists of the previous year are *prima facie* evidence of the right of persons to vote, conclusive only in the absence of all other evidence, and capable of being overthrown by other evidence. But the House rejected the report of the committee, and *seems* to have taken the list as conclusive.

Taliaferro vs. Hungerford (1st contest), 12th Cong......C. & H., 246

Under the Virginia law, permitting only freeholders of six months' standing to vote, the land lists are *prima facie* evidence of the right to vote, but may be rebutted by other evidence.

Taliaferro vs. Hungerford (2d contest), 13th Cong......C. & H., 252

Under the Virginia law, requiring a freehold estate as a qualification for voting, the land lists, or certified copies of them, are satisfactory evidence of the qualification or disqualification of voters unless disproved by other evidence.

Porterfield vs. McCoy, 14th Cong......C. and H., 270

Where, under the Virginia law requiring a freehold estate in land as a qualification for voting, votes were attacked because the names of the voters were not found on the land lists, the committee received parol testimony to show that such voters were in fact qualified, but expressed the opinion that the reception of such testimony was not in accordance with the rule of law that the best evidence the case admits of should be required. If this rule had been followed and only documentary evidence admitted a still larger majority for petitioner would have been shown, and the rule of law seems to have been relaxed for the purpose of showing that, on the state of the case most favorable to the sitting member, petitioner would still have a majority.

Loyall vs. Newton, 21st Cong......C. and H., 523

Tax lists in North Carolina, not conclusive.

Where, in North Carolina, there were more names on the list of voters than were on the tax list, but it appeared that persons had the right to vote, under the State laws, who had at any time paid taxes, *held*, that the tax lists were not conclusive evidence of what persons were entitled to vote.

McFarland vs. Purviance, 8th Cong......C. and H., 133

Certified copies of original returns evidence of their contents in Mississippi.

The committee counted returns rejected by the county commissioners because no list of voters accompanied them, or for similar irregularities. The certificate of the commissioners as to the number of votes ~~so~~ rejected, and copies of the original returns certified by the clerk of the chancery court (in Mississippi), were held to be sufficient evidence of the contents of the returns.

Lynch vs. Chalmers, 47th Cong......2 Ells., 357

Certified copies of returns not in official custody of certifying officer not evidence.

A certified transcript of a rejected return, made and certified by a chancery clerk (in Mississippi), there being no law requiring such returns to be kept on file as official records by this officer or any other, is not evidence.

Lynch vs. Chalmers (minority report), 47th Cong......2 Ells., 362

County court, in West Virginia, authorized to make a record.

The county court in West Virginia has the power to make a record of its proceedings in regard to elections. "There is inherent in every such tribunal, and necessarily incident to its very purpose and existence, the power to make such a record as will perpetuate and make available its legitimate action." And, aside from general principles, it appears from an examination of the legislation of West Virginia on the subject that the county court is more than a mere returning board.

Smith vs. Jackson, 51st Cong......Rowell, 18

Board of supervisors, in California, authorized to keep a record.

The board of supervisors provided for by the statutes of California is an official body, required to keep a record, and this record, duly certified, imports verity, and must stand until shown to be incorrect.

Wigginton vs. Pacheco, 45th Cong......1 Ells., 7

WEIGHT OF

Vague opinion insufficient.

The opinion of witnesses that a larger number of votes are returned as cast than there were voters present at the election is not sufficient to rebut the presumption that the officers did their duty.

McDuffie vs. Davidson, 50th Cong......Mobley, 597

Evidence sufficient to shift burden of proof conclusive unless rebutted.

"When the legality of votes is assailed, upon notice and answer, and the issue formed, that issue is to be fairly heard and tried upon evidence. When one party introduces apparently credible evidence, sufficient of itself to maintain the issue, the opposite party is called upon to meet it, and if he does not do it with the means at hand there can be but one reasonable conclusion, and that is that there was no answer to it."

Wallace vs. McKinley (minority report), 48th Cong......Mobley, 207

Insufficient notice of election not proved.

Where there was proof that notices were put up the day before the election, but no proof that these were the first notices, the committee held that the fact of insufficient notice was not proved.

Morton vs. Daily, 37th Cong......1 Bart., 410

Testimony of a conspirator must be corroborated.

"The testimony of a conspirator swearing to his own infamy and implicating others in the same crime is always jealously scrutinized, and unless corroborated in material points by evidence coming from uncontaminated sources can not generally be received as sufficient to establish a litigated fact. And if, in addition to this, such conspirator declines to submit to a full, thorough, and searching cross-examination upon the whole subject-matter testified to by him in his examination in chief, this circumstance casts additional suspicion upon his testimony; and if to this be also added the fact that such conspirator is at the time he so testifies the paid agent of the party producing him in ascertaining and arranging the evidence for his employer, this circumstance is one calculated to cast additional doubt and suspicion upon his testimony. There was a period in the history of American and English jurisprudence when the paid attorney or counsel of a litigant party would not be heard to testify on behalf of his client."

Bromberg vs. Haralson, 44th Cong......Smith, 358

Where the testimony of fraud was the testimony of the State registrar, testifying that he himself procured it to be committed, but the testimony was not sufficiently corroborated by that of his subordinates, and the Federal supervision of the Congressional election rendered it incredible that such fraud could have been commit-

ted at that election at least, a majority of the committee held that the testimony was insufficient to establish the fraud. A minority held that it would be sufficient in a criminal court to convict an accomplice of crime, and if not sufficient in this case to give the seat to the candidate, against whom the fraud was committed, it was certainly sufficient to justify refusing it to the candidate in whose favor it was committed.

Sheridan vs. Pinchback, 43d Cong......Smith, 326, 337

"Coached" evidence disregarded.

Where contestee called a large number of colored witnesses to testify that they voted for him, but their answers were uniform and appeared to be "coached," the committee disregarded their evidence.

Aldrich vs. Underwood, 54th Cong......Report 2006, p. 12

For evidence required to set aside a return, *see* Return Impeachment of.

For evidence of vote when returns impeached, *see* Return, when Impeached what Votes Counted.

For amount of evidence required to prove a vote illegal, *see* Illegal Votes, and Votes, Presumption of Legality.

For evidence required to prove bribery, fraud, intimidation, etc., *see* under these heads:

SUPPRESSION OF. *See* SUPPRESSION OF EVIDENCE.

EXECUTIVE.

See GOVERNOR.

EX PARTE AFFIDAVITS.

See EVIDENCE, *Ex Parte*.

EX POST FACTO LAW.

See ELECTIVE FRANCHISE.

EXPULSION.¹

To be inflicted only for causes related to duty of member.

"Neither House ought to expel for any cause unrelated to the trust or duty of a member."

Roberts, 56th Cong......Report 85, p. 46

The right to expel is absolute.

The right to expel a member is absolute, limited only by the condition that it must be exercised by a two-thirds vote. "The power of exclusion is a matter of law, to be exercised by a majority vote, in accordance with legal principles, and exists only where a member-elect lacks some of the qualifications required by the Constitution. The power of expulsion is made by the Constitution purely a matter of discretion."

Roberts (minority report), 56th Cong......Report 85, part 2, p. 77

A member meriting expulsion refused readmission after reelection.

A Representative who had saved himself from expulsion by resigning while the expulsion resolution was pending, and was reelected at a special election, was refused admission without referring the case to any committee or hearing further testimony.

Whittemore, 41st Cong. (*See* Roberts, 56th Cong.)

¹ This "digest" does not profess to cover the expulsion cases, and refers to questions of expulsion only as they come up incidentally in connection with contested-election cases proper.

EXTENSION OF TIME TO TAKE TESTIMONY.*See EVIDENCE, ADDITIONAL.***FEDERAL ELECTION LAWS.***See ELECTION LAWS.***FRAUD.***EFFECT OF. (See, also, RETURNS, IMPEACHMENT OF.)***To be eliminated, if possible, without rejection of returns.**

Where contestant proved that more votes were cast for him than were returned for him, and there were circumstances indicating fraud, the committee preferred not to reject the polls, but corrected the vote according to the proof.

Taylor vs. Reading, 41st Cong 2 Bart., 667

The committee held the law to be "that where fraud is shown to exist the poll shall not be rejected unless it is impossible to purge it of the fraud." It being shown that very many illegal votes had been received, with the fraudulent connivance of the judges of election, and there being definite proof that at least 252 of the votes shown by the numbered ballots in the box to have been cast for contestee were illegally and fraudulently cast, the committee deducted these 252 votes from the vote of contestee. The minority held that as the ballot box was clearly shown to have been tampered with, the ballots found in it were no evidence how these 252 persons voted. The fraudulent returns were no evidence of the remainder of the vote, and the only course left was to reject the entire return, and count only such votes as each party had proved aliunde.

Le Moyne vs. Farwell, 44th Cong Smith, 409, 422

Where not enough to affect the result, election valid.

Where there was fraud and bribery on behalf of contestee, but no proof connecting him with it, or showing that it affected enough votes to change the result, the committee reported for contestee.

Evans vs. Turner, 56th Cong Report 198

Distinction between illegality and fraud.

"The distinction is between mere illegality and fraud in the conduct of elections. The first does not deprive the candidate of any votes save those proven to have been illegally cast for him; the second, by destroying the value of the returns as evidence, causes the rejection of the entire poll and deprives the candidates of all the votes cast for them, as well the legal as the illegal ones, unless otherwise proved."

Wise vs. Young (minority report) 55th Cong Report 772, part 2, p. 4

Where votes fraudulently kept from box, returns can not be purged and must be rejected.

"The authorities are clear and complete that where fraud taints a return it can not be purged, but must be rejected; but a return can be purged only by rejecting ballots illegally cast or wrongfully counted. While in this case legal ballots were unquestionably kept from the box by the illegal and wrongful acts of persons connected with the machinery of the election, it is impossible to determine the number of these ballots, and the only logical and equitable result is to reject such returns."

Murray vs. Elliott, 54th Cong Report 1567

Polls rejected or returns corrected, according as discrepancy large or small.

Where the number of votes cast was proved to have been much less than the number returned, the committee rejected the whole polls; where the discrepancy was smaller, they corrected the returns according to the probable state of the vote.

Robinson vs. Harrison, 54th Cong Report 1121

Returns rejected or purged, according to amount of discrepancy.

Where there were many more voters proved by their own testimony to have voted for contestant than were returned for him, and the remainder was less than the number returned for contestee, and there were other indications of fraud, including the partisan appointment of election officers, the committee threw out the whole returns and counted only the votes proved aliunde. Where the margin was smaller, and might have been accounted for by the ballots rejected as imperfect, the committee corrected the returns according to the proof.

Wise vs. Young, 55th Cong Report 772

Returns rejected or purged, according to circumstances.

Where it was shown by the testimony of list takers, corroborated by the testimony of the voters themselves, that many more votes were cast for contestant than were returned for him, and there were other indications of fraud, the committee rejected or corrected the returns, according to the testimony in each case.

Patterson vs. Carmack, 55th Cong Report 895

Returns rejected or corrected, according to amount of discrepancy.

Where more votes were proved to have been cast for contestant than were returned for him the committee rejected or corrected the returns according to the amount of the discrepancy. The minority corrected many returns, but rejected only a few.

Wise vs. Young, 55th Cong Report 186

Fraudulent returns rejected.

Returns which are tainted with fraud can not be made the foundation of the title to a seat in the House. The result should be purged of the fraud if practicable, and the poll only thrown out when no other alternative remains but to give effect to the fraud or to reject the poll.

Atkinson vs. Pendleton, 51st Cong Rowell, 46

Votes fraudulently added to returns deducted.

Where it was proved that returns and poll books had been altered so as to show several hundred votes for contestee which had not been cast, the committee unanimously deducted the votes thus fraudulently added.

Chaves vs. Clever, 40th Cong 2 Bart., 467

Votes fraudulently returned deducted.

Where it was charged that a large number of persons whose names were marked on the check list as voting did not vote, and some witnesses swore that their names were the same as those marked on the list, and that they had not voted, and it was proved that a large number of the persons marked could not be found in the ward by a diligent search two months after the election, and that many of them were not on the assessor's list, the committee agreed as a compromise to deduct 105 from contestee's vote, the majority holding that the charges of fraud were sustained, the minority holding that they were not sustained, but agreeing to the compromise because of the lack of testimony explaining the irregularities.

Abbott vs. Frost, 44th Cong Smith, 614, 619

Entire vote excluded.

Where, in a county in which votes cast for one party had been notoriously counted for the other, and the voters of the defrauded party at this election therefore refused to vote, but many more votes were still returned for contestee than were cast for both parties, the committee held that the entire vote should be excluded. Contestant's supporters were justifiable in not voting, and "it would be a travesty upon justice to permit his opponent to be allowed the votes which were cast at the election in his favor."

Aldrich vs. Robbins, 56th Cong Report 327

Fraudulent return set aside.

It was charged that the presiding officer at an election, after the legal poll was closed, held a new and fraudulent election. The House seems to have sustained the charge.

Jackson vs. Wayne, 2d Cong C. and H., 47

Vitiates entire poll.

"When the result in any precinct has been shown to be 'so tainted with fraud that the truth can not be deducible therefrom,' then it should never be permitted to form a part of the canvass. The precedents, as well as the evident requirements of truth, not only sanction, but call for the rejection of the entire poll when stamped with the characteristics here shown."

Knox vs. Blair, 38th Cong 1 Bart., 526

Where the poll was opened the night before election, at a different place from the legal one, and a large number of illegal votes received, and the votes received the next day at the legal place were received in the same box unopened, the entire vote was rejected.

Todd vs. Jayne, 38th Cong 1 Bart., 560

Return vitiated by fraudulent voting.

Where there was proof of the deliberate reception of fraudulent votes, with the connivance and in part by the procurement of the election officers, and there was definite proof of the fraudulent character of 116 votes, but only 30 could be deducted from either candidate, there being no proof for whom the others were cast, "the committee see no alternative but to accept the return, and thus sanction the fraud, or set it aside altogether. They can not doubt that the latter course comes within the precedents of former Congresses and of this committee and of the present House, and they therefore reject this return altogether."

Dodge vs. Brooks, 39th Cong 2 Bart., 88

Wholesale fraudulent voting; whole poll rejected.

"Two hundred and forty votes might have been illegally cast for either candidate in a large district without causing the loss of more than that number to either, when proved, but 200 or more votes can not be received by election officers with a guilty knowledge that they were illegal, or in gross violation of the election laws, which they were bound to consult, without entailing a stronger penalty. In such cases not only State courts, but legislatures and Congress have not hesitated to declare the whole poll void and of no effect, except as to such votes as either party chooses to save, by proof of their legality."

Myers vs. Moffett, 41st Cong 2 Bart., 566

Where many fraudulent votes returned, whole poll thrown out.

Where the election was held by others than the regularly appointed officers (who were, however, selected by the voters present, under the forms of law) and they returned as voting many more persons than there were names on the registry lists of qualified voters, and it was impossible to purge the polls, the committee unanimously rejected the whole precinct.

Switzler vs. Dyer, 41st Cong 2 Bart., 790

Whole vote of a county thrown out.

Where the superintendent of registration, for a money consideration, removed his first appointees and appointed new registering officers for the purpose of procuring a fraudulent registration to be made, and these registering officers disregarded the law and admitted very many disqualified persons to register, so that the total registry was twice as large as the registry made two years earlier and that made two years later, the committee threw out the whole vote of the county where these frauds prevailed.

Shields vs. Van Horn, 41st Cong 2 Bart., 924-929

Whole poll rejected.

The committee quoted the rule from *Howard vs. Cooper* [*Knox vs. Blair* (?)] (1 Bart., 275): "When the result in any precinct has been shown to be so tainted with fraud that the truth can not be deducible therefrom, then it should never be permitted to form a part of the canvass. The precedents, as well as the evident requirements of truth, not only sanction but call for the rejection of the entire poll when stamped with the characteristics here shown." The contestant in this case had charged fraudulent voting in a precinct where he nevertheless received a large majority. The proof was not sufficient to establish the number of persons voting fraudulently,

even if taken to establish the general fact, and the above rule was quoted as indicating the only other remedy; but as in this case the remedy would be decisive of the case against the candidate charging fraud, it would have been unfair to him to apply it.

Bromberg vs. Haralson, 44th Cong Smith, 360

Return rejected.

"The law is that where fraud is proved to have been committed by the officers of an election in conducting the election, no reliance can be placed upon any of their acts, and their return must be rejected as wholly unreliable. The party claiming under the election must prove the actual vote in some other way."

Finley vs. Walls, 44th Cong Smith, 389

Vote of a whole city thrown out.

Where the testimony showed a very large amount of repeating, bribery, and intimidation in every precinct of the city of Charleston, S. C., committed by the friends of contestee, with the evident aid and collusion of the election officers, the committee unanimously threw out the vote of the whole city.

Buttz vs. Mackey, 44th Cong Smith, 684-689

Whole poll rejected.

The minority (on this point probably sustained by a majority of the committee) rejected a poll because there was unlawful interference with the United States supervisor, preventing him from discharging his duties; because the poll list was falsified by placing on it fictitious names; because a crowd of men who had already voted at another precinct were permitted to vote for contestee, while more than 200 of contestee's supporters, standing in line all day, were prevented from voting at all; and because there was no trustworthy evidence of the actual vote cast or returned.

Lee vs. Richardson (minority report), 47th Cong 2 Ells., 547

Where it was shown that the number of votes returned in a number of precincts was largely in excess of the vote actually cast, and many of the names on the poll books were obviously fictitious, the committee unanimously rejected the whole vote of these precincts.

Manzanares vs. Luna, 48th Cong Mobley, 62

"The return of the officers is *prima facie* evidence of the result of the election in the precinct where it was held. Unassailed it is sufficient to be counted in the ascertainment of the general result. It may be impeached by anything which will show it to be untrue in fact or unworthy of credit because of the improper conduct of the officers of the election. The return is accepted as the act of sworn officers, to whose acts confidence is to be given upon the presumption that they have regarded the law and done their duty. But if they are shown to have disregarded the law and violated the statutes which have been adopted to preserve the purity of the election, then their return shall be rejected, because it is no longer entitled to the credit which is given to acts of officers who have done their duty. The misconduct of the officers must be such as to make the result uncertain, for if, notwithstanding their irregularity, the true vote can be ascertained, it shall be counted. But where the condition of the poll is such that the result can not be reached with reasonable certainty, then the entire poll must be rejected."

Hurd vs. Romeis (minority report), 49th Cong Mobley, 430

Fraud in regard to one vote not fatal to whole poll.

If it had been proved that one of the judges deposited the ballot of a voter in his pocket instead of in the box, this would not authorize the exclusion of the entire vote of the precinct.

Stovell vs. Cabell, 47th Cong 2 Ells., 672

Knowingly produced by election officers, whole vote thrown out.

"While the committee should be slow to throw out the whole vote of a ward or district, nevertheless, if the facts and circumstances show that the inspectors of the registry and election knowingly produced frauds, and violated the election laws, and permitted illegal voting, and the polls can not be purged, the whole vote should be thrown out."

Van Wyck vs. Greene, 41st Cong 2 Bart., 641

Fraud committed by election officers vitiates all their acts.

Where it is proved that a given number of ballots were tampered with by the judges, the whole vote must be thrown out unless there is the most satisfactory evidence that no other ballots were tampered with.

Hurd vs. Romeis (minority report), 49th Cong. Mobley, 435

Where the managers of election stuffed the box, or permitted it to be stuffed, "their every act is tainted, and the presumption that the law ordinarily attaches to official acts, *omnia præsumuntur rite acta esse*, is destroyed, and every act of these managers attainted with suspicion and fraud."

Smalls vs. Elliott (minority report), 50th Cong. Mobley, 730

EVIDENCE OF (see also EVIDENCE).**Fictitious names on poll book rejected.**

Where the names "Oliver Twist" and "Sam Weller" appeared on the poll book the majority of the committee took it as evidence of fraud. The minority (whose conclusions were substantially adopted by the House) rejected these two votes.

Chapman vs. Ferguson, 35th Cong. 1 Bart., 269; 272

Fictitious names on poll book, whole poll rejected.

Where the voters' names were recorded on the poll books "to a great extent alphabetically, as if copied from some index or registration list," the committee rejected the whole vote of the poll on this evidence of fraud.

Manzanares vs. Luna, 48th Cong. Mobley, 63

No inhabitants in a county.

Where the evidence showed that a county contained no inhabitants votes returned from it were rejected.

Daily vs. Estabrook, 36th Cong. 1 Bart., 303

Unexplained increase in the vote a suspicious circumstance.

Where there was an increase of about 5,000 in the vote of the district over that cast at the previous election, and this increase was nearly all in eight or nine precincts, and was all in the vote of one candidate, there being no substantial increase or decrease in the votes of other candidates, the committee were of the opinion that if such an increase had been due to any legitimate cause it would necessarily have been something well known and easily proved. The contestee having failed to account for it in any way, he presumably could not; and the increase, unaccounted for, was a very suspicious circumstance.

Blair vs. Barrett, 36th Cong. 1 Bart., 310

More votes than voters.

Where 128 votes were returned from a county, but the evidence showed that it could not contain over 60 voters, and there were circumstances indicating fraud, the committee deducted 68 votes from the candidate for whom all the votes of this county were returned.

Daily vs. Estabrook, 36th Cong. 1 Bart., 304

Where 141 votes were returned as being cast, but the evidence showed that there were only 58 qualified voters in the precinct, and that the registration under which this election was held was fraudulent, the committee rejected the return and threw out all the votes except a few proved *aliunde*.

Goodrich vs. Bullock, 51st Cong. Rowell, 588

Discrepancy between returns and proved vote not sufficient.

The minority held "that *fraud* when charged, must be proved, and that it never can legally be *presumed* from mere suspicious circumstances, however strong they may be deemed, that a mere discrepancy between the number of votes returned and the tally lists, or the number that may afterward be proved to have been cast, has never, in any judicial or legislative inquiry, been considered as evidence of fraud at all tending to affect the validity of the election, and that if it should be held to have that effect, no election could be sustained, and every one in the United States

could be defeated and destroyed." Where a number of voters considerably larger than the number returned for contestant testified that they voted for him, and there were circumstances suspicious of fraud, the minority held that the returns should not be rejected if the circumstances could be explained in a way consistent with the innocence of the election officers.

Washburn vs. Voorhees (minority report), 39th Cong 2 Bart., 70

More votes returned for a candidate than cast for him.

Any considerable number of votes proved for one candidate in excess of the number returned for him has always been regarded as evidence of fraud and a legitimate method of impeaching the return. Where 191 more votes were proved to have been cast for a candidate than were returned for him the committee considered it "sufficient to exclude the return from the count without further evidence."

Bisbee vs. Finley, 47th Cong 2 Ells., 177

Fraud at another election corroborative evidence.

Where the same election officers at an election only a month later were guilty of most flagrant fraud in returning large numbers of votes never in fact cast, the committee considered this fact in corroboration of the evidence indicating intentional fraud at the election in contest.

Myers vs. Moffett, 41st Cong 2 Bart., 568

Poll not rejected unless fraud clearly proved against officers.

"To vitiate a poll and justify the rejection of the returns of an election, the testimony ought to be clear and convincing in its character. It must establish fraudulent conduct on the part of the officers, or some of them, at least, charged with the duty of conducting the election, certifying the result, or making the returns."

Abbott vs. Frost (minority report), 44th Cong Smith, 624

Must be specifically proved.

Fraud must be specifically proved, and will not be presumed at one poll because proved at another.

Buchanan vs. Manning, 47th Cong 2 Ells., 295

Proved at some precincts, may be presumed at others.

"There being a conspiracy to defraud, there being proof of fraud at a number of precincts," and the illiterate character of the minority inspectors leaving opportunity for unlimited fraud at other precincts, "and there being no proof by contestee of good faith in the election, it should be set aside."

Buchanan vs. Manning (minority report), 47th Cong 2 Ells., 337

Frauds at prior elections do not excuse failure to make full proof in regard to election in question.

"Frauds at prior elections and the obstructions to the taking of testimony in prior election contests may, and often do, throw light upon the political situation in a community, but can not be taken as an excuse for not attempting earnestly in subsequent contests to comply with the rules of evidence. Every election must rest upon its own merits."

Threl vs. Clarke, 51st Cong Rowell, 180

Not presumed without evidence.

Where 14,000 names had been erased from the registry under the law, and it was charged that there was a conspiracy to use the outstanding certificates in these names as the basis for illegal voting and repeating, but there was no evidence that any such certificate was so used, the committee refused to presume that it was done.

Romain vs. Meyer, 55th Cong Report 1521, pp. 7-9

May be proved by circumstances pointing to it.

"Let it be remembered that fraud can rarely, if ever, be proved by direct evidence, and that the rule is that whenever a sufficient number of independent circumstances which point to its existence are clearly established, a *prima facie* case of its existence is made, and that if this case is not met by explanation or contradiction it becomes conclusive."

Noyes vs. Rockwell (minority report, sustained by the House), 52d Cong ... Stofer, 43

Circumstantial evidence establishes prima facie case.

"Fraud can rarely, if ever, be proved by direct evidence, and the rule is that whenever a sufficient number of circumstances which point to its existence are clearly established, a prima facie case of its existence is made, and if this case is not met with explanation or contradiction it becomes conclusive."

Mitchell vs. Walsh, 54th Cong. Report 1849

Returns false and contestant not represented on board.

Where it was proved that many more votes were returned from the contested precincts than were cast, that names of persons not voting were on the poll lists, and that contestant was not represented on the election boards, the committee held that the fraudulent character of the returns was established.

Goodwyn vs. Cobb, 54th Cong. Report 1122

Ballot box out of sight of voter.

The returns of a precinct where the boxes were so placed that the voter could not see whether his ballot was deposited or not, and there were many other indications of fraud, were rejected, and only votes proved aliunde counted.

Aldrich vs. Underwood, 54th Cong. Report 2006, pp. 6-9

Many suspicious and illegal acts.

The votes of one parish and three wards of another were thrown out on the ground that "the watchers appointed by the Republicans were refused admission to the polling places by the Democrats. Republicans, mostly colored men and legal voters, who would have voted for contestant, were refused the right of suffrage; tally sheets, lists of voters, and poll books were altered and forged; ballot boxes were stuffed with fraudulent ballots, and many other illegal acts done in the interest of contestee and against contestant."

Coleman vs. Buck, 54th Cong. Report 758

Suspicious reversal of colored vote.

Where it was in evidence that most of the colored voters were Republicans, but in the precincts in this case in which the Republican party had been denied proper representation on the election boards, most of them were returned as voting the whole Democratic ticket, the committee characterized this fact as "suspicious," and said: "Unless some reason for this is shown, it will certainly add great strength to the presumption of fraud arising from the selection of ignorant judges, and force us to the conclusion that the vote returned from these contested districts did not represent the actual vote cast by the voters."

Patterson vs. Carmack, 55th Cong. Report 806, p. 8

Testimony of watchers that vote less than returns.

The testimony of persons who were present at the polls all day and kept count or tally of the number who voted or could have voted, which number was much less than the number returned as voting, was received among other evidence to show that the returns were fraudulent.

The minority held that the ballots themselves were the "best and only admissible evidence."

Aldrich vs. Robbins, 54th Cong. Report 572

Poll list stuffed alphabetically.

Where the first 200 names on the poll list were in alphabetical order, the names immediately following them were those of the voters who voted first in the morning, and the poll list was stuffed throughout with the names of persons who did not vote and in many cases did not exist, the committee found these returns tainted with fraud and rejected them, and as there was no other proof of the vote, threw out the polls.

Van Horn vs. Tarsney, 54th Cong. Report 355

Poll lists alphabetically stuffed.

Where the poll lists contained many more names than the number shown to have voted, and the extra names were in direct alphabetical order or in simple alphabetical alternations or groups, the committee threw out the returns as fraudulent.

Aldrich vs. Plowman, 55th Cong. Report 284

Returns absurdly large and poll lists alphabetically stuffed.

Where, throughout a whole city, the returns were "absurdly large," many more being returned as voting than voted, the extra votes sometimes being placed on the poll lists in alphabetical order, or composed of "fictitious or nonregistered persons, or persons proved not to have voted, the committee threw out the whole vote, but counted such votes as were proved aliunde.

Wise vs. Young, 56th Cong......Report 186

More votes cast for contestant than returned.

Returns from precincts where it was proved that more voters voted for contestant than were returned for him were rejected, and only the votes proved aliunde counted.

Aldrich vs. Underwood, 54th Cong......Report 2006

More votes cast for contestant than returned for him.

Where it was proved that more votes were cast for contestant than were returned for him, this fact was held to impeach the returns from the precincts in which it was proved.

Aldrich vs. Robbins, 54th Cong......Report 572

More votes returned than cast.

Where the returns in a large number of precincts showed a very large vote, practically all for contestee, when the evidence showed that a much smaller number of votes was cast, that many of the names on the poll lists were the names of dead, absent, or fictitious persons, and others the names of persons who did not vote, the committee held that fraud was established.

Aldrich vs. Robbins, 54th Cong......Report 572

FREEHOLD TITLE

As qualification for voting in Virginia. See Qualifications of Electors.

GOVERNOR (see also Prima Facie Right, Credentials, and Vacancy).**Powers not to be delegated.**

The power of the governor to fix the time of election can not be delegated to anyone else.

McKenzie, 37th Cong......1 Bart., 461

Grafflin, 37th Cong......1 Bart., 464

Can not by the words of his writ of election limit the time for which members shall serve.

Where the governor issued a writ of election to fill a vacancy caused by the calling of Congress in special session before the regular day of election, and specified in the writ that the member elected should serve only for the called session, the committee held that this limitation was in excess of the governor's powers, but that it might be regarded as mere surplusage, and did not invalidate the writ. If there were no other grounds on which the election was illegal, if the members were elected at all they were elected for the whole unexpired term of the Congress. This decision was sustained by the House, but at the next session it was rescinded.

Gholson and Claiborne, 25th Cong......1 Bart., 9

The Territorial governor exceeded his powers in fixing the time for a special election.

The organic law of Kansas Territory provided that the first election should be held at a time fixed by the governor, subsequent elections to be held at times fixed by the legislature. The election law passed by the legislature contained no provisions for special elections to fill vacancies. The governor issued a proclamation fixing the time for an election to fill the vacancy caused by the unseating of Mr. Whitfield. The committee held that the governor had exceeded his powers, and that the election was void for this reason among others. The minority held that the governor acted within the spirit of the law. The House did not directly act upon the merits of the case.

Reeder vs. Whitfield (second case), 34th Cong......1 Bart., 215-222

His decision in regard to time and place of election to fill vacancy to be followed.

"By the Constitution of the United States * * * the governor is constituted the tribunal to determine when and where to order an election to fill a vacancy, and where the laws by which he is to be guided are doubtful his decision ought to be followed by Congress. This course is founded upon precedent, upon the respect due to State authority, and upon that public policy which requires a full representation of the States."

Pool vs. Skinner, 48th Cong. Mobley, 67

HOUSEKEEPERS.

WHAT ARE. (See QUALIFICATIONS OF ELECTORS.)

HOUSE OF REPRESENTATIVES (see also Committee on Elections, Returns, Delegate, and Membership).

Not a continuous corporation.

The House of Representatives is not a continuous corporation, but each House has a separate and independent existence, which begins when it first meets and organizes.

Hammond vs. Herrick, 15th Cong. C. and H., 294

Acts as a judicial body.

"The House, in judging of elections, has no discretion to exercise. It acts in a judicial character, and the only thing to be adjudicated is this: Who has received a majority of the votes of the electors in the district, polled at the time, in the manner, and at the places prescribed by law?"

Miller vs. Thompson, 31st Cong. 1 Bart., 127

Confined to elections, qualifications, and returns.

"In adjudicating upon any case of a contested election, the House can only determine whether such election has been held in accordance with existing legal provisions, whether the qualifications of the person elected are such as the Constitution requires, and whether the return have been legally made."

Perkins vs. Morrison, 31st Cong. 1 Bart., 144

Laws of the respective States should be its rule of action.

"Although the House of Representatives, by virtue of the fifth section of the first article of the Federal Constitution, are made the judges of the election returns and qualifications of its members, yet this power is not plenary, but is subordinate to the second and fourth sections of the same article, the first of these sections providing that the electors of the members shall have the qualifications requisite for the most numerous branch of the State legislature; the fourth section empowering and authorizing the legislature in each State to prescribe the places, times, and manner of holding elections for Senators and Representatives—such regulations being subject to alterations made by the Congress. By force of these provisions, the House is compelled, when adjudicating in any matter affecting the elections, returns, or qualifications of any of its members, to make the law of the respective States from which such members may be returned its rule of action."

Wright vs. Fuller, 32d Cong. 1 Bart., 156

Can not be estopped by State law from investigating legality of returns and votes.

The law of Alabama (passed in 1868) empowered the county canvassing board to reject votes and returns upon proof of fraud or intimidation. This rejection was to be final unless an appeal was taken to the probate court within ten days. The committee held that the latter clause was not binding on the House. "It is not competent for the legislature of a State to declare what shall or shall not be considered by the House of Representatives as evidence to show the actual votes cast in any district for a member of Congress, much less to declare that the decision of a board of county canvassers rejecting a given vote shall estop the House from further inquiry. The fact, therefore, that no appeal was taken from the decision of the board of canvassers * * * can not preclude the House from going behind the returns and considering the effect of the evidence presented."

Norris vs. Handley, 42d Cong. Smith, 72

Has powers of court of equity as well as of court of law.

"The House possesses all the powers of a court having jurisdiction to try the question who was elected. It is not even limited to the powers of a court of law merely, but under the Constitution clearly possesses the functions of a court of equity also." So even if it be conceded that ministerial officers can not always count for a candidate votes clearly intended for him, the House is not prevented from doing so.

McKenzie vs. Braxton, 42d Cong. Smith, 21

Has powers of court in cases of quo warranto.

The House is not precluded by the face of the returns, but in inquiring into the validity of an election has all the power of a court in cases of *quo warranto*.

Dean vs. Field, 45th Cong. 1 Ells., 200

The House not bound by the strict rules of judicial procedure.

Neither the committee nor the House is bound by the usual rules of evidence in their letter and strictness, but should proceed upon more liberal principles in the investigation of truth. A contested election is not to be regarded as a mere private litigation, but a great public inquiry, where the real parties are not so much the returned member and the contestant as the voters of the district. "The distinction claimed to exist between an ordinary forensic court and a legislative assembly is recognized not only in Parliament and Congress, but in the courts themselves, and from a very early period."

Vallandigham vs. Campbell, 35th Cong. 1 Bart., 230

"It is the duty of the committee to approach as nearly as possible the ballot box, and, by an examination of all the testimony, see that no legal voter is deprived of his just right to the elective franchise." * * * "This committee and the House are not circumscribed by the formalities that regulate proceedings of a board of return judges."

Koontz vs. Coffroth, 39th Cong. 1 Bart., 142

"By the Constitution, in all matters pertaining to the election, returns, and qualifications of its members, the House is made 'a law unto itself,' and has no other rule forced upon it for the determination of these questions than the sanction of the oath of its members, and that due regard for the rights of constituencies which the representatives of constituencies, from the nature of their own duties and relations, must have and feel. Not that the technical rules of the law applicable to evidence and weight of evidence, the duties of officers, etc., may not be called in to aid in the proper investigation of a case, but that when called in they shall not be regarded as greater than the rights to be affected by their application."

Wallace vs. Simpson (majority report) 41st Cong. 2 Bart., 556

"It may [be], and doubtless is, sometimes necessary to sacrifice justice in a particular case in order to maintain an inflexible legal rule, but all just men must regret such necessity and avoid it when possible to do so."

McKenzie vs. Braxton, 42d Cong. Smith, 21

Courts will invoke the aid of technical rules to prevent gross injustice, but they should not be permitted to stand in the way of equal and exact justice unless of such a rigid character and so firmly embedded in the law as to compel adhesion to them. Doubts on such questions are always resolved in favor of justice and against wrong.

Loury vs. White (minority report), 50th Cong. Mobley, 644

"The House of Representatives, with its broad and indeed limitless powers respecting the settlement of contested-election cases, is only desirous of arriving at the truth. While it will not depart from wise and well-settled rules of law, it will not hedge itself about with technical rules which do manifest wrong."

Mitchell vs. Walsh, 54th Cong. Report 1849

Not bound by technical rules, but should follow precedents.

"The House is the exclusive judge of the qualifications, elections, and returns of its own members. In the exercise of this prerogative it is not bound by the technical rules of judicial procedure, nor even by its own precedents. These may be per-

suasive, and, in so far as they embody the wisdom of experience, enlighten the mind and contribute to right conclusions. * * * And if we are wise and patriotic we will be aided by rules whose soundness has been tested by experience."

Bisbee vs. Finley (minority report), 47th Cong 2 Ells., 203

Will keep in view its own precedents.

"The Constitution of the United States makes each House of Congress the exclusive judge of the qualifications, election, and returns of its own members. In making the inquiry involved in this constitutional provision the House will carefully keep in view the customs and precedents which have heretofore prevailed in such matters. The prime object in all such cases is, if possible, to ascertain who was the people's choice at the election in question. This can only be accurately ascertained by giving close and fair attention to all the surroundings, facts, and circumstances connected with the case under consideration."

English vs. Hilborn, 53d Cong Report 614, p. 9

Powers plenary and absolute.

"The powers of Congress in regard to the elections of its members are plenary and absolute. Congress may reject supervisors' returns and accept those of the precinct inspectors, or if it sees fit it may reject the precinct returns, and, from the evidence of the voters or from any other outside testimony that it deems trustworthy, may determine how the vote of a district was actually cast. There is no limit whatever to the power of Congress in regard to the evidence by which it may seek to determine the vote of a district."

McDuffie vs. Davidson (minority report), 50th Cong Mobley, 599

Has plenary power to consider any evidence it chooses.

Under the plenary powers conferred upon the House by the Federal Constitution to determine the election of its own members, it possesses the undoubted power to determine a contest on any evidence which in its opinion establishes fraud.

McDuffie vs. Turpin (minority report), 52d Cong Stofer, 102

Will go behind all returns.

"The House, by its constituted agents, will go behind all certificates and returns to inquire into and correct all mistakes in elections brought to its notice by a contest legally made."

Gooding vs. Wilson (minority report), 42d Cong Smith, 84

May inquire into result of first election after a second has been held.

Where a majority was required to elect, and neither candidate appearing to receive a majority at the first election, the governor ordered a new election, at which the sitting member was elected, but the petitioner claimed to have been elected at the first election; *Held*, that it was a question which might be inquired into by the House.

Washburn vs. Ripley, 21st Cong C. and H., 682

May investigate election of Territorial legislature which passed the law under which the Congressional election was held.

Where the contestant claimed that the law under which the election was held was invalid because the Territorial legislature by which it was passed was not elected by the people of the Territory, but was imposed upon them by an armed invading force, the committee reported that the public importance of the question demanded an investigation by the House. The minority held that to investigate the election of members of a Territorial legislature would be assuming a jurisdiction not possessed by the House, and establishing a dangerous precedent. The House ordered the investigation and subsequently vacated the seat.

Reeder vs. Whitfield (first case), 34th Cong 1 Bart., 185-204

Can not inquire into validity of adoption of State constitution.

The constitution of a State having been recognized by all the departments of the State government and by Congress as the established constitution of the State, it was held that it was too late for the House to inquire into the validity of the proceedings by which it was adopted.

Birch vs. Van Horn, 40th Cong 2 Bart., 207

ILLEGAL VOTES.

WHEN INQUIRED INTO (BUT *see* QUALIFICATIONS OF ELECTORS).

Whether inquired into, where election by ballot.

The committee expressed a doubt as to the propriety of investigating the qualifications of electors where the voting was by ballot; but as the testimony presented was in any case insufficient to establish the charges, they did not decide the question.

Reed vs. Cosden, 17th Cong......C. and H., 358

Will not be inquired into, where election by ballot.

Where the election was by ballot the committee held that they would not inquire into the qualifications of electors, for if the right of secrecy implied in an election by ballot is to be preserved, the voters can not be compelled to disclose for whom they voted, and without such disclosure it would be vain to inquire into their qualifications with a view to purge the polls.

Easton vs. Scott (committee overruled by House), 14th Cong......C. and H., 276

WHAT ARE (*see also* QUALIFICATIONS OF ELECTORS).

Aliens and nonresidents.

The votes of aliens and nonresidents rejected.

Biddle and Richard vs. Wing, 19th Cong......C. and H., 512

HOW PROVED (*see also* VOTES, PRESUMPTION OF LEGALITY OF, BURDEN OF PROOF, and EVIDENCE.)

Received by election officers, must be shown illegal beyond a reasonable doubt.

"Before a member is admitted to a seat in the House something like the judgment of a court of competent jurisdiction has been pronounced upon the right of each voter whose vote has been received, and in order to overturn this judgment it must be ascertained affirmatively that the judgment was erroneous. *Prima facie* it is to be taken that none but the votes of qualified voters have been received by officers whose sworn duty it was to reject all others." This principle was unanimously adopted by the committee. The majority held further: "It is not sufficient that there should exist a doubt as to whether the vote is lawful or not; but conviction of its illegality should be reached, to the exclusion of all reasonable doubt, before the committee are authorized to deduct it from the party for whom it was received at the polls."

New Jersey case, 26th Cong......1 Bart., 24

"It is not sufficient to doubt the illegality of a vote, but conviction of its illegality should be reached to the exclusion of all reasonable doubt." (New Jersey case, quoted with approval in—)

Wallace vs. McKinley, 48th Cong......Mobley, 188

"A vote once legally cast can not be set aside except upon proof so strong as to produce the certain moral conviction that the said vote was illegal. The burden of proof is on the party assailing the vote."

Le Moyne vs. Farwell, 44th Cong......Smith, 414

"It is to be presumed that the judges of election did their duty and received no illegal votes. If they failed to do their duty, it must be proved." Where suggestions according to which a man may have been a legal voter were not negated by the evidence it was presumed they could not be, and the vote allowed to stand.

Archer vs. Allen, 34th Cong......Report 137, p. 11

Evidence must be clear and satisfactory.

The rule stated in the New Jersey case (1 Bart., 25) that a vote received by the election officers can not be thrown out unless it is proved illegal beyond a reasonable doubt goes too far. "The true rule is believed to be one which, while it may not require the exclusion of all reasonable doubt, does require *clear* and *satisfactory* proof of fraud or mistake before the legal presumption in favor of the correctness of the acts of sworn officers shall be nullified."

Baromberg vs. Haralson, 44th Cong......Smith, 358

Received by election officers, presumed to be good until the contrary clearly shown.

"The rights of citizens who have been admitted to vote can only be impeached by direct and positive testimony; such evidence of disqualification, of identity of person, and of the act of voting as is clear and unmistakable. It never could be tolerated that men should be disfranchised upon suspicion and inference merely."

Wright vs. Fuller (minority report sustained by the House), 32d Cong. Report 136, part 2, p. 5.

Evidence which satisfies and convinces the mind.

"Evidence which might have been sufficient to put the voter to his explanation if challenged at the polls is not deemed sufficient to prove a vote illegal after it has been admitted. * * * After a vote has been admitted something more is required to prove it illegal than to throw doubt upon it. There ought to be proof which, weighed by the ordinary rules of evidence, satisfies and convinces the mind that a mistake has been made and which the House can rest upon as a safe precedent for like cases."

Gooding vs. Wilson, 42d Cong. Smith, 82

Proof of identity required.

The committee unanimously adopted as a rule of decision "That when a name is found on the poll book proof that an individual of that name resides in the county, who is a minor, is not sufficient to strike the name off the poll book, and that some proof, direct or circumstantial, other than finding the name on the poll book, will be required of the vote having been given by such minor in the county or precinct where the vote is assailed."

Letcher vs. Moore, 23d Cong. C. and H., 750, 826

Must be specifically proved.

"The committee consider that in order to unseat a member of this House who has the regular certificate of election and who is conceded to have received a majority of several hundred votes of the votes received and counted, they should be able to report whose votes were excluded that ought to have been counted; that it would not do for the committee or for the House to say that out of 2,500 rejected voters, all of whose names are unknown, they are satisfied that enough were legal voters and ought to have been counted to give the contestant a majority."

Burch vs. Van Horn, 40th Cong. 2 Bart., 211

Where voters set out with the avowed purpose of casting illegal votes and were given tickets for the contestee by their foreman, but they could not be traced to any particular poll or identified by name, the committee held that there was no way to deduct their votes.

Knox vs. Blair, 38th Cong. 1 Bart., 530

Where it was certain that illegal votes were cast, but definite proof was not made as to their number, the committee said: "The presumption is always in favor of the legality of a vote which has been admitted by the proper officers; and, since all elections in Kentucky are *viva voce*, and since the record shows how each person votes, it would not, we think, be too much to require contestant to prove the want of residence of such persons as he claims illegally voted for contestee."

Burnes vs. Adams, 41st Cong. 2 Bart., 770

Where the contestee alleged that the registry lists of a county contained the names of many disqualified persons, and there was some general evidence in support of this claim, the majority (not sustained by the House) held that he should have proved the disqualification of each individual voter, so that the polls might be purged.

Switzler vs. Dyer (majority report), 41st Cong. 2 Bart., 789

Votes can not be deducted for illegality unless the evidence establish the names of the illegal voters and their individual political affiliations. General evidence of the political affiliations of a class and that a certain number not individually named voted illegally is not sufficient.

O'Ferrall vs. Paul (minority report), 48th Cong. Mobley, 156

Votes not rejected on doubtful evidence.

It was charged that 1,000 persons had voted for contestee who were not residents of the county. There was "testimony tending to prove that 9 colored men voted at the election who were not *bona fide* residents of the county of Dallas. The evidence shows that at some period before the election they had resided in adjoining counties. But these parties took, when challenged, the requisite oath of residence to entitle them to vote, and upon the proof it would be unsafe to hold that they were not legally entitled to vote as they did."

Bromberg vs. Haralson, 44th Cong......Smith, 365

Merely conflicting testimony insufficient.

The committee refused to reverse the decisions of the selectmen (in Maine) in regard to the residence and qualifications of voters upon merely conflicting testimony.

Anderson vs. Reed, 47th Cong......2 Ells., 286

Appearance of voters not sufficient evidence of minority.

Where bystanders testified that certain persons had voted who appeared to be less than 21 years of age, but each of the voters made affidavit before voting that he was of age, the testimony was held to be "too vague and uncertain to justify * * * striking off any vote as having been cast by a minor."

Bromberg vs. Haralson, 44th Cong......Smith, 365

The mere statement of a witness that an elector is a minor or nonresident is not sufficient. The witness must give facts to justify his opinion.

Lowe vs. Wheeler, 47th Cong......2 Ells., 76

Negative testimony to show nonresidence.

The committee unanimously adopted as a rule of decision "that no name be stricken from the polls as unknown upon the testimony of one witness only that no such person is known in the county, and that where a man of like name is known, residing in another county, some proof, direct or circumstantial, other than finding such a name on the poll book, will be required of his having voted in the county or precinct where the vote is assailed." The House went further than the committee, and restored some votes rejected by the committee upon stronger testimony than that above declared to be insufficient.

Lecher vs. Moore, 23d Cong......C. and H., 749, 825, 844

Where the proof that inmates of the poorhouse who had voted had been sent to the poorhouse from other townships than the one in which it was situated and where they voted was negative, consisting of the testimony of public officers and old residents that they knew no such persons, it was held to be admissible, and in this case sufficient.

Le Moyne vs. Farwell (minority report), 44th Cong......Smith, 424

The testimony of witnesses residing in a precinct that they are not acquainted with certain persons whose names are found on the poll list as voting may be sufficient to establish nonresidence in country precincts, but not in a crowded city.

Hurd vs. Romeis, 49th Cong......Mobley, 424

The evidence of persons well acquainted in a precinct that they are not acquainted with persons who appear on the poll list as voting is competent, and makes out a *prima facie* case of nonresidence. The burden of proof is on the party claiming the benefit of the votes to prove them legal.

Hurd vs. Romeis (minority report), 49th Cong......Mobley, 450

Where canvassers had been sent through the district to verify the registration lists, and had returned long lists of persons as "not found," and subpoenas for these persons had also been returned as not found, the committee quoted McCrary, section 356, on the admissibility of such testimony, but pointed out that there was other testimony of undoubted competency showing the same state of facts.

Moore vs. Funston, 53d Cong......Report 1164, pp. 3-7

Convict; record of conviction must be produced.

Where votes are alleged to be illegal because of the conviction of the voter of crime, "the record of conviction is the best evidence and the only evidence to be accepted by the House, unless the loss or destruction of that record is shown."

Lowe vs. Wheeler, 47th Cong. 2 Ells., 76

In the absence of proper evidence of conviction and punishment, an elector is not disqualified on account of the alleged committal of crime.

Garrison vs. Mayo, 48th Cong. Mobley, 59

Convicts; record of conviction and proof of identity necessary.

Where votes are rejected for conviction of crime, a copy of the record of conviction should be produced, and also evidence of the identity of the person offering to vote with the person convicted. It is not enough that the voter has the same name as one of the names found on a list, prepared by a political committee, known as a "convicts' list."

Bisbee vs. Finley, 47th Cong. 2 Ells., 174

Convicts; record of conviction sufficient.

It is sufficient to produce the record of conviction to establish that a voter was a convict.

Worthington vs. Post, 50th Cong. Mobley, 649

Convict, in Ohio; certificate of pardon must have been issued.

Where a convict is not permitted to vote without a pardon from the governor (in Ohio), which pardon the governor is required to issue on the presentation of a certificate of good conduct, and a convict presented such certificate, but neglected to wait for the issuance of the pardon, held that he was not entitled to vote.

Campbell vs. Morey, 48th Cong. Mobley, 227

Affidavit of voter competent to prove his vote.

The affidavit of a voter taken before competent authority, in pursuance of regular and sufficient notice, may be read in evidence to prove his title to vote.

Porterfield vs. McCoy, 14th Cong. C. and H., 270

Large proportion of votes to population not always proof of illegal voting.

The mere fact that the number of votes polled is an unusually large proportion of the whole population is not in a frontier country and in new railroad towns any evidence of illegal voting.

Bolkin vs. Maginnis, 48th Cong. Mobley, 378

Coal-mine pay roll as evidence of nonresidence.

As to the value of a coal-mine pay roll as evidence of the length of residence of employees, see the case of

Cook vs. Cutts, 47th Cong. 2 Ells., 243-283

For a discussion of the weight of coal-mine pay rolls and the like evidence of the length of residence of voters, see

McGinnis vs. Alderson, 51st Cong. Rowell, 631-678

How they were cast must be proved by the ballots, if preserved.

Where many votes were claimed to be illegal (under the Pennsylvania registration law), because required proof of qualification was not presented at the polls, and the testimony of the voters themselves was taken to show how they voted, the committee held this evidence to be inadmissible, being secondary. The ballots, having been preserved, should have been introduced. "It is a well-established principle that the ballot of a voter which has been safely preserved by some authorized custodian is the best evidence as to how or for whom he voted, and must be produced, and that the testimony of the voter himself is secondary and inadmissible." "But while the committee adhere to the opinion that the evidence of the voters was inadmissible, and to the uniform current of decisions that where the ballots cast at an election are required to be so numbered as to enable them to be identified, and they have been safely preserved by some legal custodian, they must be

produced as the best evidence, and the testimony of the voters is secondary and inadmissible, yet it has been considered proper to report the names of such voters who cast illegal votes, and who, as shown by their own testimony, voted for the contestee." (The number thus shown was insufficient to overcome contestee's majority.)

Greevy vs. Scull, 52d CongStofer, 157

HOW ELIMINATED (*see also* RETURNS, WHEN SET ASIDE WHAT VOTES COUNTED).

Three methods discussed.

Where the last legal opportunity for registration was ten days before election, and contestee asked that a number of precincts be thrown out because voters were permitted to register on the day of election and vote, the majority refused to throw out the precincts, but deducted the votes to the number of 55, proportionally from the candidates. The minority stated the number as 90, and stated arguments in favor of throwing out the whole vote of the precincts where they were cast, and of deducting them all from contestant, who had received the highest number of votes in these precincts, but did not decide between these courses, and waived the whole question in arriving at the result. On the whole case, which involved other questions, the House agreed with the minority.

Platt vs. Goode, 44th CongSmith, 656, 682

Deducted from candidate for whom cast.

Where it appeared from the return that votes were given by persons whose names were not on the tax lists, and who were not within the description of such electors' sons as were permitted by the law of Pennsylvania to vote without being on the tax lists, their votes were deducted from the vote of the candidate for whom they were cast.

Richards, 4th CongC. and H., 99

Votes cast by unqualified persons deducted from the total votes of the candidates for whom they were respectively cast.

Clopton (Bassett vs. Clopton), 4th CongC. and H., 101

Votes having been cast on both sides by persons not qualified to vote, they were deducted from the votes of the candidates respectively, and the seat given to the petitioner, who had a majority of the remainder.

Moore vs. Lewis, 8th CongC. and H., 128

If colored votes subtracted from Republican poll, then white votes from Democratic.

Where contestant proved many colored votes illegal, and offered general evidence that the colored votes were cast for contestee, the committee held that white illegal votes should be subtracted from contestant's vote if colored illegal votes were to be subtracted from contestee. The minority subtracted only the colored votes.

Williams vs. Settle, 53d CongReport 337, parts 1 and 2

Deducted from candidates pro rata.

"In purging the polls of illegal votes, the general rule is that unless it is shown for which candidate they were cast, they are to be deducted from the whole vote of the election division, and not from the candidates having the highest number. Of course, in the application of this rule, such illegal votes would be deducted proportionately from both candidates, according to the entire vote returned for each" (quoted from McCrary, sec. 298). This was stated to be the rule to be applied when it could not be shown for whom illegal votes were cast, but in this case it was applied to precincts where it could have been shown but was not.

Finley vs. Walls, 44th CongSmith, 373

Where contestee objected to any proof of illegal votes in a precinct because it was not alleged in the notice for whom the illegal votes were cast, the committee held that "a poll may be purged of illegal votes without it being proved for whom they are cast." Votes being proved to be illegal, they were deducted from the candidates *pro rata*.

Finley vs. Walls, 44th CongSmith, 371

Deducted from candidate for whom cast, and remainder deducted pro rata.

If illegal votes are shown, and there is proof as to which candidate received a part of them these should first be deducted from his vote, and the remainder then deducted *pro rata*.

Lowe vs. Wheeler (minority report), 47th Cong......2 Ells., 142

Either deducted pro rata or disregarded.

In the absence of proof as to how illegal votes were cast they should either be allowed to stand or deducted from all the candidates *pro rata*.

Hurd vs. Romeis, 49th Cong......Mobley, 425

Ought not to be deducted pro rata.

"We maintain that the true rule is, when illegal votes have been cast, to purge the poll by first proving for whom they were thrown, and thus preserve the true vote; if by the use of due diligence this can not be done, and the result is still left in doubt, then to throw the poll out entirely. We think this is a safer rule to maintain the purity of the ballot box than the other one, which apportions the *fraud* between the parties. This rule ought to be applied in all cases where the fraudulent vote is considerable and permeates the whole poll, and not in cases where it is scattering and inconsiderable. In those cases it may be justly inferred that the result would not be affected by retaining the poll unpurged."

Curtin vs. Yocum (minority report, adopted by the House), 46th Cong1 Ells., 424

Deducted from majority candidate in each precinct.

Where illegal votes are proved, but it is not shown for whom they were cast, they should be deducted from the majority candidate in each precinct. "It is on this theory only that the election can be avoided where there are enough illegal votes to affect the result."

Hurd vs. Romeis (minority report), 49th CongMobley, 452

Where no proof for whom cast, no remedy.

Where 87 illegal votes were cast at a precinct, but there was no proof of fraud or which candidate received any of the votes, the minority held that the return must stand and that no votes could be deducted.

Myers vs. Moffett (minority report), 41st Cong2 Bart., 585

Where they can be purged, the poll not rejected.

Where more than half the votes cast in a precinct were illegal, but from the evidence it was possible to tell the largest number that could have been illegal and for whom they were cast, the committee rejected these votes and counted the rest.

Todd vs. Jayne, 38th Cong......1 Bart., 559

"The rule is well settled that the whole vote of a precinct should not be thrown out on account of illegal votes having been cast, if it be practicable to ascertain the number of illegal votes and the person for whom cast, in order to reject them and leave the legal votes to be counted. Legal votes are not to be thrown out in order to get rid of illegal votes unless necessity requires it as the only means of preventing the consummation of a fraud upon the ballot box."

Barnes vs. Adams, 41st Cong2 Bart., 770

Election not vitiated by.

Where it appeared that a very large number of illegal votes was probably cast, but no more than might have been expected in an unsettled frontier country, but there was definite proof as to only a few and no proof that more were likely to have been cast for one candidate than another, and nothing connecting any candidate with procuring them to be cast, the election was allowed to stand.

Burleigh and Spink vs. Armstrong, 42d Cong......Smith, 91

If election invalidated, it is only in particular polls.

"If the rule contended for by contestant is adopted [to declare an election void where so many illegal votes were cast as to render the result uncertain] we maintain it must be applied to the polling precincts where contestant alleges the fraud occurred.

Then each party is left to prove his vote by calling the voters in the rejected precincts. If they do not, they must stand on the vote of the other unchallenged precincts, and can not be heard to complain of their own negligence.

Curtin vs. Yocum (minority report, adopted by the House), 46th Cong. . . 1 Ells., 424

Rejection of whole poll to be avoided if possible.

The exclusion of an entire poll is the very last resort, and it must never be done where there is any rational means by which the illegal votes can be eliminated. This rule was approved by both a majority and minority, but they differed as to the possibility of purging the poll in this case.

Le Moyne vs. Farwell, 44th Cong. Smith, 411, 422

Whole poll thrown out.

Where in two precincts very many voters whose names were not on the assessment lists were permitted to vote without requiring of them the proof of qualification prescribed by the law of Pennsylvania in such cases, and there was no proof for whom most of these votes were cast, the committee threw out the whole vote of both precincts.

Myers vs. Moffett, 41st Cong. 2 Bart., 567

Election should be declared void.

Where illegal votes sufficient to affect the result are shown, but there is no proof as to how they were cast, the election should be declared void.

Hurd vs. Romeis (Mr. Green) 49th Cong. Mobley, 428

In case of doubt, better to order a new election.

The rule that where illegal votes are proved, but it is not shown for whom they were cast, they shall be "deducted proportionately from both candidates according to the entire vote returned for each," "is, perhaps, the best rule that can be adopted in such a case. It is manifest, however, that it may sometimes work a great hardship, for the truth might be, if it could be shown, that all the illegal votes were cast for one of the candidates, while it is scarcely to be presumed that they would ever be divided between the candidates in exact proportion to their whole vote. But the rule that would deduct them all from either one of the candidates, in the absence of proof as to how the illegal votes were cast, is much more unreasonable and dangerous. The above rule is, perhaps, the safest one to be adopted in a court of justice, where there is no power to order a new election, and where great injury would result from declaring the office vacant. But it is manifest, as we have already said, that it might work a great hardship. And in a legislative body, having the power to order a new election, it is safer, in the opinion of your committee, and more conducive to the ends of justice, to order such new election than to reach a result by the application of such a rule."

The minority held that the votes should be deducted *pro rata*.

Finley vs. Bisbee, 45th Cong. 1 Ells., 93, 118

REQUIRED EVIDENCE OF QUALIFICATION NOT PRODUCED AT THE POLLS.

Not registered, and no record of other proof of qualification, rejected.

Where names were found on the poll books [in Pennsylvania] which were not found on the assessor's list, and there were no reasons for the reception of the votes marked after these names, as was required by law, to show that they had made due proof of qualification, the committee held the votes to be illegal. The minority held that it was a mere immaterial omission by the election officers.

Wright vs. Fuller, 32d Cong. . 1 Bart., 159, and Report No. 136, 1st sess. 32d Cong.

Unregistered voters (in Florida) must be shown to have taken the full oath required.

The law of Florida provided that voters must be registered at least six days before the election. The registering officers had authority to strike from the list the names of persons whom they knew of their own knowledge or ascertained by testimony to have ceased to be entitled to vote. A voter whose name had thus been erased would be entitled to vote on making oath before the officers of election that his name had been improperly stricken from the lists, and also taking the oath

required of challenged voters. A large number of persons had been permitted to vote whose names were not found on the list in the hands of the judges at the polls. They each took an oath, but there was testimony which the committee held to be sufficient to prove that it was the oath required of challenged persons, without the addition prescribed for persons whose names were not on the registry lists. There was proof that a large number of these voters' names actually did appear on the original registry lists, though not on the copies in the hands of the judges. The committee deducted only those whose names were not shown to be on the original lists, but a part of those signing the majority report expressed their opinion that all should have been deducted who were not found on the copy of the list in the hands of the judges, whether found on the original list or not.

Finley vs. Walls, 44th Cong......Smith 367-391.

Must be shown, in Florida, never to have been registered.

Under the constitution and laws of Florida no person was permitted to vote who had not been registered, but a voter whose name was not found on the registry list in the hands of the election officers might vote on taking the oath required of challenged persons, and also making oath that he had been registered and that his name had been improperly struck off from the registry list. It was proved that a large number of persons had voted whose names were not on the registry lists. Evidence which the committee held to be inadmissible was also offered to show that they had never been registered. The committee held that the admissible testimony only showing that they were not registered at the time of the election it was not sufficient to overcome the presumption arising from the reception of their votes, it being presumed that they had been registered and wrongly struck from the list, and that they had taken the required oaths.

Finley vs. Bisbee, 45th Cong......1 Ells., 92-96

Votes of qualified electors, received without required proof of qualification, legal.

Under the constitution of Florida foreign-born persons were permitted to vote under the same conditions as native citizens upon presenting to the officers of election certified copies of their naturalization papers or declarations of intention. The election officers were forbidden to receive their votes without the presentation of such certificates. A number of foreign-born persons voted at the election without presenting the required certificates. None of their votes were challenged and they were not requested or required by the officers of election to produce any papers. The evidence showed that all but seven of them had, in fact, been naturalized and could have produced the legal certificates if it had been required of them. The committee found that the fact of naturalization or declaration of intention was the only additional *qualification* required by the constitution of foreign-born persons, and that the requirement of the production of certificates was a mere directory requirement as to mode of proof. This construction of the constitution was the more certain because it was evidently implied in the acts of the legislature passed in pursuance of it. These votes having been received by the officers of election, the presumption was that the voters were qualified. The omission to present the required proof of qualification could, at most, only shift the burden of proof to the party claiming their votes to show that they were in fact qualified. This had been done as to all but seven, and with these exceptions the votes were counted.

Finley vs. Bisbee, 45th Cong......1 Ells., 89-92

In Pennsylvania law requiring certain affidavits and vouchers from nonregistered voters directory merely.

Under the constitution of Pennsylvania, which provides the qualifications of voters and permits the legislature to enact a registration law, "but no elector shall be deprived of the privilege of voting by reason of his name not being registered," the committee held that "the foregoing clause of the constitution is, in our judgment, a limitation on the power of the legislature of the State, and it can not pass a registry law whereby a voter shall be deprived of suffrage, if otherwise qualified, by reason of nonregistration. This, it seems to us, was the very purpose of the clause." If the election law is so construed as to hold the elector responsible for the neglect of the election officers, or to deprive him of his vote for nonregistration, though otherwise qualified, it is repugnant to this clause of the constitution. But by construing the law as directory its constitutionality can be maintained.

Curtin vs. Yocum (minority report, adopted by the House), 46th Cong...1 Ells., 419, 420

In Pennsylvania if election officers fail to require of unregistered voters the affidavits required by law the votes not illegal if otherwise qualified.

"We regard section 10 of the election law of Pennsylvania, *supra*, so far as it requires a qualified elector to produce his own affidavit and that of a voter of his election district to his qualifications, directory merely, and in the nature of a law to authorize the board of election, on the day of election, while it is being held, to correct the registry lists theretofore furnished them by the county commissioners, by adding the names of qualified voters thereto who may have been unintentionally omitted. The registry lists and poll lists will then agree. It is the duty of the election officers to comply with this law. It is imperative on them, and if they fail they subject themselves to the penalties provided in section 12 of the registry law. But to allow a nonregistered voter to vote without requiring him to comply with the law, if he is otherwise qualified, is quite a different question. If he refuses to comply, on being requested, then it is clearly the duty of the officers to refuse his vote, because he refuses to obey a reasonable regulation prescribed by the legislature, and he hurts no one but himself. But if he is allowed to vote without being required to file the affidavits, and is otherwise qualified, his vote is not an illegal one. The officers of election have simply failed to take and preserve the evidence which the law requires of them; but the failure on their part to take and preserve this evidence does not reach the qualification of the voter. Nor do we believe the courts will hold any such doctrine, for it would be equivalent to holding the evidence of a fact superior to the fact itself."

Curtin vs. Yocum (minority report, adopted by the House), 46th Cong....1 Ells., 420

The minority applied to the case of foreign-born voters who did not present their certificates of naturalization at the polls the rules adopted by the House in the case of *Curtin vs. Yocum*, and held that the votes could not be deducted in the absence of proof of actual disqualification.

Bisbee vs. Finley (minority report), 47th Cong.....2 Ells., 237

Affidavits of unregistered voters certified but not signed.

Where affidavits of unregistered voters were not signed by the affiants, but were properly certified by the officer before whom they were taken, the committee unanimously held them to be sufficient; but when there was no jurat attached, and they did not appear to have been sworn before any officer, they were unanimously held to be fatally defective.

Le Moyne vs. Farwell, 44th CongSmith, 412, 422

Absence of affidavits in prothonotary's office no evidence that they were not filed with the election officers by the voters.

"The rule of law is that a public officer is presumed to do his duty, the contrary not appearing. Under the law there were several acts required to be done by the officers. The first one was to ascertain whether a person offering to vote was registered; if he was not, to require an affidavit of himself and also of a registered voter to certain facts; to see that it was subscribed and sworn; to take and keep it till the election was over, and then to return it to the prothonotary's office, with certain other papers. To show that the last act was not performed does not show that the rest were left undone, or that proof of failure in this one particular is proof of a failure in all. It doubtless does overcome the presumption as to the particular act, but we doubt whether it can be extended any further. We are not ready to assent to the proposition that because the election officers failed to return the required affidavits to the office of the prothonotary therefore they must be presumed not to have required them at all."

Curtin vs. Yocum (minority report, adopted by the House), 46th Cong....I Ells., 421

In Pennsylvania law requiring affidavits of nonregistered voters mandatory, but law for filing these affidavits directory.

It was held by a portion of the committee that the provision of the Pennsylvania election law requiring certain affidavits of unregistered voters was mandatory, but that the provision requiring these affidavits to be filed in the office of the prothonotary was directory. It is to be strongly presumed that the officers of election have not committed the crime of allowing unregistered persons to vote without requiring the necessary affidavits, and this presumption is not to be overcome without evidence and merely by a remote inference from the fact that no such affidavits are on file in

the prothonotary's office. And especially is contestant not to be permitted to take advantage of the absence of these affidavits when the evidence tends to show that the affidavits were in existence, and contestant by his own act procured their destruction and prevented them from being put in evidence.

Curtin vs. Yocum (2d minority report), 46th Cong......1 Ells., 435-438

Registration law of Pennsylvania mandatory.

"The authorities are uniform to the effect that all statutes are mandatory which can not be disregarded without ignoring the legislative intent." Under this principle the provisions of the election law of Pennsylvania requiring the presentation of certain affidavits by unregistered voters are not directory merely, but mandatory. "The will of the legislature can not be carried out unless this provision of the statute is complied with, and to disregard it is to disregard one of the safeguards which the law-making power of Pennsylvania deemed necessary for the protection of the ballot."

Curtin vs. Yocum (majority report), 46th Cong.1 Ells., 428

The evidence of qualification required by law must be produced on the day of election, and can not be afterwards produced.

"It is a fundamental principle as firmly established as any rule of law that votes must be cast as the law directs, and if the law requires the voter to produce certain specified evidence of that right before he can cast his vote, and he fails to produce that evidence, such vote, if cast, is illegal and void. * * * The principle must likewise be maintained that the production of this evidence at the trial will not change the legal status of the voter, and thus make these votes in question legal votes. * * * The principle is self-evident. Voting is a single act commanded to be performed within a particular time, on a particular day, and in conformity with law; there can not, therefore, be a valid performance of the requirements of the law at a period subsequent to the day on which alone the law commanded the act to be performed."

Bisbee vs. Finley, 47th Cong.2 Ells., 175

Law requiring affidavits of unregistered voters only partly mandatory.

"Where a registry law requires the production of an affidavit by an unregistered elector as the condition for his voting it is mandatory to a certain degree and for a certain purpose. - It is mandatory so far as to require good faith in its observance and to prevent its willful evasion. But the whole scope and purpose of such a law is to defeat fraud, subterfuge, and evasion, and to enable every lawful and qualified voter to vote and have his vote counted in a canvass purged of all illegal votes. The moment the operation of the registration defeats itself, operates to defraud the legal elector and defraud him of his vote, it not only ceases to be mandatory, but is *quoad hoc* void. * * * But the statute, in so far as it provides what declarations shall be set forth in the affidavits, is directory merely."

The minority (Mobley, 672) held the law to be mandatory in both respects.

Campbell vs. Weaver, 49th Cong......Mobley, 461, 463

Affidavits in substantial compliance with law sufficient.

Votes were attacked on the ground that the affidavits presented by the voters in lieu of registration were not sufficient under the law of Illinois. The committee found most of them to be in substantial compliance with the laws, but rejected five votes where the affidavits had not been filled out at all—"were in fact blank affidavits."

Worthington vs. Post, 50th Cong......Mobley, 653

Can not be made legal at a subsequent investigation.

"Under the [Pennsylvania] act of January 30, 1874 (P. L., 31), it is the duty of the elector whose name is not on the registry list to produce the required affidavits at the time he offers to vote. Election officers can not waive such production. A vote received without such affidavit is illegal, and can not be made legal at a subsequent investigation in the courts" [cases cited].

Craig vs. Stewart, 52d Cong.Stofer, 9

The minority expressed a "doubt" of this ruling, but did not definitely dissent.

Craig vs. Stewart (minority report), 52d Cong.Stofer, 16

Ballots marked by election officers, without required oath of disability, counted.

Where voters were assisted by the election officers to prepare their ballots without taking the oath of disability provided for by law [in Illinois], but did informally ask for the assistance and were known or believed by the judges to be entitled to it, the committee counted their votes. The minority rejected them. The House adopted the resolutions proposed by the minority on the whole case, but on this point appears to have agreed with the majority.

Rinaker vs. Downing, 54th Cong. Report 1400

Not counted.

The minority held that the law was mandatory. Under the old ballot laws such provisions could be more liberally construed, but "under the Australian ballot system secrecy is not merely permitted, it is enforced; it is not solely for the benefit of the voter, but for the benefit of the public as well. A compulsory secrecy unknown to former systems of voting is a fundamental and essential element of this ballot law."

Rinaker vs. Downing (minority report), 54th Cong. ... Report 1400, part 2, pp. 5-10

Ballots marked by election officers, without required oath of disability, not counted.

"Ballots voted by electors who were assisted in marking their ballots without having first made the affidavit of disability, as provided by said statute [of Illinois], are not legal and should not be counted."

Steward vs. Childs, 53d Cong. Report 1741, p. 3

Votes rejected.

Under a mandatory statute requiring the production at the polls of specified evidence of payment of poll tax as a prerequisite for voting, the committee rejected the votes of voters who had in fact paid the tax and were known to the judges, by other evidence than that specified in the law, to have paid it. The minority counted the votes.

Thrasher vs. Enloe, 53d Cong. Report 842, pp. 4, 11

INCOMPATIBLE OFFICE.

See QUALIFICATIONS OF REPRESENTATIVES.

INDIANS.**Their right to vote.**

Under the law for the government of the Territory of Michigan, providing that "every *white* male citizen," possessing certain qualifications, might vote, held that the right of half-breed Indians, possessing the legal qualifications, depended on their mode of life and the society to which they belonged. One of them, who, by his manner of living and place of abode, was assimilated to the great body of the civilized community, and who had never belonged to any Indian tribe, could vote; but one who belonged to an Indian tribe or was "uncivilized in his deportment and not approaching the manner of other citizens" could not vote.

Biddle and Richard vs. Wing, 19th Cong. C. & H., 511

Votes of tribal Indians rejected.

Where Indians, at their own pueblo, without authority from the probate judge, organized an election, appointed their own chiefs to conduct it, and made their returns direct to the Secretary of the Territory, instead of to the probate judge, the committee threw out the votes.

Lane vs. Gallegos, 33d Cong. 1 Bart., 165

INDIAN RESERVATIONS.**Whether trespassers on "half-breed lands" entitled to vote.**

The committee held that trespassers on "half-breed lands" (similar to Indian reservations in some respects) were entitled to vote. The House refused to sustain the committee, the decision turning, apparently, chiefly on this point.

Bennet vs. Chapman, 34th Cong. 1 Bart., 208

Inhabitants of, have no right to vote.

Votes cast in a precinct situated in the Pawnee Indian Reservation, which by the law of Congress was not a part of Nebraska Territory, were excluded by the committee.

Daily vs. Estabrook, 36th Cong 1 Bart., 303

Residents on, can not vote.

The committee rejected votes cast by residents on the Pawnee Indian Reservation, which was under the law no part of Nebraska Territory, but counted votes cast by residents of the "half-breed land," which was not an ordinary Indian reservation.

Morton vs. Daily, 37th Cong 1 Bart., 404, 410

Votes cast in, illegal.

Elections held on Indian reservations in the Territory of Dakota held to be illegal, the organic act organizing the Territory excepting from its territory those Indian reservations which under existing Indian treaties could not be made a part of any State or Territory without the consent of the tribes.

Burleigh and Spink vs. Armstrong, 42d Cong Smith, 90

Where not set aside by treaty, votes cast in them legal.

Under the provision of the organic act of the Territory of Dakota, excluding from its limits lands not permitted by treaties with Indian tribes to be included within the limits of any State or Territory without the consent of the tribe, the committee held that "It does not apply to any portion of the Territory upon which Indians may happen to live, but only such portions as are held by particular tribes, under and by virtue of treaties defining boundaries, and stipulating the exclusive jurisdiction to be exercised by the tribes holding them." Votes cast in a precinct in territory largely inhabited by Indians, but not under such a treaty, the votes not being shown to be otherwise illegal, were counted by the committee.

Todd vs. Jayne, 38th Cong 1 Bart., 563

INELIGIBILITY (see also Qualifications of Representatives).

Ineligibility of majority candidate gives no title to minority candidate.

The ineligibility of the candidate receiving the highest number of votes gives no title to the candidate receiving the next highest number. (A very full discussion of the English rule and the reasons for its inapplicability in this country will be found in this case.)

Smith vs. Brown, 40th Cong 2 Bart., 400-405

The ineligibility of the majority candidate gives no title to the candidate receiving the next highest number of votes.

Jones vs. Mann, 40th Cong 2 Bart., 475

The majority of the committee announced their opinion that the ineligibility of a majority candidate ought to involve the election of the candidate receiving the next highest number of votes, but they yielded their conviction to the authority of contrary precedents.

Wallace vs. Simpson (majority report), 41st Cong 2 Bart., 552

Ineligibility of member-elect gives no claim to the candidate receiving the next highest number of votes.

Marwell vs. Cannon, 43d Cong Smith, 190

Ineligibility of the sitting member gives to the minority candidate no title to the seat.

Cannon vs. Campbell, 47th Cong 2 Ells., 613-619

Ineligibility of the sitting member gives no title to the candidate having the next highest number of votes, even in the case of a representative from Indiana, though the rule in the State of Indiana is different.

Lowry vs. White, 50th Cong Mobley, 638

Whether ineligibility of majority candidate gives title to minority candidate.

The law of Georgia provided that where the majority candidate was ineligible the election should go to the candidate having the next highest number of votes. The committee expressed some doubt whether such a law could apply to the elections of members of Congress, but refrained from deciding the question, it not being necessary to the determination of the case.

Christy vs. Wimpy, 40th Cong......2 Bart., 466

Ineligibility of majority candidate ought to give election to minority candidate.

Mr. Cessna reported that where a majority candidate was notoriously ineligible under the fourteenth amendment, votes cast for him ought to be treated as nullities, and the election adjudged to the candidate receiving the next highest number of votes. The House sustained the report, but probably on other grounds.

Wallace vs. Simpson, 41st Cong......2 Bart., 732

Where notice of ineligibility of majority candidate presumed minority candidate elected.

Where votes are cast for an ineligible candidate whose ineligibility is such that the electors are bound to know and take notice of it, such votes are nullities, and the eligible candidate receiving the highest number of votes is elected.

Wood vs. Peters (Mr. Bennett), 48th Cong......Mobley, 121

INHABITANT.

See also QUALIFICATIONS OF REPRESENTATIVES.

Definition of.

The word "inhabitant" comprehends those who are "*bona fide* members of the State, subject to all the requisitions of its laws and entitled to all the privileges and advantages which they confer."

Bailey, 18th Cong......C. and H., 415

What constitutes.

Claimant had been for many years a resident of Virginia, but a few years before the election he moved to Ohio, and voted there once or twice. Some months before the election he returned to his previous residence in Virginia, with his family, and remained. The committee held him to be an inhabitant of Virginia and eligible to Congress.

Upton, 37th Cong......1 Bart., 369

Difference between inhabitant and citizen.

"The word inhabitant comprehends a single fact, locality of existence; that of citizen a combination of civil privileges, some of which may be enjoyed in any of the States in the Union. The word citizen may properly be construed to mean a member of a political society; and although he might be absent for years, and cease to be an inhabitant of its territory, his rights of citizenship may not be thereby forfeited, but may be resumed whenever he may choose to return; or, indeed, such of them as are not interdicted by the requisition of inhabitancy may be considered as reserved."

Bailey, 18th Cong......C. and H., 415

Inhabitancy in State lost by Government employment at Washington.

A person in the employ of the Government at Washington, though retaining his citizenship in the State whence he was appointed, and intending to return thereto, held not to be an inhabitant of the State within the meaning of the Constitution, and hence not eligible to Congress.

Bailey, 18th Cong......C. and H., 411

A foreign minister does not lose his inhabitancy.

A citizen having been elected to Congress while holding the office of minister to Spain, but having resigned the latter office before March 4, the committee reported: "The capacity in which he acted excludes the idea that, by the performance of

his duty abroad, he ceased to be an inhabitant of the United States; and, if so, inasmuch as he had no inhabitancy in any other part of the Union than Georgia, he must be considered as in the same situation as before the acceptance of the appointment."

Forsyth, 18th Cong C. and H., 497

The case of ministers of the United States residing at a foreign court presents no analogy to that of persons in the domestic service of the Government at Washington. The former retain their inhabitancy in their respective States; the latter do not.

Bailey, 18th Cong C. and H., 418

Voting citizenship not necessary.

A member of Congress must be an inhabitant of the State from which he is elected, but he need not have a voting citizenship.

Bayley vs. Barbour, 47th Cong 2 Ells., 679

Not a mere sojourner.

"To be an *inhabitant* within the meaning of this section of the Constitution, if it does not mean *resident* or *citizen*, certainly means more than *sojourner*." The temporary sojourn of claimant in North Carolina, for the purpose of being private secretary to a military governor, held not to constitute him an inhabitant.

Pigott, 37th Cong 1 Bart., 464

INSPECTORS.

See OFFICERS OF ELECTION.

INTIMIDATION.

WHAT IS.

A cannon near the polls not intimidation.

Where a cannon was drawn in a political procession the night before election, and on election day it was in a place in front of the polls, where it had customarily been, and it was fired twice on election day, but in sport and without ball, and not at times when voters were approaching the polls, the circumstance was held to be without significance.

Whyte vs. Harris (minority report), 35th Cong Report 538, p. 46

Coarse and threatening language not sufficient.

Where the polling place was fixed in an unusual and inconvenient place, and coarse and threatening language was used against persons intending to vote for contestant for the purpose of intimidating them, the committee "can not for such reasons recommend the throwing out of the whole vote of such precinct."

Chaves vs. Clever, 40th Cong 2 Bart., 468

Inflammatory language, not affecting the result, immaterial.

Where it was shown that the canvass was a heated one, and much inflammatory and denunciatory language used, by the contestee and others, in regard to colored voters who would vote the Democratic ticket, and that three or four voters were intimidated thereby, it was held that this did not constitute such a condition of violence and intimidation as to affect the result.

Bromberg vs. Haralson, 44th Cong Smith, 366

Voluntary withdrawal of voters, without sufficient justification, not fatal.

Where there was considerable violence and excitement at a poll, and colored voters attempting to vote early in the day were forcibly prevented, but by 10 or 11 o'clock, under the advice of one of their leaders, they dispersed and did not again attempt to vote at that poll, there being no display of violence sufficient to justify this course, a majority of the committee did not think the evidence sufficient to justify the rejection of the poll, especially as under the law (of South Carolina) these voters could have voted at any other poll in the county.

Lee vs. Richardson, 47th Cong 2 Ells., 521

Social and religious ostracism.

"It need not be that there is at the time of voting the presence of threats, or of force, or the present fear of actual bodily hurt. The genius of free institutions demands that the *mind* as well as the body shall be free to exercise the elective franchise as the voter may see fit. The fear of bodily harm, the fear of social ostracism, the fear of religious wrath, if brought to bear upon the body of voters, or if exercised to any great extent, mar the purity and destroy the freedom of elections, and if it be so general as to affect the result, or if from it the real result can not be ascertained from the returns, the election is void."

Richardson vs. Rainey, 45th Cong 1 Ells., 233

Numbering of tickets not intimidation.

Where it was shown that some colored voters voted numbered Democratic tickets (the tickets generally not being numbered), but it was not shown that they did not do so voluntarily, the committee held that the fact was not proof of intimidation.

Finley vs. Bisbee, 45th Cong 1 Ells., 103

Citizen not bound to fight his way to the window.

"The committee holds that a citizen has a right to a free and unmolested approach to the ballot box, and is not bound to fight his way to a polling window, especially when to do so he must come into conflict with persons who claim to be officers of the law, the truthfulness of which claim he has no means of negativing, and that a candidate whose supporters have done all in their power to make voters believe that they would suffer injury if they attempted to vote can not be heard to say that the intimidated voters should not have believed the threats made to them."

Mudd vs. Compton, 51st Cong Rowell, 158

Disturbance before opening polls, not fatal.

Where there was a disturbance before the opening of the polls, but the election itself was orderly and there was no intimidation, the returns were allowed to stand.

Robinson vs. Harrison, 54th Cong Report 1121, p. 2

Must be such a display of force as to intimidate men of ordinary firmness.

A poll can not be rejected for intimidation unless there was such a display of force as ought to have intimidated men of ordinary firmness. In a case where the violent interference with the voting was such as might easily have been overcome by the voters, but they abstained from trying to vote, under the orders of their leader, for the purpose (as the minority thought) of making out a case of intimidation that would cause the rejection of the poll, thereby making a gain for the candidate favored by them, the minority held that the poll should not be rejected.

Mudd vs. Compton (minority report), 51st Cong Rowell, 169

Need not be such as would overpower the will of voters of reasonable courage.

Coercive methods do not operate alike on all voters. Regard should always be had to the mental and physical organization and environment of the particular voters concerned. The oppressive acts need not be such as would overpower the will of voters of reasonable courage, otherwise the weak and ignorant would be disfranchised. Neither is physical violence the sole criterion, nor should the examination be limited to acts committed at the very time of the election. Preceding occurrences often give significance and momentum to recent acts.

Benoit vs. Boatner (2d case), 54th Cong Report 2808, p. 26

Interference by negro policeman insufficient.

Where a negro policeman forcibly interfered with negro workers and ticket distributors for the Democratic ticket and there was some evidence that colored voters were thereby intimidated, the committee held that the intimidation was not sufficient to throw out the poll.

Moore vs. Funston, 53d Cong Report 1164, p. 8

WHEN INQUIRED INTO.

The committee will not inquire into the reasons why votes were not cast.

Where it was charged that voters were prevented from voting by intimidation, the committee said: "The committee are of opinion that the duty assigned to them does not impose on them an examination of the causes which may have prevented any candidate from getting a sufficient number of votes to entitle him to the seat. They consider that it is only required of them to ascertain who had the greatest number of legal votes actually at the election. * * * The inspectors of election are constituted judges of the qualifications of the electors, and exercise, from necessity, a discretionary power. If they err and reject a legal vote, or an elector from any cause should fail in presenting his vote for their reception, the nature of the case precludes it from entering into the consideration of the general result of the election, unless, indeed, corruption should appear sufficient to destroy all confidence in the purity and fairness of the whole proceeding. It is properly a question between those officers and the injured party."

Biddle and Richard vs. Wing, 19th Cong......C. and H., 506

HOW PROVED.

Hearsay and general reputation insufficient.

"It would seem that if over two thousand electors were deterred from voting by violence, threats, or intimidation, some of these electors could be found to come forward and swear to the fact. Your committee think that it would establish a most dangerous precedent to allow a fact of this character, so easily established by the direct and positive testimony of so many witnesses, to be proven solely by hearsay and general reputation. We have not forgotten nor overlooked the fact that the same state of things which would make men afraid to vote for a particular party might also make it difficult to secure testimony in behalf of that party. But in many parts of the district where testimony was taken there is no pretense that witnesses were intimidated; and, besides, if the contestant had shown to the satisfaction of the House that witnesses needed the protection of the Federal Government in order to be safe in testifying fully and freely, that protection would have been afforded at any cost. * * * There can be no doubt that testimony of this character [hearsay and general reputation] ought to be held insufficient of itself to establish the fact of intimidation. It ought at least to be corroborated by other facts, such as the unexplained failure of large numbers of those alleged to have been intimidated to vote before the House could safely act upon it."

Norris vs. Handley, 42d Cong......Smith, 75

The evidence of at least some of the persons intimidated should be produced.

"Where it is alleged that a large number of persons have been deterred from voting by violence or intimidation the testimony of these persons should be produced, or at least some of them. The opinions and impressions of others are not sufficient."

Donnelly vs. Washburn (minority report) 46th Cong1 Ells., 502

Smalls vs. Tillman (minority report) 47th Cong2 Ells., 490

EFFECT OF.

In cases of doubt the returns should stand.

"It may be difficult to determine what precise amount of disorder, obstruction, and even violence among bystanders adjacent to the polls should be deemed sufficient to vitiate the election. * * * If the state of facts proved leave it doubtful whether on the whole the poll should be retained or rejected, your committee are of opinion that they will best avoid the establishment of bad precedents by giving effect to the returns in all cases of doubt."

Howard vs. Cooper, 36th Cong1 Bart., 281

Mere personal altercations will not vitiate poll.

"A mere fight or series of fights, even if the election officers should be involved in them, is no ground for throwing out the vote of the precinct at which such fighting took place. There must be an organized, concerted design to intimidate and

overawe in order to justify the disfranchisement of the whole community of a precinct, ward, or county; a mere accidental conflict between two or more persons is not sufficient. This is well settled by Congressional precedents."

Blair vs. Barrett (minority report), 1st sess. 36th Cong......Report No. 563, p. 56

Will not vitiate election where proceedings not suspended.

The minority (whose conclusions were substantially adopted by the House) held that allegations based upon "intimidation of voters" did not contain any ground upon which the election could be declared void if they were proved, and the statements upon the subject made in *Biddle and Richard vs. Wing* (C. and H., 507) were quoted with approval. "Let us once establish the precedent that Representatives are to be unseated and the will of the people, especially when expressed by large majorities, overruled, because of violence at the polls, and while it will put all our city elections in the power of the riotous and rowdy, it will inaugurate a new rule as to future cases as unsound in principle as it will be bitter in its fruits."

Whyte vs. Harris (minority report), 35th Cong......1 Bart., 263, 266

Where election not arrested and result not changed, election not vitiated.

The committee held that in order to void an election for violence it must be shown either that the violence actually arrested the election, or that voters were prevented from voting, whose votes, if cast, would be sufficient to change the result.

Harrison vs. Davis, 36th Cong......1 Bart., 345

Proceedings not interrupted, and violence some time before election, result should stand.

"To invalidate or make void an election on the ground of riot and intimidation, it must appear that the proceedings at the election were interrupted and the ascertainment of the result prevented thereby." Where the violence was several days before the election, the election should not be held void merely because many voters pretended that they were afraid to vote.

Hunt vs. Sheldon (minority report), 41st Cong......2 Bart., 714

Violence before the election, not affecting the result, immaterial.

Where there had been riots, violence, and threats before the election, but a truce was declared on the day of election, and, though both parties came to the polls armed, there was no violence at the polls and substantially the full vote of both parties was cast, the committee refused to reject the poll.

Barnes vs. Adams, 41st Cong......2 Bart., 763

Small number of votes intimidated, these rejected, but poll retained.

Where a small and known number of voters were intimidated to vote for contestee in a precinct where in any event he would have had a considerable majority, the return should not be rejected. Were their number uncertain the return would be excluded, and if a sufficient number were so intimidated as to overcome the majority of contestee he would not be entitled to retain his seat.

Bowen vs. Buchanan, 51st Cong......Rowell, 198

Must be shown to have affected the result.

Where there was considerable testimony to show violence, intimidation, and ballot-box stuffing, but it was vague and general, and on the most favorable construction of the testimony it was impossible to identify specifically enough votes affected to overcome more than half the majority of contestee, the election was held not to be invalidated.

Jones vs. Mann, 40th Cong......2 Bart., 474

Where there had been disturbances and a collision between a colored procession and certain white men the night before election, but there was no evidence to show what persons, if any, were deterred from voting and what efforts they made to vote, and a full vote appeared to have been cast, the committee refused to reject the vote of the precinct.

Niblack vs. Walls, 42d Cong......Smith, 105

In considering the question of intimidation, the first inquiry is: How many voters failed to vote? Although there may have been efforts to intimidate, and although outrages may have been committed with this view, yet if these efforts were unavailing and those who were sought to be intimidated did in fact vote, there is an end of controversy.

Norris vs. Handley, 42d Cong......Smith, 76

Where intimidation shown, burden on other party to show result not affected.

"Where intimidation is practiced over men sufficient in number to affect the result the burden of proof is devolved upon him in whose interest the intimidation is done to show that the intimidation did not affect the result. If this proof be not made the intimidation is so interwoven with the vote that it is impossible to separate with reasonable certainty the good from the bad vote, and the whole precinct must be rejected."

Hurd vs. Romeis (minority report), 49th Cong......Mobley, 444

Violent ejection of election officer would vitiate poll.

Where a person claiming to be an election officer was forcibly ejected by the police, the committee held that if he had been a duly appointed officer this fact would have vitiated the election. But it appearing that under the law he was not entitled to act at this poll, and that he had had notice of the law, they did not reject the poll.

Myers vs. Moffett, 41st Cong......2 Bart., 569

Where such as would intimidate men of ordinary firmness, whole poll rejected.

"The committee would not hesitate to decide that where there was such violence and bloodshed as would intimidate men of ordinary firmness, and where a sufficient number of voters to have changed the result were kept from the polls by reason of this intimidation, it would be as fatal to the poll as if the election board had been controlled by violence."

Wallace vs. Simpson, 41st Cong......2 Bart., 742

Whole vote thrown out.

Where there was rioting and violence at a poll, and voters wishing to vote for contestant were intimidated, and the United States supervisors were interfered with, all with the aid and connivance of the election officers, the whole vote was rejected.

Bisbee vs. Finley, 47th Cong......2 Ells., 190

When the evidence shows conclusively that violence, threats, and intimidation have been used to affect the result at a precinct the whole vote will be rejected.

Smalls vs. Elliott, 50th Cong......Mobley, 680

Entire precinct not thrown out if legal votes can be proved.

"It is well settled that the vote of an entire precinct shall not be thrown out unless it be impossible to make proof as to the number of legal votes cast in such precinct."

Where intimidation is alleged the number intimidated should be at least approximately shown, or some sufficient reason given for not making such proof.

Norris vs. Handley, 42d Cong......Smith, 77

Whole county thrown out.

Where violence was prevalent throughout a county, the canvass and count of the vote involved in inextricable confusion and fraud, and the record illegally suppressed, the returns from the county were thrown out.

Smalls vs. Tillman, 47th Cong......2 Ells., 435

Where registration of a county controlled by intimidation, whole county thrown out.

Where the evidence, as found by the committee, showed that in the county on which the majority of contestant depended "there was no just and reasonable ground to fear personal violence or injury in consequence of appearing to make and support objections to registration, but that it was against the general and public opinion of the county that persons who had not committed disloyal acts should be disfranchised merely on the score of opinions and sympathies, and that probably many persons did refrain from making objections rather than encounter this general sentiment," and also, "that a large number must have been registered who were

disqualified by reason of having sympathized with those engaged in rebellion," but the specific evidence did not show enough illegal votes cast to overcome the majority of contestant, the committee recommended that contestant, who had a majority if this county were counted, be seated. One member of the committee contended that there was a worse state of affairs than that described by the committee, and that whoever applied for registration, qualified or disqualified, was registered, and that the large majority of the votes cast in the county were by disqualified persons. The House agreed with this conclusion, and refused to seat contestant.

Switzler vs. Anderson, 40th Cong 2 Bart., 374-395

A whole election may be vitiated by intimidation.

Where, in precincts casting five-sixths of the vote of the district, the proof showed that "in some to a much greater extent than others, but in all to a most culpable extent, violence, tumult, riot, and general lawlessness prevailed; that as a consequence the reception of illegal votes and the rejection of legal votes, the acts of disturbance and assault committed on peaceable citizens, and the intimidations so predominated as to destroy all confidence in the election as being the expression of the free voice of the people of that Congressional district," the committee recommended that the election be set aside. The minority found that the violence was less than claimed, and held also that an election should not be set aside for violence when it had been nevertheless possible to hold the election and declare the true result of the votes as cast. The House laid the whole question on the table.

Whyte vs. Harris, 35th Cong 1 Bart., 262

Where intimidation prevalent in more than half the district, whole election void.

"The minority can only elect where the majority, with full opportunity and facility to vote as they choose, unrestrained and untrammelled by undue influence, refrained through apathy or neglect from voting. But when undue influence, terrorism, intimidation, or illegal influences have been brought to bear upon the great mass of the voters, and they have been influenced, and have voted subject to these influences, although the full and accurate extent of such influence can not be arrived at, the entire election should be voided, although a minority may have voted free from such influences, and for this reason: The entire people in such case evinced a desire to vote. The right of the majority to rule is fundamental. In such a case the will of the majority is defeated, *not* from apathy, but from *undue influence*. The true remedy is to void the election, remove the undue influences, and give the majority that opportunity to rule which is its undoubted right."

Where there were Federal troops present, and other influences which the committee held to be intimidating, in four counties casting the majority of the votes in a district, but not in the other four counties casting a minority of the votes, the committee held that the election was void.

Richardson vs. Rainey, 46th Cong 1 Ells., 272

Result obtained by intimidation reversed, and contestant seated.

Where contestee received by the returns a majority of 4,291, but 5,700 persons were prevented by violence and intimidation from voting for contestant, the committee stated this as one of three grounds for the seating of contestant. Contestant was seated.

Wallace vs. Simpson, 41st Cong 2 Bart., 744

Whether intimidated votes to be counted as if cast.

If intimidation were shown, and the number of persons intimidated satisfactorily proved, "it would be our duty either to count the persons intimidated, as if they had voted according to their wishes, or throw out the entire precinct. It is not necessary to determine here which would be the proper course."

Norris vs. Handley, 42d Cong Smith, 78

Votes suppressed by intimidation counted as if cast.

Where voters had attempted to vote for the sitting member, and had been prevented by violence and intimidation, the committee counted the votes of those in regard to whom there was definite proof. It was contended that the only remedy was the rejection of the poll, but the committee said: "This remedy in the present case would only add to the injury, inasmuch as the sitting member received a majority, and this shows the necessity for some other remedy. This is to be found in the

rule, which is well settled, that where a legal voter offers to vote for a particular candidate, and uses due diligence in endeavoring to do so, and is prevented by fraud, violence, or intimidation from depositing his ballot, his vote should be counted."

Niblack vs. Walls, 42d Cong Smith, 104

Votes prevented from being cast by intimidation can not be counted.

"No principle in the law of elections can be regarded as better settled than that no candidate can be held to have been elected to office by the votes which, whatever the cause, were not in fact cast for him." If the charges of intimidation had been sustained it ought to unseat contestee, but would not justify the seating of contestant.

Smalls vs. Tillman (minority report), 47th Cong 2 Ells., 489

Votes lost by intimidation not counted, but whole poll rejected.

Where 175 voters, who testified that they would have voted for contestant, were prevented from voting by intimidation, the committee refused to count their votes, but rejected the entire vote of the poll where they attempted to vote.

Mudd vs. Compton, 51st Cong Rowell, 158

COERCION OF EMPLOYEES AND DEPENDENTS.

Mere existence of rumors not sufficient.

Where it was asked that the returns of precincts where the employees of a certain corporation voted be rejected, on account of the coercion alleged to be exercised by the said corporation over the votes of its employees, but the proof only showed that there was a prevalent impression that it was necessary to vote a certain ticket in order to be employed by the company, and did not show definitely how many votes were affected by the prevalent impression, nor implicate any of the members of the corporation, except by showing that tickets were distributed at the polls by one of them, the committee held that these circumstances were insufficient to cause the rejection of the vote of these precincts.

Bowen vs. Buchanan, 51st Cong Rowell, 197

Vague rumor insufficient.

"A common report 'that men would lose their job' if they did not vote as their superiors directed," and the like vague rumors, "hardly constitute such an overthrow of men's wills and determinations as can be taken notice of by the law."

Anderson vs. Reed, 47th Cong. 2 Ells., 286

Mere existence of a rumor insufficient; its truth must be shown.

Where it was charged that the employees of a large corporation were illegally influenced by their employers to vote for contestee under fear of discharge, but the testimony consisted chiefly of evidence of the existence of rumors of the use of such a system of coercion, the committee said: "It is necessary for us to ascertain and determine from the evidence the *truth* of these rumors, and not their bare *existence*, as they may have been entirely unfounded and untrue. The charge that such a system prevailed at the time of the election in controversy must be established by competent proof, rendered by sworn witnesses, personally cognizant of the facts upon which the charge is based. * * * It is our duty to reject all the evidence that has been offered relative to the existence of the rumors to which we have alluded, as it is clearly incompetent, and we must for the same reason discard all evidence relating to voluntary statements made by persons not under oath or witnesses, as all such *hearsay* evidence is inadmissible." In this case the only evidence remaining after the exclusions under the above rule went to show that three persons who had been discharged in a period of eighteen years believed that they were discharged for political reasons. There was other evidence that they were discharged for drunkenness, and many employees testified that no such system of coercion existed. The committee unanimously refused to sustain the charge.

Duffy vs. Mason, 46th Cong. 1 Ells., 364

Mere expression of a wish not intimidation.

It is not intimidation for an overseer merely to express a wish that his men should vote as he did, unaccompanied by any threats, express or implied, of discharge. "This claim would overthrow, if allowed, all labor to secure votes for one party

or another. If one may not ask a voter to vote his ticket, he may not make a political speech, publish a political newspaper, or dare to express an opinion in the presence of voters."

Page vs. Pirce (minority report), 49th Cong Mobley, 511

Must be shown to be successful.

Where it is alleged that voters were intimidated by their employers, "the burden is on the contestant to prove that the attempt was effectual. To justify the disfranchisement of an entire precinct on this ground there ought to be some evidence to show its influence on the election."

Hurd vs. Romeis, 49th Cong Mobley, 425

Prisoners and paupers coerced; votes rejected.

Where prisoners were taken from jail and paupers from the poorhouse and coerced into voting for contestee, their votes should be rejected.

English vs. Pelle, 48th Cong Mobley, 169

Discharge of employee not always unjustifiable.

Where there was conflicting evidence that a few mill hands may have voted for contestee for fear of discharge, the committee, in disallowing the claim to reject the returns, remarked also: "We can conceive how an ardent and active politician among employees in a factory could become obnoxious and merit his discharge apart from his support of any candidate."

Watson vs. Black, 53d Cong Report 1147, p. 6

MILITARY INTERFERENCE.

Election not vitiated.

Where United States troops, under the command of the brother of the sitting member, violently interfered with the freedom of an election, the committee recommended that the election be set aside, but the House overruled the committee.

Trigg vs. Preston, 3d Cong C. and H., 78

The committee recommended that the election be declared void because, in a part of the district, the militia of the State "assumed to determine who should and who should not vote, and for whom votes should be cast, and by threats, violence, and by various modes of intimidation so far interfered with the election as, in the opinion of the committee, to render the election a nullity."

The minority found that no such condition of violence was proved, and that no evidence was presented except as to five of the fifteen counties of the district, and against only eight precincts in those five counties. The House agreed with the minority, and refused to vacate the seat.

Bruce vs. Loan, 38th Cong 1 Bart., 482-520

Not considered where result evidently not affected.

Where there were some irregularities, and military interference was alleged, but it appeared that contestee received the votes of a large majority of all the voters in the district, the committee did not consider the propriety of the military orders complained of, or their effect, as in any case the contestee was elected.

McHenry vs. Yeaman, 38th Cong 1 Bart., 551

Peaceful presence of individual soldiers not intimidation.

Where there were six to ten soldiers at a polling place, but so far as appeared they were legal voters and had a right to be there, and they were not there as an organized squad, but had stacked their guns at a distance, and the only persons who were deterred from voting by their presence were certain deserters who were hiding from arrest, the committee held that the charge of military interference was not sustained.

Koontz vs. Coffroth, 39th Cong 2 Bart., 149

Election not vitiated by mere presence of a few soldiers.

Where it was shown that a small squad of United States soldiers was stationed in a town, and on election day were near the polls, "but the evidence failed to show any disorderly or threatening conduct on their part, and it was apparent that no man of ordinary firmness was or could have been thereby intimidated from voting," the committee held the charge of intimidation not to be sustained.

Bromberg vs. Haralson, 44th CongSmith, 363

Where a large part of the vote prevented from being cast, whole vote rejected.

In one county a large part of the colored vote failed to be cast. The town where the election was held was occupied by an armed and organized force. Pickets were stationed on all the roads leading to the town, and no one was allowed to enter without a pass. Witnesses asserted that voters were allowed to come and go in peace, and that the negroes were urged to vote; but they did not vote, and the committee said, "It is clear that they abstained from doing so for reasons which most men would consider good and sufficient." The report does not definitely state whether the vote should be rejected or not, but Mr. McCrary, the author of the report, states in his treatise on elections (§419) that "the committee were of opinion that this was not a free and fair election," and bases the decision on the ground of military interference.

Giddings vs. Clark, 42d CongSmith, 97

Presence of troops intimidation.

The committee condemned the sending of Federal troops to South Carolina in 1876, and found that they were sent there for the purpose of carrying the election by intimidation. The question whether the presence of troops at or near the polls, without the commission of any overt act by them, was in itself such intimidation as to void the election was discussed by the committee, and the opinion *seems* to have been that such presence does of itself constitute intimidation and voids the election; but the committee recommended that the election be declared void after discussing intimidation practiced in other ways as well. The minority held that the use of the military as a police force to keep the peace was proper, and that no intimidation having been practiced or threatened by the soldiers the election was valid. Whatever intimidation was practiced was chiefly in the interest of contestant. Only some twenty votes were shown to have been attempted to be intimidated in the interest of contestee, and in these cases it was unsuccessful. As contestee's returned majority was over 1,500, this could not affect the result or the validity of the election.

Richardson vs. Rainey, 45th Cong 1 Ella, 224-288

IRREGULARITIES.

GENERAL PRINCIPLES (see also LAWS MANDATORY AND DIRECTORY).

Positive commands of the law must be obeyed.

"The committee are sensible that trivial errors, committed by the officers conducting elections, resulting perhaps from a misconstruction of a doubtful passage of a law, ought not to deprive any class of citizens of representation. Still it must be manifest that, to preserve the election franchise pure and unimpaired, the positive commands and requirements of the law, in respect to the time, place, and manner of holding elections, ought to be observed." Statutes directing the manner of holding elections are as imperative as those directing the time and place; but the House refused to concur in findings based on a strict construction of the above principles.

Taliaferro vs. Hungerford (second contest), 13th CongC. and H., 251

Violation of statute intended to protect purity of election, on a matter within control of voter, fatal.

"A statute in relation to such irregularities as want of uniformity in size, color, texture, or appearance of ticket, or something of that character, under the control of those clothed with the power and duty of providing tickets, would and should be construed as directory. But an irregularity in contravention of a statute intended to protect the purity of the ballot box against frauds, which irregularity is within the control of the voter himself, must not be tolerated. A statute applied to such irregularities is, by the courts, and of right should be, construed as mandatory."

Sullivan vs. Felton, 50th CongMobley, 763

Not affecting the result, immaterial.

Errors relating to form rather than substance, and not affecting the result, held to be immaterial.

Porterfield vs. McCoy, 14th Cong C. and H., 269

Substantial compliance with the law only required.

"Our election laws must necessarily be administered by men who are not familiar with the construction of statutes; and all that we have a right to expect are good faith in their acts and a substantial compliance with the requirements of the law."

Ingersoll vs. Naylor, 26th Cong. 1 Bart., 35

Violation of directory statutes immaterial.

"Elections should not be set aside for want of mere form for innocent or unintentional irregularities. On the other hand, all the mandatory provisions of the law must be observed, or the election can not and should not be sustained."

Reid vs. Julian, 41st Cong 2 Bart., 830

"It is an established principle of law in cases of contested elections, not only in Congress, but in the States of this Union, that wherever there has been a neglect on the part of the returning officers or the canvassing officers to comply literally with the merely directory provisions of the statute, such neglect shall not work injury to anybody; that the votes shall be received and counted; that the parties shall have the benefit of them for whomsoever they are cast. In every case of contested elections the one great question to be determined, the one point of supreme importance to be ascertained by the House, sitting as judges, is, Who received the majority of votes of the legal electors of the district; whom do the people want to represent them; for whom have the majority of voters legally cast their votes? The fact that some officers may have made an artificial or somewhat informal return should not affect the substantial interests of the parties to that election."

Hunt vs. Sheldon (minority report), 41st Cong 2 Bart., 538

Irregular election permissible in extraordinary cases.

"In extraordinary cases, and where it appears that in no other way can the actual will of the voter be ascertained, a resort to methods not technically in accordance with statutory direction may be justifiable, and upon proof that a full, fair, and honest election has been held by those only who are qualified voters, under these circumstances the returns from such an election, when duly proved, may be considered and counted. None of those guards provided by statute to secure honest results should be neglected; but when statutory provisions designed to protect qualified voters in the exercise of their legal rights are made use of with deliberate purpose to suppress the will of the majority, such action will be regarded as fraudulent."

McDuffie vs. Turpin, 51st Cong Rowell, 290

May weaken prima facie force of returns.

"Mere irregularities in the conduct of the election, where it does not appear that the legally expressed will of the voter has been suppressed or changed, are insufficient to impeach officially declared votes. But a succession of unexplained irregularities and disregard of law on the part of intelligent officials removes from the ballot box and the official returns that sacred character with which the law clothes them, and makes less conclusive evidence sufficient to change the burden upon the party who maintains the legality of the official count."

Langston vs. Venable, 51st Cong. Rowell, 437

Votes not to be lost by mistake of returning officers.

"The committee will forbear from exhibiting arguments to prove that votes, fairly and honestly given, ought not to be lost or set aside for any mistake of any of the returning officers. It is conceived to be entirely unnecessary to prove that what has been the uniform decision of the House of Representatives ever since the formation of the Government, in such cases, has been correct."

Colden vs. Sharpe, 17th Cong. C. and H., 371

MISCELLANEOUS INFORMALITIES.

At first election in New Mexico.

Where, at the first election held in New Mexico, there were numerous irregularities in the election, the committee held that allowances were to be made, and, as there was no proof of fraud, disregarded the irregularities.

Lane vs. Gallegos, 33rd Cong......1 Bart., 164

Returns rejected for technical reasons counted.

Where returns were rejected by the county canvassers for technical reasons, the committee counted them.

Switzler vs. Dyer, 41st Cong......2 Bart., 791

Returns not sealed, not signed, etc.

Where there were marked irregularities in the returns from a majority of the precincts in a county, such that the county clerk testified that no one could make out a correct return from them, some of them not being sealed, some of them not signed or certified, some of them not showing that the oath had been taken, and most of them not showing in what State or county the election was held, or for what office the votes cast for contestant and contestee were given, the committee regarded the irregularities as very great, but as it was not necessary to the decision of the case did not rule on the question of their rejection.

Bell vs. Snyder, 43d Cong......Smith, 258

Where no harm done, immaterial.

Where there were three ballot boxes at each precinct, where complaint was made that they were so placed that the United States supervisors could not watch them all, where some ballots were handled by unauthorized persons, and some officers of election were momentarily absent, but no harm was done, the committee (under a directory statute) held all these irregularities immaterial.

Watson vs. Black, 53d Cong......Report 1147, pp. 2-5

Held not to justify rejection of returns.

Precincts rejected by county canvassers because certain judges or inspectors of election were not sworn, registration books were not kept open thirty days, some of the officers absented themselves for a brief time, parties other than officers handled the ballots, the officers of election began to count the votes before the polls closed, or an officer of election was a candidate for another office, were counted by the committee, it appearing that no harm had been done.

Williams vs. Settle, 55d Cong......Report, 337

Sundry informalities immaterial.

The following irregularities were held to be violations of directory provisions of the law, and not to vitiate the election or returns: "A failure of one or more precinct officers to take the oath of office prescribed by law; a failure of one or more of the precinct officers to file the official oath in the office of the secretary of state; a failure to appoint a clerk of election according to law; a failure of the precinct officers to organize as a board; a failure to keep a poll list according to law; a failure to open the polls at the hour fixed by law; a failure of the clerk to take the oath of office prescribed by law; the fact that a ballot box contained more than one opening; the circumstance that but one United States supervisor attended the election; an adjournment of the polls during the day; a failure to keep a tally list; a failure to count the ballots immediately after the close of the poll; a failure to administer the oath prescribed by law to the electors; the fact that the poll lists, ballot boxes, and statements of results were not delivered to the county canvassers by the chairmen of the precinct boards; the refusal of the county canvassers to entertain and decide upon protests presented by electors; the fact that the election was conducted by two instead of three precinct officers; and the fact that the county canvassers opened the ballot boxes when they canvassed the votes."

Richardson vs. Rainey, 45th Cong......1 Ells., 229

Exhibiting open tickets too near the polls.

Where the law had been violated by exhibiting open tickets within 100 feet of the polls, the committee held that while the violators of the law might be punished the vote of the poll ought not to be thrown out.

Wigginton vs. Pacheco, 45th Cong......1 Ells., 14

Ballots issued too near the polls.

Fifty-three ballots marked with a red pencil were rejected by the committee on this ground, and on the ground that they were issued to the voters within 100 feet of the polling place, in violation of the mandatory statute of California, and that the voters were bribed.

Sullivan vs. Felton, 50th Cong Mobley, 755

INDICATIONS OF FRAUD (see also FRAUD, AND RETURNS, IMPEACHMENT OF).**Gross disregard of law rendering returns unreliable.**

"While it is well established that mere neglect to perform directory requirements of the law, or performance in a mistaken manner, where there is no bad faith and no harm has accrued, will [not] justify the rejection of an entire poll, it is equally well settled that where the proceedings are so tarnished by fraudulent, or negligent, or improper conduct on the part of the officers, as that the result of the election is rendered unreliable, the entire returns will be rejected, and the parties left to make such proof as they may of votes legally cast for them."

Covode vs. Foster, 41st Cong 2 Bart., 602

Gross irregularities, affecting reliability of result.

The committee rejected the vote of a poll on the ground that the result was rendered unreliable by the following circumstances: During part of the day a hat was used for a ballot box; the judge in charge of the hat was drunk and disorderly, and the other officers were more or less under the influence of liquor; outsiders, some of them intoxicated, were admitted to the room, where they could have tampered with the ballots; an unsworn outsider acted as clerk during the count; there was an excess of 6 ballots in the box, and it appeared that throughout the day challenges by one party were systematically ignored and many votes were admitted without due precautions to test their legality. The minority held that none of these circumstances were sufficient of themselves to vitiate the poll, and they could have no more effect when all combined. The House sustained the majority.

Covode vs. Foster, 41st Cong 2 Bart., 603-605

Gross disregard of law, indicating fraud.

Where a poll had been thrown out by the probate judge for fraud and irregularities, the committee sustained its rejection on the ground of the following irregularities and indications of fraud: The election was practically *vice voce*, the judge crying each vote as it was cast, in violation of law; the election officers were not sworn; the ballots, which should have been delivered by the voters in person, were handled and written upon by an unsworn outsider; the legal poll books were not used, but loose sheets of paper, and there were 192 ballots in the box not numbered and in excess of the names on the poll book.

Otero vs. Gallegos, 34th Cong 1 Bart., 180-184

IN REGISTRATION (see also REGISTRATION).**Gross irregularity in making up registration.**

Where the registering officers of a precinct were not residents, as required by law, and they permitted the registry to be made up chiefly by an unsworn clerk, in entire disregard of the requirements of the law and with no precautions to confine it to the legal voters, and as a result there was a large and unexplained increase in the vote, the committee rejected the precinct.

Dodge vs. Brooks, 39th Cong 2 Bart., 81-85

Use of an alphabetized copy of registry list, made by outside parties.

The committee held that the use for the purpose of facilitating voting of a more perfectly alphabetized copy of the registry list than the regular certified copy, made at the request of the judges by private persons, and not verified except by counting the names, did not vitiate the election.

Hogan vs. Pile, 40th Cong 2 Bart., 282

Use of wrong registry list and reception of illegal votes.

Where the assessor registered a number of persons on the "additional list" without the personal application required by law, and failed to furnish the election officers the required certified copy of the list, and they therefore used a list which had been posted up in a bar room for a month, and votes were received from voters whose names were not found on this list, without requiring of them the affidavits prescribed by law, the committee rejected the poll.

Covode vs. Foster, 41st Cong......2 Bart., 605-608

Original registry list used, instead of certified copy.

An election should not be vitiated because of the failure of an assessor to perform a part of his duty. Where the assessor performed all of his duty except furnishing a certified copy of the list, and the election officers used the original list instead of a copy, the election should stand.

Covode vs. Foster (minority report), 41st Cong......2 Bart., 616-618

No legal registration and gross irregularities.

Where there was no legal registration in a precinct, the election officers were not residents of the precinct, as required by law, and there were very many serious irregularities, it was rejected by the committee, and only the votes proved *aliunde* counted.

Reid vs. Julian, 41st Cong......2 Bart, 830

In North Carolina, election invalid if registration at wrong time and place.

Under a mandatory law (in North Carolina) that "no registration shall be had, except at the times and places hereinafter provided," the committee held that the returns from precincts in which this law was not complied with should be rejected.

Pearson vs. Crawford, 56th Cong......Report 199, p. 4

Harmless irregularities disregarded.

In one county the registration list was verified by only one commissioner, instead of by the board, in another it was written instead of printed, and there were minor irregularities in a third, but the committee held that none of these irregularities were fatal under the Georgia law.

Fellon vs. Maddox, 54th Cong......Report 1743

"Place of birth" not specifically recorded.

Under the statute of North Carolina requiring the registration to specify as near "as may be" the "place of birth" of each elector, the supreme court of the State had decided that a registration specifying only the State of birth was invalid. The committee accepted the decision, but argued that the proof in this case was insufficient to establish the irregularity. The minority applied the decision and held all votes cast on such registrations illegal.

Williams vs. Settle, 53d Cong......Report 337, parts 1 and 2

IN HOURS OF HOLDING ELECTION (*see also* ELECTION, TIME OF HOLDING).

Polls opened too late, and by wrong officers, fatal.

Where the polls were not opened until three hours after the time required by law, the committee held that the burden of proof was on the party who sought to uphold the election to show that the result was not affected. This not having been affirmatively shown, and it appearing in addition "that the requisite number of inspectors did not officiate; that those who did officiate were not sworn; and that but one-half of the registered vote at that precinct was polled," the committee held that the vote of the poll must be rejected. The minority held that the delay in opening the polls having been necessary in order to comply with the provisions of the law in regard to appointing new judges in place of the absent judges, and no impression having been given out that no election would be held, it was the duty of the electors to remain until the polls were opened. The other irregularities complained of were not mentioned in the notice of contest and could not be considered. If they were considered they would not overthrow the return, as the officers were at least *de facto* officers, whose acts affecting the public, in the absence of proof or suggestion of fraud, were valid.

Yeates vs. Martin, 46th Cong......1 Ells., 386, 397

Votes rejected.

Votes received before the election board was organized or complete, as required by law, were excluded from the count by the committee.

Greery vs. Scull, 52d CongStofer, 161

Adjournment before completing canvass not fatal.

Where the inspectors violated the law in adjourning before completing the canvass of votes, such adjournment does not vitiate the poll unless it is shown to have afforded facilities for fraud or that during it the box was concealed and tampered with.

Bisbee vs. Finley (minority report), 47th Cong2 Ells., 215

Brief adjournment at noon does not justify counting vote which might have been cast during time of adjournment.

Where the polls were closed for a short time at noon, and a person passing the polls at the time, with his family and goods in a wagon, in the act of moving out of the county, failed to vote on account of the closing of the polls, *held*, that "he was not entitled to vote, but if he had been, the circumstances attending his case were not such as to justify us in counting his vote."

Campbell vs. Morey, 48th CongMobley, 227

Slight interruption immaterial.

The law of South Carolina providing that the polls shall be kept open without interruption being directory merely, an interruption of a few minutes which did not affect the result should not void the election.

Smalls vs. Elliott (minority report), 50th CongMobley, 717

Adjournment for dinner, discrepancy of votes, etc., not fatal.

Where there was a discrepancy of 4 votes between the ballots and the poll book, the inspectors were not properly sworn, the poll was adjourned for dinner and the ballot box concealed from public view, and the election was opened and closed later than the legal hour, but there was no proof of actual fraud, the committee allowed the poll to stand, after purging it of illegal votes. But a part of those who signed the majority report were in favor of rejecting it entirely.

Finley vs. Walls, 44th CongSmith, 378, 391

Adjournment for dinner, box not sealed, etc., not fatal.

Where one of the inspectors was not sworn, the box was not sealed during the adjournment for dinner, and the key was in the possession of an outsider, the count of the votes was irregular, and the ballot box was returned unsealed by the same outsider, all in violation of law, the committee, while condemning the irregularities, did not reject the poll.

Finley vs. Walls, 44th CongSmith, 381

Adjournment for dinner, with no other suspicious circumstances.

The conduct of judges of election in adjourning for dinner and leaving the ballot box unsealed and unguarded is highly reprehensible. "It is of the highest importance that the ballot box should be guarded and protected in the most careful manner; that all the provisions of law made for the security of the ballot should be strictly obeyed. There should not be the least opportunity for tampering with the ballots. It is certainly a serious question whether such an irregularity as this ought not to vitiate the election." But the mere fact of adjournment for dinner would not be sufficient to vitiate an election; the contestant in this case had not charged fraud, there was no evidence that the box had been tampered with, and some negative evidence that it was not, and the committee did not reject the returns, but they held that they "would, were there any facts tending to show that the ballot box had been tampered with, have decided to reject the returns."

Cox vs. Strait, 44th CongSmith, 434

Adjournment for dinner not fatal.

Where the judges in twelve precincts adjourned for dinner, the committee unanimously held that this alone would not vitiate the election. "The committee can not sanction this practice of temporary adjournment; but inasmuch as it has ob-

tained very extensively in the State of Ohio, and inasmuch as it does not appear in these cases that any person was deprived of his vote in consequence of the adjournment, they do not feel warranted in depriving so large a number of electors of their votes on account of this unintentional and, in these cases, harmless errors of their officers."

Delano vs. Morgan, 40th Cong 2 Bart., 172

Box only open part of day and same votes probably cast in another box, fatal.

Where there were two boxes opened in a precinct, but one of the boxes was open only part of the day, and it was at least doubtful whether it was legally opened at all, and it was probable that after it was closed many of the voters who had voted in it voted in the other box, the committee sustained the action of the county canvassers in rejecting this box.

Norris vs. Handley, 42d Cong Smith, 72

Poll open during only part of the day not fatal.

Where, as the result of a prearranged plan, the election was held by officers other than those regularly appointed, but the regularly appointed officers opened another poll an hour after the legal time and held an election until 11 o'clock, when they were driven away by violence, the majority of the committee refused to count the votes received by them during the time that their poll was open. The minority counted the votes. On the whole case the House sustained the minority.

Switzler vs. Dyer, 41st Cong 2 Bart., 790, 807

Poll not kept open full legal time, but no votes lost.

"The objection of sitting member that 'the soldiers' election law requires the polls to remain open at least three hours' is regarded by the committee as frivolous, when he makes no effort to prove that any voter was prevented from casting his vote, but only objects to votes that were cast, and where no attempt is made to prove fraud."

Koontz vs. Coffroth, 39th Cong 2 Bart., 141

Closing the polls and reopening them after sunset fatal.

Where a poll was not closed until some time after sunset, the committee expressly refrained from deciding whether the votes received after sunset should be rejected or not, but where polls were closed at sunset and afterwards opened again, they rejected all the votes received after the first closing.

Hogan vs. Pile, 40th Cong 2 Bart., 288

IN FORM, CUSTODY, OR NUMBER OF BALLOT BOXES.

A gourd for a ballot box.

Where the ballot box was required to be sealed, and a large gourd was used and tied in a handkerchief, and the box was not in legal custody over night, but there was no evidence of fraud, the committee held that the irregularities were insufficient to vitiate the return.

Arnold vs. Lea, 21st Cong C. and H., 605

A cigar box for a ballot box.

Ballots rejected because returned in a cigar box, because of the failure of the proper officers to provide the usual ballot box, should be counted.

Smith vs. Shelley, 47th Cong 2 Ells., 24

Box kept by wrong officers.

Where the election was required to be held for two days and the officers of election were to "take charge of the box" over night, and in several precincts the box was kept by the sheriff or other persons, but securely locked up, and there appeared to be no fraud, the committee held that the spirit of the law had been sufficiently complied with to count the votes.

Arnold vs. Lea, 21st Cong C. and H., 601

Box exposed to danger of being tampered with before official count.

Where, after an unofficial count on the night of the election, the ballot box was left over night in a saloon, and was counted the next morning and official returns made, the committee rejected the poll in spite of the evidence that the first unofficial count agreed with the official count made the next morning. The minority held that the proof of this unofficial count, publicly made and announced at police headquarters, was sufficient to overcome the presumption that the box had been tampered with.

Le Moyne vs. Farwell, 44th Cong. Smith, 412, 423

Box temporarily in possession of one judge, but no fraud.

Where the ballot box had been left imperfectly sealed for a few moments in the custody of one of the judges, but there was no evidence or suspicion of fraud, the committee refused to reject the vote.

Smith vs. Jackson, 51st Cong. Rowell, 23

One box instead of two, and a judge not sworn.

Where ballots for a city election and the Congressional election were deposited in the same box, so that a voter could easily have cast two ballots of the same sort, and where, in addition, one of the judges who aided in the counting was not sworn, and there were other irregularities, the committee rejected the poll.

Howard vs. Cooper, 36th Cong. 1 Bart., 281

One ballot box instead of two.

The law of North Carolina requiring separate ballot boxes for ballots for Congress and for Presidential electors was held to be directory merely, and an election was not held void where only one box was provided for both sorts of ballots.

Boyd vs. Shober, 41st Cong. 2 Bart., 906

Use of two boxes instead of one.

Where there were two ballot boxes at different windows in the same room, both equally in or out of the charge of the officers of the election, and it appeared that the vote was so large that the use of two ballot boxes was a practical necessity and was customary, and as a matter of convenience white men generally, but not exclusively, voted at one box and colored at the other, and the boxes were changed and put in each other's places at least once during the election, and the State board had rejected the "white man's box" and counted the other, the committee held that the two boxes must stand or fall together, and as either decision would be equally decisive of the case in favor of contestant, did not decide whether the whole vote should be counted or rejected.

Giddings vs. Clark, 42d Cong. Smith, 96

Four ballot boxes in a single precinct.

Where four ballot boxes were opened in different parts of the court-house, presided over by different sets of officers, and so situated that it was impossible for the United States supervisors to supervise them all, the committee held that it was not only subversive of the Federal supervision law, but also contrary to the Georgia law which provided that there should be not more than one polling place in each militia district. The committee, however, did not reject any votes, as it was not necessary to the decision of the present case. The minority held that the use of the four boxes being customary and practically necessary, on account of the large number of votes, was proper.

Sloan vs. Rawls, 43d Cong. Smith, 154, 168

One box instead of two.

The officers of election were required "to open a poll" to take the sense of the voters on constitutional amendments, and each voter, etc., was required to "deposit a ticket or ballot." In part of one county separate boxes were not used, and votes on the amendments were printed on the same ticket with votes for Congress; in a few cases votes on the amendments were on separate ballots folded inside the Congressional ballot. All these votes were rejected by the county canvassers. The majority held that the law was directory merely, and that "to open a poll" did not necessarily mean to have a separate ballot box, nor to "deposit a ticket or

ballot" mean that it must be separate from the general ticket. The minority held that the ballots were properly rejected, but that the House, under its broader power, might count them. On the whole case, which involved other issues, the House agreed with the minority.

Platt vs. Goode, 44th Cong......Smith, 652, 677

Two ballot boxes instead of one.

Where there is no statute prohibiting the use of two ballot boxes, one for white and the other for colored voters, the only question to be considered is whether their use interfered with the purity, freedom, or convenience of the election.

Stovell vs. Cabell, 47th Cong......2 Ellis., 671

Three ballot boxes not fatal.

Where there were three ballot boxes at each precinct in a city, but the number was necessary and no harm was done, the committee held (under a statute in terms directory and not mandatory) that the election was not void.

Watson vs. Black, 53d Cong......Report 1147, p. 2

Watson vs. Black, 54th Cong......Report 2892, p. 4

Failure to open before beginning election fatal.

Where the ballot boxes were not opened, as required by law, before beginning the election, and at the close of the polls the ballots of the preceding election were found to be still in the box, the committee rejected the precinct. "The provision of law requiring ballots to be deposited in empty boxes is, in its nature, just as mandatory as a provision requiring that the ballots shall be on white paper and without device. * * * It is axiomatic that laws designed to secure the accuracy of the count are mandatory."

Pearson vs. Crawford, 56th Cong......Report 199, p. 5

IN PLACE OF ELECTION. (See also POLLING PLACE, AND UNORGANIZED COUNTIES).

Election not at legal place.

Where an election was held at the place named in the proclamation, but this was 2 miles from the place where the election was customarily held, and where the committee held it must be legally held, the poll was rejected.

Howard vs. Cooper, 36th Cong......1 Bart., 281

One poll where two required.

Where two companies of soldiers voted at one poll, the military election law requiring a poll for each company, a portion of the committee held that the law was mandatory and the votes should be rejected. Others of the committee held that as the election was a fair one, the votes should be counted.

Koonz vs. Coffroth, 39th Cong......2 Bart., 143

Votes of township and incorporated city cast at same poll.

Where, under a special charter, all the votes in a township and an incorporated city lying within it were cast at a single poll in the city, though the general law required separate polls to be opened for the township and for each ward in the city, the committee were inclined to think that the general law applied, but as eighteen different elections had been held in the same way, under the same law, they did "not feel justified in setting aside an election held in pursuance of a construction so long sanctioned by the authorities of the State." The minority held that as no election had been held according to law, the returns should be rejected.

Delano vs. Morgan, 40th Cong......2 Bart., 173, 200

Votes from unorganized territory returned to wrong county.

Where the unorganized territory west of organized counties was attached to them for election and other purposes, and the commissioners of a county established a township in the unorganized territory, and votes were cast and duly returned, but the county clerk refused to receive them, and by surveys made since the election it appeared that the township was north of a line drawn due west from the north line of the organized county, the committee held that the votes were cast outside of the territory attached to the county and were nullities.

The minority held that as the township was within the territory supposed at the time of the election, by the then admitted lines, to belong to the county, and as the voters were in any case residents of the Congressional district, the votes should be counted. The House, on the whole case, did not adopt the conclusions of either majority or minority.

Miller vs. Thompson, 31st Cong1 Bart., 121, 129

Precincts not in legal existence.

The votes of precincts which had no legal existence at the time of the election, and were not legally established for nearly a year afterwards, were unanimously rejected by the committee.

Chaves vs. Clever, 40th Cong2 Bart., 468

Election districts established at wrong meeting of board.

The county commissioners were required to meet in stated meetings in January and September of each year and in extra session at such times as a majority of the board deemed necessary. At their stated meetings they were empowered under certain circumstances to establish election districts. The committee held that election districts established at an extra session were illegally established, and rejected all votes cast at them.

Cox vs. Strail, 44th CongSmith, 431

Precincts established by less than a quorum of the court.

Where the contestant objected to the votes of certain precincts on the ground that at the meeting of the court at which they were established a quorum was not present, but it appeared that the order had been generally acted on as a valid order, and the elections regularly held and returned, the committee said, "These precincts must be regarded as established under color of law, and as having a *de facto* existence," and refused to reject the votes on this ground among others.

Gause vs. Hodges, 43d CongSmith, 300

Precinct not established by law.

It was apparently assumed in both majority and minority reports, and explicitly asserted in debate, that votes cast at a precinct not established by law must be rejected.

Sloan vs. Rawls, 43d CongSmith, 148, 171

Precincts established at wrong meeting of board.

The statute of Montana prescribing that precincts and polling places shall be established by the county commissioners at the regular meeting immediately preceding the general election is directory merely.

Botkin vs. Maginnis, 48th CongMobley, 378

Annexation of part of a precinct not in strict form of law.

Where it was sought to throw out the votes of all residents of a certain portion of a precinct on the ground that the legal proceedings annexing this territory to the precinct were not in due form, but it appeared that the order had been universally accepted and acted on, and the residents of this territory had voted in the precinct for years, the committee unanimously declined to examine into the legality of the court proceedings, and counted the votes. "Voters are not to be disfranchised under such circumstances any more than the acts of *de facto* officers are to be held invalid in collateral proceedings."

Atkinson vs. Pendleton, 51st CongRowell, 57

Votes cast in boroughs by residents of townships excluded.

Under the provision of the constitution of Pennsylvania that a voter "shall have resided in the election district where he shall offer to vote at least two months immediately preceding the election," the committee held that votes cast by residents of townships at polling places located in boroughs distinct from the townships must be excluded, even in cases in which the borough poll was the usual voting place and no other was provided.

Greery vs. Scull, 52d CongStofer, 158

Slight change in boundaries held not to make votes illegal.

Where the boundaries of certain districts had been slightly changed but the polling places were the same and the voters had not changed their residence, and the old registry list was used at the polls, the committee held that the votes were regularly cast and the registration was not invalidated.

Greevy vs. Scull, 52d CongStofer, 159

IN OFFICERS OF ELECTION. (See also OFFICERS OF ELECTION.)

Same magistrate acting in two capacities.

Where the same magistrate acted as judge of the election and as assistant to the clerk in making up his return, there being nothing in the law prohibiting it, it was held not to affect the validity of the returns.

Easton vs. Scott, 14th CongC. and H., 279

Votes written down by sheriff instead of by clerk.

Where the sheriff conducting the election was required to appoint one or more "writers" to take the polls, and in one county, during a part of the time while the writer was absent, the sheriff himself wrote down the names, the committee rejected all the votes so written down in the absence of the writer.

Draper vs. Johnston, 22d CongC. and H., 710, 712

Only one clerk to take Congressional poll.

Where the officer conducting the election was authorized to "appoint so many writers as he shall think fit," to take the poll, and three "writers" or clerks were appointed, but only one of them took the poll for Congress, the committee held that even if this were held to be the appointment of but one writer the power of the officers to appoint so many as they shall think fit "is an authority to appoint only one if, in their judgment, one is sufficient."

Botts vs. Jones, 28th Cong1 Bart., 76

Substitution of clerk for inspector and unsworn outsider for clerk.

Where, during part of the day, the judge performed the duties of an inspector, an inspector performed the duties of a clerk, a clerk performed the duties of an inspector, and an unsworn outsider performed the duties of a clerk, and the majority of the committee found that these irregularities had for their purpose and result the fraudulent reception of a large number of illegal votes, they recommended that the election be set aside, though the contestant had not proved enough illegal votes cast for contestee to overcome the returned majority.

The minority held that the irregularities were immaterial, especially in the absence of any allegation of fraud. The House refused to vacate the seat, thus substantially sustaining the minority.

Wright vs. Fuller, 32d Cong1 Bart., 152-164

Temporary absence of part of the election officers.

Where the judges and clerks took turns in going out to meals, so that each of them was in turn absent for about half an hour, but no harm resulted, the committee refused to reject the returns.

Delano vs. Morgan, 40th Cong2 Bart., 173

Boards not legally organized, and only partial election held.

Where the county election was organized by the coroner, acting without color of legal appointment, and imperfect notice was given, so that the election was held in only seven of the twenty-five counties of the district, and very many of the voters did not vote, the whole vote was thrown out.

Sheafe vs. Tillman, 41st Cong2 Bart., 910-912

Tally kept by unsworn outsiders.

Where the law required the officers of election to count the votes immediately at the close of the polls, publicly and without moving the ballot box, and they carried it a distance of 16 miles to the county seat before counting under a misapprehension of the law, taking care to keep the box in such a way as to rebut every

presumption of fraud, but had their tally sheet kept by unsworn outsiders, the vote was thrown out for these two reasons, but chiefly because of the unsworn tally keepers. The minority held that the vote should not be thrown out.

Spencer vs. Morey, 44th Cong. Smith, 442

Outsider assisted in the count.

Where it was alleged that during the count some of the ballots were taken from the box by an outsider, but it was doubtful whether this occurred at the election in contest or another, and the person accused was shown to be of good character, and the circumstances were such that he could scarcely have changed the tickets, the committee held that "it was a wrongful act, or irregularity, if it occurred, but under the circumstances we can not recommend the exclusion of this return."

Hurd vs. Romeis, 49th Cong. Mobley, 426

IN POLL BOOK OF VIVA VOCE ELECTION.

Names not in full on poll book.

Under a statute requiring the names of the voters to be entered on the poll book, the committee held that when the Christian names were not entered in full, but by the initials only, the election should be held void. But the House refused to concur.

Taliaferro vs. Hungerford (2d contest), 13th Cong. C. and H., 250

Names not entered in separate columns on poll book.

Where the law required the clerks of the poll to enter the names of the voters in distinct columns under the names of the candidates, and they were instead entered in a single column, with figures or marks under the candidates' names to indicate the votes, the committee held that the election was void. But the House refused to concur.

Taliaferro vs. Hungerford (2d contest), 13th Cong. C. and H., 250

Where the names of the voters were not written under the names of the candidates in separate columns, as required by law, but in the same column, and the votes carried forward and marked under the names of the candidates, it was held not to vitiate the poll.

Porterfield vs. McCoy, 14th Cong. C. and H., 268

Votes set down in figures instead of in writing.

Where the law required the number of votes to be set down "in writing" and it was stated in figures, the committee held that it was not a literal compliance with the law, but as the variance related only to form, and no harm appeared to have been done, counted the votes.

Easton vs. Scott, 14th Cong. C. and H., 281

IN COUNT OF VOTES.

Votes counted by only part of election board, but correctly counted.

Where, after part of the vote of a precinct had been counted, the managers refused to count it further, and the count was completed by one manager and a clerk, and the fairness of the election and count, as well as the result, was proved by the supervisor's return and the testimony of a supervisor and of one manager, the committee counted the vote.

Sloan vs. Rawls, 43d Cong. Smith, 150

Count not public, and discrepancy in result.

Where a county board refused to permit anyone to be present at the canvass of the vote, and the result as certified by them showed nine less votes for contestant than the aggregate of the precinct returns, the committee declared the practice reprehensible and dangerous, and unanimously counted the vote according to the precinct returns.

Burns vs. Young, 43d Cong. Smith, 181

Counting of votes before close of polls condemned, but not held fatal.

It is a gross irregularity for judges of election to begin to count the votes before the closing of the polls, the time prescribed by law, and thereby to deprive subsequent voters of the secrecy of the ballot. (But the committee did not reject a return on this account.)

Frederick vs. Wilson, 48th Cong......Mobley, 402

Ballots counted by fives instead of singly.

Where the law required the votes to be counted one at a time from the box, and they were instead spread upon a table and assorted and counted by fives, held that this was a mere irregularity, and should not void the election in the absence of any evidence of fraud or corruption.

Hurd vs. Romeis, 49th Cong......Mobley, 424

Ballots handled by unauthorized persons.

"In all elections the most important thing to be shown is that the votes counted were those cast. There can be no assurance of this fact, except that the ballots have been preserved in the exclusive custody of the officers charged with the duty of keeping them. Any interference with them by an unauthorized person, any handling or taking them into possession by others than the proper officers, whereby an opportunity to tamper with them and alter them has been given, will be fatal to the count, unless the clearest and most satisfactory explanation has been made of the conduct of such persons. The burden is shifted to the contestee to show that what was done did not interfere with the ascertainment of the true result."

Hurd vs. Romeis (minority report), 49th Cong......Mobley, 448

Ballots not counted one at a time suspicious, but standing alone not fatal.

The statute requiring ballots to be counted from the box one at a time is directory merely and its disregard does not of itself vitiate the election; but it raises a suspicion, and where other circumstances show that the ballots were tampered with the poll should be rejected.

Hurd vs. Romeis (Mr. Green), 49th Cong......Mobley, 427

Votes not counted immediately.

"The correctness of the count is an essential of the election. The laws made to secure this result are mandatory." Where the managers of the election did not "immediately proceed publicly" to count the vote, and the result of this count is shown to be false, the return should be rejected.

Smalls vs. Elliott (minority report), 50th Cong......Mobley, 731

IN FORM OF RETURNS (*see also* RETURNS).

Substantial compliance only required.

A return rejected by the State canvassing committee because not certified in form of law, but found by the committee to be in substantial compliance with the law, was counted by the committee.

Mallory vs. Merrill, 16th Cong......C. and H., 330

Names in return idem sonans.

Where, by errors in making out county transcripts, votes returned by the precinct officers as having been cast for Cadwallader D. Colden were returned to the governor as having been cast for Cadwallader D. Colder and Cadwallader Colden, the committee, on proof of the facts, counted them as cast and originally returned.

Colden vs. Sharpe, 17th Cong......C. and H., 369

Informality in a county abstract not fatal.

"Your committee would not reject for mere informality a county abstract which truly presents the aggregates of votes actually cast in the voting precincts."

Clark vs. Hall, 34th Cong......1 Bart., 215

Returns not on separate sheets.

Where the law required that abstracts of votes for different offices should be returned on separate sheets and they were returned on the same sheet, *held*, that the law was directory and its violation did not vitiate the election.

Fenn vs. Bennett, 44th Cong Smith, 593

Return certified, but not attested.

The law of Virginia required the county returns to be certified by the county commissioners, attested by the clerk, and deposited in the clerk's office. A certified copy was to be sent to the seat of government. The copy sent was certified regularly by the commissioners and *certified* by the clerk, but not attested by him. It was rejected by the State canvassers on this account. The majority held that the rejection was arbitrary and illegal; that the certification of the clerk without the addition of his formal attestation was a substantial compliance with the law, and that in any case it was the duty of the secretary of the Commonwealth, under the law, to send a special messenger for a proper return if the one forwarded was illegal. The minority held that the return was properly rejected by the canvassing board, but that the House, under its power to go behind the returns, could count the vote, except from two precincts, which must be rejected for other reasons. On the whole case, which involved other issues, the House sustained the minority.

Platt vs. Goode, 44th Cong Smith, 651, 678

Returns signed by mark.

Returns rejected because signed by the mark (x) of the inspectors should have been received and counted.

Smith vs. Shelley, 47th Cong 2 Ellis, 20

Vote for Congress omitted from return, but shown by tally sheet.

Where the certificate of the vote of a precinct made by the precinct officers omitted the vote for Representative in Congress, but the tally sheet showed the vote, and a recount of the ballots by the county court showed the same result as the tally sheet, the committee refused to reject the vote.

Smith vs. Jackson, 51st Cong Rowell, 22

Irregularity in one portion of a return does not affect the rest.

Where a precinct return was irregular as to votes cast for Presidential electors and had been rejected entire by the county commissioners, the committee counted the vote for Representative in Congress, which was regularly returned.

Langston vs. Venable, 51st Cong Rowell, 440

Partly signed, counted.

Where certain returns had been rejected, as not signed, but some of them were signed in part and were enough to show that the election was legally held and for whom the votes were cast, the committee counted these returns.

Watson vs. Black, 53d Cong Report 1147, p. 10

Not sealed, but no harm done, counted.

Where the returns and poll books were not properly sealed, owing to the mistake of the election officers, but there was no indication of fraud or unfairness, the committee counted the returns, though rejected by the county commissioners.

Goode vs. Epes, 53d Cong Report 1952, pp. 5, 7

Informal certificate, immaterial.

Where the certificate of the judges of election to a precinct return was informal but not ambiguous, the committee counted it, though rejected by the county commissioners.

Goode vs. Epes, 53d Cong Report 1952, p. 7

Tally sheets counted, where no allegation that they were incorrect.

The officers of election at a number of precincts made no formal returns, not having been supplied with blanks for them, but transmitted the tally sheets, which the county canvassers had counted and contestant sought to have rejected. The tally

sheets and the oral testimony of the officers of election stating the votes were in evidence. The committee held that if it had been alleged that the tally sheet of any precinct did not correctly represent the vote it would have been necessary to recount the ballots, but as this was not alleged they allowed the count to stand.

Kearby vs. Abbott, 54th Cong. Report 1596

Signatures of judges written by clerk.

The committee counted three precincts which had been rejected by the county canvassers—the first on the ground that one of the judges was not sworn; the second on the ground that the signatures of the judges were written, at their direction, by the clerk, and the third on the ground that there was an excess of two ballots in the box.

Brown vs. Swanson, 55th Cong. Report 1070, p. 2

IN TRANSMISSION OF RETURNS (see also RETURNS).

Lists of voters not returned, decision of State canvassers accepted.

Where it was alleged that lists of voters were not returned to the secretary of state from certain precincts, as the law required, the committee were divided as to what the effect of this violation of the law would be if presented as an original question, but inasmuch as the State canvassers had passed upon the question, they did not feel authorized to overturn their decision.

Milliken vs. Fuller, 34th Cong. 1 Bart., 177

Poll books not returned in time, immaterial

Where votes had been legally cast, but were rejected by the Territorial canvassers because the poll books were not returned within three days, as required by law, the committee unanimously counted the votes.

Chapman vs. Ferguson, 35th Cong. 1 Bart., 268

Aggregates returned instead of "abstracts."

Where the law required "abstracts" of the vote of each county to be returned to the Territorial canvassers, and in nine counties statements of the aggregates of the votes were alone returned, the committee held that even if these statements were not "abstracts" the votes ought not to be rejected, it not being denied that the aggregates were correctly returned.

Morton vs. Daily, 37th Cong. 1 Bart., 413

Returns forwarded by express instead of special messenger.

Where the returns of a county were required to be forwarded by special messenger and they were, instead, forwarded by express, and there was some evidence indicating that they had been tampered with on the way, the committee held that there was some force in the contention that they should be rejected, but did not reject them.

Chaves vs. Clever, 40th Cong. 2 Bart., 469

Poll books not regularly returned.

Where the poll book was not returned with the certificate of election, but was found in the room where the election was held some days later, and was not signed nor certified, the committee held that, though it was an irregularity which, connected with other irregularities, might have very considerable weight, still in this case, it being fully identified by evidence, and there being no proof that it had been tampered with, it was not to be regarded as sufficient reason for rejecting the poll.

Finley vs. Walls, 44th Cong. Smith, 371

Returns not transmitted in time, and by messenger instead of by mail.

The law required the county returns to be in duplicate and to be forwarded to the governor and secretary of state by mail within a given time. As made out they differed in date, but were otherwise duplicates. They were not forwarded by mail, but sent to the contestant by a private messenger, opened by a private person, and

by him delivered to the State board after the time required by law. They were rejected by the State board. The committee required further evidence to be produced before counting them, and two of the three county canvassers testified that the copies in evidence were correct copies of the returns as made out by them. The committee waived the other objections as immaterial, and counted the votes.

Niblack vs. Walls, 42d Cong Smith, 103

Returns delivered unsealed by unauthorized person.

Where the returns should have been conveyed to the county auditor by one of the judges of the election sealed, and they were instead conveyed by an unauthorized person unsealed, but it was proved that he delivered them just as he received them, the committee considered it a grave irregularity, but did not reject the return.

Cox vs. Strait, 44th Cong Smith, 436

Ballots forwarded by the wrong officer, and not "forthwith."

Where the law required the ballots to be forwarded forthwith, sealed, to the city clerk's office by a constable in attendance on the election, and they were not forwarded for several hours, and were then forwarded by a police officer, who, finding the clerk's office closed, left the sealed envelope with the night watchman in the city marshal's office until 7 o'clock the next morning, when he delivered it, with seals unbroken, to the clerk, the committee held that the provisions which were violated were mandatory, and that the vote must be thrown out, in the absence of proof *alimide*, especially as in this case there were reasons for suspecting actual fraud.

The minority held that the law was directory; that the fact that the seals were intact rebutted any suspicion that the ballots had been tampered with; that the vote was proved by the returns, and that the evidence said to raise a suspicion of fraud was inadmissible and insufficient.

Abbott vs. Frost, 44th Cong Smith, 602, 622

Returns delivered by wrong officer.

Where the township returns were required to be delivered to the county returning board by one of the judges of election, and they were instead delivered by the registrar, there being no fraud, *held* unanimously that the returns should have been received.

Yeates vs. Martin, 46th Cong 1 Ells., 385, 407

Ballots sent to county canvassers uncounted.

Where the law required the precinct officers to count the votes at the polling place on the evening of election, and they instead forwarded the ballots uncounted to the county canvassers, the minority held that the county canvassers had no authority to count the ballots, and were right in refusing to do so.

Smalls vs. Tillman (minority report), 47th Cong 2 Ells., 487

Failure (in South Carolina) to forward precinct election papers to State canvassers.

The failure of the chairmen of the county canvassers of three counties (in South Carolina) to forward to the governor and secretary of state the precinct election papers can not vitiate the proceedings of the State board of canvassers.

Smalls vs. Tillman (minority report), 47th Cong 2 Ells., 489

Authority of messengers not shown, etc.

Where county boards of canvassers possessing no judicial powers threw out the returns of some precincts because the messengers delivering the sealed boxes containing the returns did not present written certificates showing their authority to deliver them, others because the polls appeared from *ex parte* affidavits presented not to have been opened or closed precisely at the legal hour, and one because one of the judges of election had not been legally appointed before the election, the minority (on this point apparently sustained by a majority of the committee) counted all these returns.

Lee vs. Richardson (minority report), 47th Cong 2 Ells., 521-561

Slight irregularity in seal.

Where the returns of a county had been rejected by the State canvassers on the ground that on the seal impressed on the returns the word "county" was written over the word "circuit" of the seal, the committee unanimously counted the returns. So of a precinct which had been rejected because not returned in time.

Garrison vs. Mayo, 48th Cong......Mobley, 56

Return not sealed.

Where a town return had been rejected by the State canvassing committee because not sealed as required by law, but no fraud appeared and there was other record evidence that the vote therein stated was correct, the committee counted the votes.

Mallory vs. Merrill, 16th Cong......C. and H., 329

The law required the judges of election to seal up the returns, ballots, and one of the poll books, and forward them by one of their number to the county clerk. In two precincts the ballots and poll books were returned unsealed. The majority held that the law requiring them to be sealed was directory, and that in the absence of proof or suspicion of fraud the votes should not be rejected (McCrary, §166, and elsewhere). In this case there was neither proof nor suspicion of fraud, and the fact that the election had been held and the error committed by Democratic officers exclusively, and that the papers had been in their custody alone, raised a presumption that if fraud had been committed it would not have been in favor of contestant.

The minority held that the law was mandatory, and that it was not necessary that there should be positive proof that the ballots had been tampered with. "It is sufficient to show that opportunity for such tampering has been afforded. The burden of proving that this has not been done devolves upon the party insisting upon the count."

This issue was the decisive one in the case. The House agreed with the minority.

Platt vs. Goode, 44th Cong......Smith, 654, 678

Ballots and poll books returned not sealed.

A precinct return rejected by the county commissioners because the ballots and poll books were returned unsealed was unanimously counted by the committee.

O'Ferrall vs. Paul, 48th Cong......Mobley, 147, 150

Return received after close of county canvass, counted by committee.

A return received the day after the adjournment of the county canvassing board, but otherwise unimpeached, counted by the committee.

English vs. Hilborn, 53d Cong......Report 614, pp. 1, 2

To be counted only if established by competent evidence.

Where certain returns were not forwarded by the precinct inspectors to the county canvassers, the committee presented a table of the alleged missing returns, to show that they were insufficient to affect the result, but held that the evidence by which they were sought to be established was in any case inadmissible.

Whatley vs. Cobb, 53d Cong......Report 267, p. 2

Ballots stolen, rest of return counted.

Where the ballots from a precinct had been stolen after the count, the county commissioners rejected the poll book, for the reason that, the ballots being stolen, they could not compare the two and verify the return. The committee said: "We think that the commissioners erred. It was evident that the ballots were stolen to prevent a fair ascertainment of the result of the election. The purpose of the spoliators should have been frustrated if possible; the poll book, though not in the condition required by law, should have been examined, and if found unaltered should have been allowed. To determine whether or not it had been altered, the commissioners were authorized by section 134 of the election laws of Virginia to summon and examine witnesses. We allow the contestant his majority at this precinct."

Goode vs. Eper, 53d Cong......Report 1952, p. 9

Returns received too late, counted by committee.

The committee counted returns not canvassed by the county canvassers in one county, and refused to reject returns canvassed by the county canvassers in another county, which returns in both of these cases had not been filed with the county canvassers within the time provided by law.

Rosenthal vs. Crowley, 54th Cong Report 177

Received too late, counted.

The return of a county received too late to be counted by the State canvassers was counted by the committee.

Robinson vs. Harrison, 54th Cong. Report 1121, p. 5

IN CANVASS OF VOTES (see also MISTAKE).**Poll books sent forward uncanvassed.**

Where the law required the poll books to be canvassed by the probate judge and three householders, and an abstract of the votes to be sent by them to the secretary of the Territory, and the county registrar instead forwarded the poll books to the secretary: *Held*, that the election was not void, but the House refused to sustain the committee (perhaps on other grounds).

Bennet vs. Chapman, 34th Cong. 1 Bart., 205

Returns opened and inspected by wrong officer.

"The law * * * has pointed out a particular mode of making election returns, and has designated particular officers who shall open and inspect them. If they are opened and inspected by any others they are thereby vitiated; for if such a practice were tolerated innumerable frauds might be perpetrated and the popular will defeated."

Daily vs. Estabrook, 36th Cong. 1 Bart., 302

Votes not canvassed and tabulated.

Where polls were rejected by the official canvassers because no "abstract of votes" was returned, but the abstract required was merely a computation or summation of the votes, and the votes themselves were all returned (the election being *viva voce*), the committee counted them.

Knox vs. Blair, 38th Cong 1 Bart., 534

Where result declared from tally sheets, irregularity in poll books immaterial.

Where poll books were defective—in not being signed or certified, and otherwise—but the result was required to be declared from the tally sheets, and not from the poll books, and there was no evidence in regard to the tally sheets, the committee presumed that they had been returned correctly and in due form, and held that the *prima facie* correctness of returns based upon them could not be impeached by showing that the poll books were defective.

Follett vs. Delano, 39th Cong. 2 Bart., 117-121

County canvass made up from affidavits of inspectors, the returns being stolen.

Where a county clerk testified that the precinct returns had been stolen from his office, and that he had made out the county canvass on the basis of affidavits from the judges of election in only part of the precincts, the committee said: "This way of making a return is substantially defective, and such a certificate can furnish no evidence of the correctness of its contents." No precinct returns or other evidence to establish the vote being presented, the votes returned were rejected.

Gause vs. Hodges, 43d Cong. Smith, 299

County canvassing board irregularly constituted.

Where the returns of a county were canvassed by the clerk of the county commissioners and two county officers selected by him, under an old law, instead of by the county commissioners, as required by the law in force at the time of the election, and the vote of the county had been thrown out by the Territorial canvassers for this reason, the committee said: "Although this question as to the proper board

to canvass the precinct returns is a very important one for the Territorial canvassers to consider, your committee do not regard it of much importance in coming to a decision in this case, as the question for the House to consider is who in fact received the highest number of votes, and the precinct returns * * * very clearly show the actual vote."

Fenn vs. Bennett, 44th Cong Smith, 593

Votes not canvassed.

"Nothing is better settled than this, that the failure of a board of canvassers to canvass the votes and declare the result does not invalidate an election otherwise regular and valid."

Patterson vs. Belford, 45th Cong I Ells., 54

Returns not canvassed.

Duly certified copies of the precinct returns "are by law the primary legal evidence of the votes cast, and unless assailed are conclusive." Where returns were asked to be thrown out on the ground that they had not been canvassed by the county canvassers at their first count, and that the supreme court, under whose mandate they were subsequently canvassed, had no jurisdiction or authority to issue such writ of mandamus, the committee declined to consider the question of the jurisdiction of the supreme court, but held that there being no attack on the correctness or integrity of the returns, and no reason shown why they should not have been canvassed, it was the duty of the committee to count them. A similar decision was rendered as to the vote of a county whose returns had not been canvassed by the State canvassing board until they were required to be canvassed by a writ of mandamus.

Bisbee vs. Hull, 46th Cong Ells., 315-319

In South Carolina, State canvass should be based on all the papers.

Where the law (in South Carolina) required all the precinct election papers to be sent to the governor and secretary of state, the committee held that if this was not a repeal of the former law requiring the State canvassers to base their canvass on the county returns, the two laws should at least be construed *in pari materia*, and the canvass should be based on both the county returns and the precinct papers.

Smalls vs. Tuman, 47th Cong 2 Ells., 432

Precinct returns improperly rejected by county canvassers counted by committee.

Where county canvassing boards, possessing no judicial powers, had thrown out the votes of a number of precincts regularly returned, the committee restored the votes according to the precinct returns.

Muckey vs. O'Connor, 47th Cong 2 Ells., 567-572

A day too late, counted.

The returns of a county were twice canvassed, the first time the day before and the second time the day after the proper day, the first time by disqualified canvassers, the second time by their qualified substitutes. The committee held that the second canvass was lawful. The board could have been compelled by mandamus to make it, even after the legal day, and what they could be compelled to do they could do voluntarily. And even if neither canvass had been lawful, the committee could have canvassed the votes.

Denny vs. Owens, 54th Cong Report 1877, p. 5

Informal certificate, fatal.

Where the determination of the county canvassers was required to be "reduced to writing, signed by said commissioners, and attested by the clerk, and shall be annexed to the abstract of the votes," but the abstract of votes, instead, was merely certified by the county clerk, who signed the name of the chairman of the board to it under general instructions and also signed his own name, the committee rejected the vote of the county on the ground that the return was not signed and that there was no other evidence of the vote.

Moore vs. Funston, 53d Cong Report 1164, p. 12

Not fatal.

The minority said: "It is no ground for the disfranchisement of the voters of a whole county that the returning officers, on a day subsequent to the election, are guilty of an informality in attesting the returns, where the result is not in any way affected by such informality."

Moore vs. Funston (minority report), 53d Cong......Report 1164, p. 25

JUDGES.

See OFFICERS OF ELECTION.

JUNIOR.

Omission of the word "junior" from ballots. (*See Ballots, Imperfect.*)

Omission from returns. (*See Returns.*)

JURISDICTION.

See HOUSE OF REPRESENTATIVES and COMMITTEE ON ELECTIONS.

LAND.

As a qualification for voting. (*See QUALIFICATIONS OF ELECTORS.*)

LAND LISTS.

See EVIDENCE, DOCUMENTARY.

LAWS.

FEDERAL ELECTION. (*See ELECTION LAWS.*)

LAWS, OF STATES.

See STATE LAWS.

LAW FOR TAKING TESTIMONY (see also House of Representatives, Evidence, and Notice of Contest).**Does not apply to some exceptional cases.**

In a contest between persons claiming election on different days the statutes of the United States providing for taking testimony in contested election cases do not directly apply, unless by a resolution of the House.

Holmes and Wilson, 46th Cong......1 Ells., 324

Directory.

The committee regarded the law of 1851 "as directory merely, and not as absolutely controlling the action of the House or of the committee (for they could not believe that it was the intention of Congress, if it had the power, which is not conceded, to disfranchise, by operation of this law, the people of a Congressional district because of the inadvertence, ignorance, negligence, or collusion of the candidates or either of them)".

Archer vs. Allen, 34th Cong......Report 8, p. 8

In a later report in the same case they said: "The act itself was directory and cumulative. Its object was to protect, and not to defeat, the rights of contesting parties and of the people. It was to be an aid, and not an obstruction."

Archer vs. Allen, 34th Cong......1 Bart., 173

Directory, but not to be departed from except for cause.

"The committee do not consider the act of 1851 as of absolute, binding force upon this House, for, by the Constitution, *each* house shall be the judge of the elections, returns, and qualifications of its own members, and no previous House and Senate can judge for them. The committee, however, consider that act as a wholesome rule, not to be departed from except for cause."

Williamson vs. Sickles, 36th Cong 1 Bart., 290

Perhaps not binding, but should be followed.

"It may be true that the law of Congress prescribing the mode of practice to be followed in the House in contested election cases is not absolutely binding upon the House in view of the provisions of the Constitution of the United States (Article I, section 5), which provide that 'each House shall be the judge of the elections, returns, and qualifications of its own members.' But it might work very great injustice to a contestee to require him to meet a case outside of this parliamentary-practice act without any previous notice to him that the House intended to depart from it in a material respect. Until the House itself lays down and prescribes a different mode of contesting elections before it, the parties to the contest have a perfect right to rely upon the statute being strictly observed and followed."

Donnelly vs. Washburn (minority report), 46th Cong 1 Ells., 471

Directory, and may be disregarded by the House.

The provisions of the statute for taking testimony in election cases are directory merely, constituting only convenient rules of practice, and the House is at liberty, in its discretion, to determine that the ends of justice require a different course.

Bisbee vs. Finley, 47th Cong 2 Ells., 194

Mandatory.

The minority said, in regard to the law of 1851: "The law of Congress we do not regard as merely directory or cumulative, but as peremptory and binding in its import and intention as any other law regulating any other judicial proceeding. The House, in judging of the election returns of its members, sits as a court. Their proceedings are judicial in their character, and why is it not competent for Congress by law to regulate the proceedings in this court as in any other? And if such regulations are made, why are they not as binding?" Any other construction would amount to a practical repeal of the statute.

Archer vs. Allen (minority report), 34th Cong 1 Bart., 175

The provisions of the law for taking testimony should be complied with. "This act we hold to be as peremptory and binding as any law regulating any other judicial proceeding, for the House in judging the election returns and qualifications of its members sits as a court."

Whyte vs. Harris (minority report), 35th Cong Report 538, p. 42

Mandatory on the House and the parties.

The minority held "that it is not competent for the committee to recommend any action to the House which involves a violation of the law of 1851, because as a law of Congress it is obligatory alike upon the House, the committee, and the contestant; that the act, relating exclusively to the initiation of the proceedings, the taking of testimony, and the preparation of the case for the decision of the House, does not infringe upon the constitutional prerogative of the House to judge of the election, return, and qualifications of its members."

Williamson vs. Sickles (minority report), 36th Cong 1 Bart., 295

LAWS, MANDATORY AND DIRECTORY (see also Election, Election Laws, and Registration Laws).

Difference between mandatory and directory statutes.

"Election statutes are to be tested like other statutes, but with a leaning to liberality, in view of the great public purposes which they accomplish; and except where they specifically provide that a thing shall be done in the very manner indicated, and not otherwise, their provisions designed merely for the information and guid-

ance of the officers must be regarded as directory only, and the election will not be defeated or affected by a failure to comply with them provided the irregularity has not hindered any who were entitled from exercising the right of suffrage, or rendered doubtful the evidences from which the result was to be declared, or permitted disqualified voters to vote, and that the irregularity itself was not occasioned by the agency of a party seeking to derive a benefit from it." (Many cases cited.)

Hunt vs. Sheldon (minority report), 41st Cong.....2 Bart., 528

If a statute expressly declares any particular act essential to the validity of the election it is mandatory, but otherwise it is mandatory or directory, as the acts prescribed affect or do not affect the actual result of the election.

Spencer vs. Morey (minority report), 44th Cong.....Smith, 459

"There can be no *directory provisions* in a statute in regard to that which the statute itself forbids being done at all. * * * The result of all the authorities is that all constitutional provisions in [and] statutes defining what the voter himself must do, both as to qualifying himself as an elector and furnishing the quality and quantity of evidence thereof which the law demands, is mandatory, jurisdictional, and in the nature of conditions precedent, while those which merely relate to the conduct of the election officers may or may not be directory, according as they may or may not appear to affect results, and according as they may or may not seem to have been regarded by the law-making power as essential and necessary safeguards against the mischief the statute was intended to prevent." Under the registration law of Pennsylvania the failure to furnish the affidavits required of unregistered voters is a neglect of the voter rather than of the officers, and the above rule applies.

Curtin vs. Yocum (majority report), 46th Cong.....1 Ells., 430

"The constitutional and statutory provisions relating to suffrage may be divided into two classes: First, mandatory, which define the right of suffrage, and, second, directory, which direct the manner of its exercise. The former relate to the substance of the right, the latter to the mode of its exercise. The former confer the right, the latter are as so many safeguards to conserve it. The right is derived from the former, and its exercise regulated by the latter. The former determine the primal and ultimate authority in the Government; the latter serve as a means to invoke and give force to it. The means being subordinate to the end, it follows that directory provisions, whether constitutional or statutory, must be liberally construed, and so applied as to give legitimate force and efficacy to the will of the sovereign power in the State. A different rule would subordinate the substance to the shadow, and would in the end substitute technical quibbles for the ballots of the qualified electors. The primal inquiry is, Whom did the qualified electors choose, as evidenced by their ballots, cast or offered, but refused? The ascertainment of the will of the qualified electors is the end of directory statutes, and this attained, 'the reason ceasing, the law also ceases.'"

Bisbee vs. Finley (minority report), 47th Cong.....2 Ells., 203

"The laws in relation to boxes, locks, the number of managers, clerks, etc., and the ordinary facilities of an election are mainly directory, unless the statute makes them otherwise, and an infraction of these directory provisions, in the absence of fraud, will not vitiate the election. Nor is the voter to be deprived of his right, nor the citizen to lose the result of an election fairly held, because of some unimportant omission of form, or the neglect of duty, carelessness, or ignorance of some election officer, or the failure to carry out some unimportant direction of the law."

Smalls vs. Elliott (minority report), 50th Cong.....Mobley, 722

Statutes directing the mode of proceeding of public officers are directory merely, unless there is something in the statute itself which plainly shows a different intent.

Smith vs. Jackson, 51st Cong.....Rowell, 23

Statutes to be construed strictly as to the officers, and liberally as to the electors.

"The general doctrine in construing election statutes is that they are to be construed liberally as to the elector and strictly as to the officers who have duties to perform under them. A statute directing certain things to be done by election officers ought to be followed by them with a high degree of strictness, but duties to be performed by the electors, as declared by statute, are directions merely, which, if not observed, it is true, may in some instances defeat his ballot, but when there

is an honest intention to obey the law, and the voter is not put in fault by any laches or negligence which he, by the use of reasonable diligence, might or could avoid, or where there is no palpable intention of violating the law apparent, in order to maintain the inestimable right of voting, courts have generally adopted the most liberal construction."

Lynch vs. Chalmers, 47th Cong......2 Ells., 350

Violation of mandatory laws fatal; of directory laws immaterial.

The violation of directory provisions of the law, if no fraud be shown to have resulted therefrom, can not vitiate an election. It is wholly different when mandatory provisions of an election law are violated. In the latter case the election is void. But the voter is not to be deprived of his right, and the citizens are not to lose the result of an election fairly held because of some unimportant omission of form, or from the neglect, carelessness, or ignorance of some election officer, or the failure to carry out some unimportant direction of the law." (Many cases cited.)

Richardson vs. Rainey, 45th Cong......1 Ells., 230

Disregard of directory laws immaterial.

"Regulations may be merely directory, and if the officer of election or the voter does not follow them they do not necessarily vitiate the vote when deposited and received."

Love vs. Wheeler (Mr. Ranney), 47th Cong......2 Ells., 97

Where the law itself forbids counting ballots of certain sorts, it is mandatory.

"The general rule, doubtless, is to count those ballots which clearly express the intention of the voter, but the intention must be expressed as provided by law. * * * The intention of the voter, if it can be clearly ascertained from the ballot, will generally be given effect to, and when it is not expressed according to the strict requirements of a statute such requirements will often be regarded as merely directory, unless a failure to comply with them is declared to be fatal to the ballot. But where the statute itself provides that a certain thing shall be done by the voter or his vote shall not be counted, then there can be no question that a provision of that character is mandatory and that a failure to comply with it is fatal to the ballot."

Yost vs. Tucker, 54th Cong......Report 1636

South Carolina ballot law mandatory.

The law of South Carolina prescribing the form of the ballot and requiring that "no ballot of any other description found in any election box shall be counted" is mandatory. "The ballot not in the prescribed form is *illegal*, and must be *rejected*, because the law in terms declares that it shall not be counted." All the ballots cast for contestant were rejected for irregularities in paper, printing, and cutting, under this law.

Miller vs. Elliott, 52d Cong......Stofer, 172

Requirement of an oath mandatory.

"Every regulation in relation to elections * * * is, in fact, *directory*; but there are some of these regulations more substantive and important in their use and character than others; and somewhere it is necessary to draw the line, distinguishing between that which is proper, but not essential, and that which so enters into the essential character of a good election that a failure in it should be held a fatal defect. Of this latter class the undersigned [minority] believe to be the requirement of an oath from at least 'a majority of the officers.'"

Goggin vs. Gilmer (minority report), 28th Cong......Report 76, part 2, p. 6

Registration law in Louisiana directory.

"The principal and only aim of the law is to secure fair elections, and the nonobservance of directory provisions can not annul an election carried on with all the essentials of an election and with perfect fairness." The registration law of Louisiana was held to be directory and its partial disregard immaterial.

Flanders and Hahn, 37th Cong......1 Bart., 443

Pennsylvania election law mandatory.

The provisions of the Pennsylvania registration law requiring personal application for the registry of additional names, requiring these names to be entered on the original list and not on a separate one, and requiring the assessor to furnish certified copies of his list to the election officers and the county commissioners "are not directory merely, but mandatory, and enforced by severe penalties."

Covode vs. Foster, 41st Cong 2 Bart., 607

Clause affecting titles of bills mandatory.

The committee expressed the opinion that the provision of the constitution of Tennessee that "no bill shall become a law which embraces more than one subject, that subject to be expressed in the title," was mandatory, and that those portions of any law not included in the subject expressed in the title would be void.

Tennessee Election, 42d Cong Smith, 6

LEGISLATURE.**Power of legislatures over Congressional elections derived from the Constitution.**

"Whatever power the legislatures possess over elections they derive from the Constitution and not from the laws of the United States."

Members elected by general ticket, 28th Cong 1 Bart., 52

Laws of States in regard to Congressional elections to be tested only by Constitution of the United States.

"In testing the validity of any laws of the States relating to the election of Representatives in Congress, and those elections also, we are to look only to the Constitution of the United States."

Members elected by general ticket (minority report) 28th Cong 1 Bart., 57

Time of holding elections not to be fixed by constitutional convention in presence of legislature.

Where a constitutional convention continued in session and passed laws after the legislature had assembled, and among these laws was one fixing the time of Congressional elections, the committee held that the law was invalid, on the ground that the passage of such a law was a legislative function and could not be exercised by the convention in the presence of the legislature.

Beach, 37th Cong 1 Bart., 393

Its power over Congressional elections paramount to State constitution.

The constitution of Michigan plainly prohibited a voter from voting outside of the township or ward in which he resided, and had been so construed by the supreme court of the State. The legislature had passed an act permitting soldiers in the Army to vote wherever they were encamped. The committee held that in such a case the authority of the legislature was paramount over that of the State constitution. The Constitution confers the right of fixing the times and places of elections on the legislatures of the States, and the committee held that by this was meant "the legislature, *eo nomine*, as known in the political history of the country." If the constitutional convention was a constructive legislature, then its enactments on this subject were simply legislation and could be superseded by later legislation.

Baldwin vs. Trowbridge, 39th Cong 2 Bart., 47

"The time of electing members of Congress can not be prescribed by the constitution of a State as against an act of the legislature of a State or an act of Congress. * * * The only apparent exception has been in the constitutions which have been formed by Territories and with which such Territories have been admitted into the Union as States. But this, if it be a valid exception, does not prove that Territories have the right by a constitution to fix the time for electing Representatives in Congress when they become States. But the authority of these provisions rests on the sanction and adoption of them by Congress in admitting such Territories as States with constitutions containing such provisions."

Holmes and Wilson, 46th Cong 1 Ells., 339

"The State legislature is not responsible to the State nor controlled by the State constitution in its action in regard to the manner of holding Federal elections. In case of a conflict between the act of a legislature and the constitution of the State in matters purely of a Federal character, the act of the legislature will prevail, provided it is not in conflict with the Constitution of the United States."

Donnelly vs. Washburn (minority report), 46th Cong 1 Ells., 495

Has full power where not restrained by constitution.

"Constitutional restriction upon legislation must be plain and certain. A State legislature has supreme power of legislating except where it is restricted by the constitution; and everything will be presumed in favor of the power of the legislature. The courts will not declare an act unconstitutional unless it is clearly made so by an express provision of the constitution."

Cox vs. Strait, 44th Cong Smith, 430

Has primary control over times, places, and manner of elections,

The Constitution "manifestly gives to the legislative departments of the several State governments primary and full control over the 'times, places, and manner of holding elections' for Representatives in Congress, subject only to such limitation or interference as Congress may affirmatively enact. * * * Inasmuch as the general power over the subject rests with the legislative departments of the States, the acts of Congress can not be held to have a wider scope than their language necessarily means, and a *casus omissus*, if there be any, remains under State control."

Patterson vs. Belford (Mr. Cox), 45th Cong 1 Ells., 67

A constitutional convention is a legislature.

"It must * * * be regarded as settled that a constitutional convention is included under the general term 'legislative' in the Constitution of the United States and acts of Congress made in obedience thereto."

Patterson vs. Belford (Mr. Cox) 45th Cong 1 Ells., 68

Bound by State constitution even in regard to Congressional elections.

The 'legislature' of a State, in its fullest and broadest sense, signifies that body in which all the legislative powers of a State reside, and that body is the people themselves, who exercise the elective franchise." It is to this legislative body, acting by constitutional convention or otherwise, that the power of fixing the times and places of Congressional elections is given. Or if "this section of the Federal Constitution can be construed to refer to this secondary or subordinate legislative body of a State, it must be held to mean that the time, place, and manner for holding elections for Representatives shall be prescribed in each State by the legislature thereof, such legislature acting in subordination and in conformity to that organic law to which it owes its own existence." An act of the legislature permitting soldiers in the Army to vote outside the State contrary to the State constitution is void.

Baldwin vs. Troubridge (Mr. Marshall) 39th Cong 2 Bart., 49

Can not fix Congressional election at another time than that prescribed by State constitution.

Where the constitution of the State had fixed the election at a certain time, the committee held that it was so fixed beyond the control of the legislature, and recommended that the contestant, who was elected on the date fixed by the constitution, be admitted.

Chil vs. Thayer, 37th Cong 1 Bart., 349

Legislature presumed to have followed constitution.

Where certain chapters and articles of the code of Tennessee were mentioned in a statute as being reenacted, but to reenact them *in toto* would have been to violate the constitution in several important particulars, the committee held that the legislative intent must have been to reenact only such provisions as constitutionally could have been reenacted.

Tennessee election, 42d Cong Smith, 3

PROCEEDINGS BEFORE LEGISLATURE NOT ADMISSIBLE AS EVIDENCE. (*See EVIDENCE in Other Proceedings.*)

MANDATORY LAWS.

See LAWS, MANDATORY AND DIRECTORY.

MEMBERSHIP.

When its incidents commence.

Membership in the House of Representatives does not commence until the organization of the House and the taking of the oath by the member. A Representative-elect previous to that time has some of the privileges of membership, but he may hold an office incompatible with membership without affecting his rights.

Hammond vs. Herrick, 15th Cong. C. and H., 286

What constitutes.

Membership in the House is not constituted by election, or by return, or both. One is not a member until he has also been qualified by taking the oath.

Hammond vs. Herrick, 15th Cong. C. and H., 293

Emoluments cover full term when only one member elected during term.

Where the House had decided that neither candidate (under the Rhode Island majority-vote law) had been elected at the first election to the Forty-ninth Congress, and claimant had been elected at the second election, the committee in the Fifty-third Congress reported that he should have been paid for the full term, as he was the only member elected from his district to the Forty-ninth Congress.

Puge, 53d Cong. Report 1645

Franking privilege, etc., do not imply membership.

The franking privilege and right of exemption from arrest belonging to Representatives-elect before the organization of the House do not imply that the incidents of membership have yet commenced or that the House is yet in existence.

Hammond vs. Herrick, 15th Cong. C. and H., 295

MEXICAN CITIZENS.

Persons who had elected to retain Mexican citizenship could not vote.

Under the stipulation of the treaty with Mexico permitting the inhabitants of New Mexico to elect whether they would retain their Mexican citizenship or become citizens of the United States, the committee held that persons who had enrolled themselves upon registries established at the prefectures in the various counties, under a proclamation issued by the military governor, had legally elected to retain their Mexican citizenship, and could not vote for Territorial Delegate.

Otero vs. Gallegos, 34th Cong. 1 Bart., 79

MILITARY GOVERNOR.

Powers of; may fix time of election.

"The exact powers of a military governor can not be easily defined. They have their origin in, and are probably limited by, necessity. They are to some extent civil, as well as military, and the authority for his civil functions is no less clear than for his military." The right of the military governor of Louisiana to fix the time of an election was sustained.

Flanders and Hahn, 37th Cong. 1 Bart., 446

MILITARY INTERFERENCE.

See INTIMIDATION, Military Interference.

MILITARY RESERVATIONS.**Residents on, may vote in the Territories.**

The rule prohibiting persons from voting in the States who reside on territory ceded to the United States held not to apply to persons residing on military reservations in the Territories, as there is in the latter case no conflict of sovereignty, and the reservations are only temporarily set aside for military use by Executive order.

Burleigh and Spink vs. Armstrong, 42d Cong Smith, 90

MINISTERIAL OFFICERS (see also Officers of Election and Canvassing Board).**Mistakes by, to be corrected by the House.**

The officers of election, board of canvassers, and governor "are all ministerial officers, and error committed by any of them, either through mistake or design, is to be corrected by the House."

Biddle and Richard vs. Wing, 19th Cong C. and H., 513

Secretary of state (of Missouri) not authorized to reject returns.

The secretary of state of Missouri, being a mere canvassing officer, had no power to go behind the returns certified to him by the county clerks. Where a county clerk included in his returns extra-official statements of violations of the registry law, the secretary of state should still have canvassed the returns, and issued the certificate to the person having the majority of the votes as returned.

Switzler vs. Anderson (majority report), 40th Cong 2 Bart., 378

Have no right to investigate questions of fraud.

Under the law of Missouri requiring the secretary of state "to cast up the votes" returned to him and certify to the election of the person receiving the highest number of votes, he was a purely ministerial officer, and had no right to investigate questions of fraud and reject the vote of a county.

Switzler vs. Dyer (majority report), 41st Cong 2 Bart., 778

Have no right to reject returns for fraud.

The committee unanimously held that the governor of Tennessee had no right to reject the votes of counties or parts of counties. It was his business to add up the returns as received by him and leave the correction of frauds to the House.

Sheafe vs. Tillman, 41st Cong 2 Bart., 910

The committee unanimously held that the secretary of state of Missouri had no right to reject the votes of a county. "His sole duty was to add together the votes returned to him as cast for each candidate in the several counties, and to give the certificate to the person to whom, upon such addition, it appeared that a majority of votes had been given."

Shields vs. Van Horn, 41st Cong 2 Bart., 923

County canvassers generally ministerial.

The duties of the county canvassers in Minnesota (and in most other States) are purely ministerial.

Donelly vs. Washburn (minority report), 46th Cong 1 Ells., 512

Have no power to count ballots for a candidate imperfectly designated.

"Under the laws of Ohio the State board are merely ministerial officers, invested with no power to meet the parties and hear evidence, and had they attempted to do it, it would have been a clear violation of duty." The State board had no right to assume that votes for "John H. Wallace," "Major Wallace," "W. W. Wallace," etc., "and returned as if for different persons, were in fact intended for Jonathan H. Wallace. The State board had no legal authority whatever to hear evidence and determine that issue of fact. If they had, they should not have stopped there, but proceeded to hear other controverted issues of fact."

Wallace vs. McKinley (minority report) 48th Cong Mobley, 191

Have no right to decide population.

Where it was provided that in all towns of over 2,000 inhabitants a transferred voter must have his transfer recorded at least 10 days prior to the election, but in all other cases might vote without such registry, *held* that the election judges had no right to decide that a town was within the exception in the absence of any legal determination of its population.

Bowen vs. Buchanan, 51st Cong Rowell, 197

MISTAKE¹ (see also Irregularities and Evidence).**In viva voce election, mistake in recording votes corrected.**

Votes set down by the sheriff, by mistake, as cast for petitioner when, in fact, cast for sitting member were counted by the committee as cast.

Porterfield vs. McCoy, 14th Cong C. and H., 267

Mistake in returns corrected by the House.

Where the deputy clerk of a county, in making out a transcript of returns to be sent to the secretary of state, spelled the name *Root* as *Rott*, and the votes lost thereby were sufficient to give the seat to petitioner, the House, on proof of the mistake, corrected it and gave him the seat.

Root vs. Adams, 14th Cong C. and H., 271

Where, by mistake of the returning officer, the names of certain candidates for State offices were inserted as having received the votes for Congress, which were, in fact, as shown by the record in the town clerk's office, cast for the candidates for Congress, the committee counted them as cast.

Mallary vs. Merrill, 16th Cong C. and H., 330

Where the inspectors of election in two towns, by mistake, returned the number of votes cast incorrectly, and the mistakes and true vote were proved by the testimony of the inspectors, the committee counted the vote as thus shown to have been cast.

Adams vs. Wilson, 18th Cong C. and H., 373

Where the inspectors, by mistake, had omitted to return any votes for the petitioner, the committee, on proof of the number actually cast for him, counted them as cast.

Wright vs. Fisher, 21st Cong C. and H., 518

May be corrected by the House, but not by the canvassers.

The committee sustained the action of the State board of canvassers in refusing to receive amended county returns correcting mistakes in the first returns, but held that this action was not binding on the House, whose duty it was to go behind all returns.

Chrisman vs. Anderson, 36th Cong 1 Bart., 332

County canvassing boards (in Kentucky) may reconvene to correct mistakes.

The minority held that county canvassing boards in Kentucky had a right to reconvene after they had made out their returns and adjourned and to make supplementary returns, correcting mistakes in the first returns, provided these supplementary returns were forwarded before the meeting of the State canvassers.

Chrisman vs. Anderson (minority report), 36th Cong 1 Bart., 336

Board may reconvene and correct mistakes.

Where a county court in West Virginia at its next regular session after the special session at which it had canvassed the vote of the county made a supplementary return to correct a clerical error in the first return, and the governor refused to count the second return on the ground that the county court after the adjournment of the special session at which it was required to canvass the returns was *functus officio*, and had no power to reconvene for any purpose connected with the election, the committee held that the returns should have been counted. "There is inherent

¹ Clerical errors, omitted returns, and the like were also corrected as a matter of course in many cases not here indexed.

in every body charged with the ascertainment of the popular will, whether its functions be judicial or ministerial, the power to correct an error when discovered, and to make its conclusions conform to the facts." The minority held that the governor was right in his ruling, but counted the vote as shown in the second return, upon evidence that it correctly represented the vote.

Smith vs. Jackson, 51st Cong......Rowell, 16

Where a county returning board in making out their abstract accidentally omitted one precinct, but before forwarding their return discovered and corrected their mistake, *held*, that this was just what ought to have been done, and if this precinct return had not been included it would have been the duty of the committee to include it in the total vote. The vote of a county can not be thrown out for such an informality.

Bowen vs. Buchanan, 51st Cong......Rowell, 196

Corrected, when proved by testimony of custodian of returns.

Where the clerk of a county testified that on a careful examination of the poll books in his possession he found that contestant had received 318 votes, instead of 309 as certified to the secretary of state, the committee added 9 votes to the vote of contestant.

Burch vs. Van Horn, 40th Cong......2 Bart., 205-211

Must be clearly shown to have been made.

Where a certified copy of one tally sheet appeared to show that one set of three marks had been counted as five, but the other tally sheet was not produced, the ballots were not examined, and none of the inspectors and only one clerk was called as a witness, the testimony was held to be insufficient to establish the fact of a mistake.

Gooding vs. Wilson, 42d Cong......Smith, 81

Where it was alleged that a figure 1 in the second column from the right, with no 0 after it, and which had been footed up as 10, ought to have been counted as 1, but there was no evidence that the true figure was not 10, the committee held that if the error had been committed it ought to be better proved.

Frost vs. Metcalfe, 45th Cong......1 Ells., 291

Mistake in footing up returns corrected.

Where the county managers, in footing up their consolidated return, had made an error to the disadvantage of contestant, evidently by mistake in omitting to include the vote given for him in one precinct, the committee unanimously agreed to correct the mistake.

Sloan vs. Rawls, 43d Cong......Smith, 147, 168

Mistake in summing up returns corrected by precinct returns.

Where it was alleged that an error had been made in summing up the precinct returns of a county, and certified copies of the precinct returns were in evidence, showing in the aggregate a larger number of votes for contestant than was shown in the total certified to the governor, and the precinct election officers testified to the correctness of the copies of the precinct returns in evidence, and there was other evidence to the same effect, the committee held that the vote should be counted according to the precinct returns. The minority held that the evidence was insufficient to show the incorrectness of the totals certified to the governor, because the correctness of the certified copies of the precinct returns in evidence was only proved by the memory of the election officers, some months after the election; because copies of only one of each of the duplicate precinct returns were in evidence, and because the vote in one of the returns was written in figures, and might easily have been tampered with. The House sustained the majority.

Mudd vs. Compton, 51st Cong......Rowell, 149, 165

Precinct omitted by mistake counted.

Where the county records had been burned and by mistake the vote of one precinct had not been counted, the committee counted it on proof of the vote.

Bell vs. Snyder, 43d Cong......Smith, 255

Clerical error corrected.

Votes returned for "Benjamin B. Enloe" and "P. H. Thresher" were counted for Benjamin A. Enloe and P. H. Thrasher, it appearing that the mistake in the names was a clerical error on the part of the returning officers.

Thrasher vs. Enloe, 53d Cong......Report 842, pp. 1, 2

MODE OF PROCEDURE.

(Under this title are included the methods of procedure tentatively adopted in the early cases, and also the methods adopted in exceptional cases after the ordinary mode of procedure had become settled. The citations are arranged in chronological order with no attempt at classification.)

In the first case in the First Congress the testimony was taken in the first instance by the committee at the seat of government, the House to determine afterwards if more was necessary.

Ramsay vs. Smith, 1st Cong......C. and H., 23

Evidence taken in first instance by Committee on Elections. It afterwards appearing that certain testimony could not be conveniently taken at the seat of government, the committee asked instructions of the House. After debate, the matter was laid on the table.

New Jersey Members, 1st Cong......C. and H., 38

Counsel heard by the House.

New Jersey Members, 1st Cong......C. and H., 38

Jackson vs. Wayne, 2d Cong......C. and H., 47

Moore vs. Lewis, 8th Cong......C. and H., 129

Appointment of a committee, 31st October, 1791, consisting of Mr. Ames, Mr. Drayton, Mr. Brown, Mr. Fitzsimmons, and Mr. Tucker, to report a uniform mode of procedure.....C. and H., 44

(The act was passed January 23, 1798.)

Testimony taken by deposition under special resolution of the House, and trial in Committee of the Whole. Counsel heard.

Jackson vs. Wayne, 2d Cong......C. and H., 47

Testimony taken by commissioners, under special resolution of the Committee on Elections, and transmitted to committee, which reported a state of facts and conclusions. Trial in Committee of the Whole and in House, on basis of report, statement of sitting member, and testimony.

Latimer vs. Patton, 3d Cong......C. and H., 69

A case was originated apparently by an *ex officio* investigation by the committee.

Bard, 4th Cong......C. and H., 116

Mode of procedure prescribed, as in case of *Latimer vs. Patton*, with the addition that parties should give each other ten days' notice of the names of illegal voters alleged before taking evidence in regard to them, and that the testimony of the petitioner should be confined to the facts stated in the specification handed to the committee.

Rutherford vs. Morgan, 5th Cong......C. and H., 118

A case was originated in the House, on the motion of a member, without any petition.

Van Ness, 7th Cong......C. and H., 122

Where there was such an exhibition of feeling between the parties as to induce the committee to reconsider their decision to hear oral arguments, the parties were required to file their arguments in writing.

Arnold vs. Lea, 21st Cong......C. and H., 607

The House ordered that the written testimony of both parties be printed, with such portions of the printed documents as should be "adjudged by the *Committee on the Judiciary* to be in any wise applicable to the case." The Committee on the Judiciary reported that the documents were all irrelevant, and they were not printed.

Arnold vs. Lea, 21st Cong C. and H., 607

Where testimony had been taken upon an assumption that did not satisfy the committee, it instructed the parties to procure other testimony, fixing a reasonable date on which it should be closed, and allowing time for transmission through the mails after that date.

Draper vs. Johnston, 22d Cong C. and H., 708

On the first day of the session, while the Clerk was calling the roll, objection was made to the qualification of one of the members claiming a seat, on the ground of insufficiency of his certificate. After some discussion the matter was waived until after the election of the Speaker, by the voluntary withdrawal of the claimants.

Letcher vs. Moore, 23d Cong C. and H., 721

Where the House had adjudged that neither of the claimants had a *prima facie* right to the seat, the case was referred to the Committee on Elections, when appointed, and they were instructed to receive as evidence all the depositions which had been or should be taken on due notice.

Letcher vs. Moore, 23d Cong C. and H., 747

Where a case had been referred to the committee by the House, with instructions to receive as evidence all depositions which had been or might be taken on due notice, the committee received the depositions already somewhat informally taken, all objections being waived by the parties, and fixed a time within which further testimony might be taken. Time was given after the date fixed to allow for transmission in the mails, and on the receipt of the testimony parties were permitted to take it from the committee room to prepare abstracts and arguments.

Letcher vs. Moore, 23d Cong C. and H., 748, 749

After the committee had established certain principles in regard to illegal votes, a subcommittee of two was appointed, with instructions to decide votes when they could agree, but when they could not agree, or the vote depended on a new principle, to leave it undecided. The committee then considered the undecided votes.

Letcher vs. Moore, 23d Cong C. and H., 825

Where, through inadvertence, the sitting member had not been given full notice of the taking of testimony, and had been unable to attend, the committee passed a resolution granting forty days' additional time for taking testimony. Before the expiration of this time the House passed a resolution calling on the committee to report what action had been taken. The committee reported its action, with a statement that such action was in accordance with many precedents, and was in the interest of fairness.

Archer vs. Allen (1st report), 34th Cong Report No. 8, 1st sess. 34th Cong., and 1 Bart., 170.

Where the contestant alleged a state of violence and intimidation and armed invasion, which, because of their public importance, demanded investigation, but which rendered it impossible to take testimony in the ordinary way, the committee recommended that the investigation be made in Washington by the committee. But the House sent a special committee to Kansas.

Reeder vs. Whitfield (1st case), 34th Cong 1 Bart., 185, 202

Where the contestant claimed that such a state of violence and intimidation existed as to render it impracticable to take testimony under the law of 1851, and petitioned for a special investigation, the House refused to grant the petition.

Brooks vs. Davis, 35th Cong 1 Bart., 245

Where the election to fill a vacancy was held so near the close of the term that to have proceeded in the ordinary way would have carried the preliminary proceedings of the contest to the expiration of the Congress, and contestant presented his notice of contest in a protest to the House, accompanied by a small amount of

record evidence, which was all that he relied on, the committee said that much might be said in justification of his course, but as in the view the committee took of the election a consideration of the evidence was unnecessary, they did not decide the question of the sufficiency of the notice.

The minority held that the notice was "legally and substantially sufficient."

Hunt vs. Menard, 40th Cong......2 Bart., 481, 495

Where the committee on elections was instructed to investigate certain charges against the validity of the election of one of the members of the House said to be made in testimony taken by a Senate committee, but the matter only came before the committee seven days before the expiration of the Congress, they asked to be discharged from further consideration of the subject.

Sypher, 42d Cong......Smith, 107

Where there was a question as to the legal time for holding the election, and the candidate elected in October had the certificate of election and the one elected in November presented an abstract of the vote cast, neither party was sworn in, but the papers were referred to the committee on elections with instructions to report as to either the *prima facie* or final right, as it should deem proper.

Patterson vs. Belford, 45th Cong......1 Ells., 52

Where notice of contest and answer were duly served but no testimony was taken, the committee, on showing of contestant, adopted a resolution recommending the granting of further time in which to serve new notice of contest and answer; but this resolution, through inadvertence, not being reported to the House in time to be of any service, the committee rescinded its former action and recommended that the contest be dismissed.

McCabe vs. Orth, 46th Cong......1 Ells., 320

Where the time in which to take testimony in a contest for the seat of a member returned as elected to fill a vacancy extended beyond the expiration of the Congress, the committee recommended that a special committee be sent to investigate the case more speedily.

Jones vs. Shelley, 47th Cong......2 Ells., 681

The ordinary method of trying contested elections in accordance with the provisions of the act of Congress will not be departed from without good cause.

Jones vs. Shelley (minority report), 47th Cong......2 Ells., 686

Where the contestee conceded that contestant was elected on the face of the returns and announced his intention not to claim the seat upon the certificate alone, but the certificate was presented to the House by a member and a resolution proposed requiring contestee to qualify as a member, the House passed a resolution referring all the papers to the Committee on Elections with instructions to report immediately which party, on these papers, had a *prima facie* right to the seat. The committee reported that the papers referred showed that contestant had a large majority on the face of the returns. The committee, having in this case been authorized both by the House and the action of contestee to go behind the certificate, could not agree that contestee should be seated upon his *prima facie* title. Contestant, having no such credentials as the law contemplates, ought also not to be seated pending the contest.

Chalmers vs. Manning, 48th Cong......Mobley, 8-10

Where testimony, taken by contestant out of time, objected to by contestee and not cross-examined, disclosed bribery and other frauds which demanded investigation, the contestee was given leave to subpoena and cross-examine the witnesses whose testimony had been taken and to take testimony of his own.

Page vs. Pirce, 49th Cong......Mobley, 475

Where a contest was pending against the seat of the Speaker of the House, he requested to be relieved of the duty of appointing the Committee on Elections. It was proposed that a select committee be appointed, to which the case of the Speaker should be referred; but the former plan was adopted, and the Committee on Elections was elected by the House.

Thoebe vs. Carlisle, 50th Cong......Journal 50th Cong., 1st sess., pp. 44, 49

Where a contestant was assassinated while in process of taking testimony, and it was alleged in the newspapers and elsewhere that the assassination was the outgrowth of the contest, or was in some way a "political assassination," the House passed a resolution directing the chairman of the Committee on Elections to appoint a subcommittee of five members to proceed to Arkansas if necessary and take testimony "in regard to the methods of said election, to the contest, and all events relating thereto or arising therefrom after said election, and as to whether the contestant or the contestee, or either of them, was lawfully elected." Acting under this resolution the subcommittee took testimony in regard to the killing of the contestant and various other murders and disturbances alleged to have been connected with the election or contest, as well as in regard to the result of the election, and the reports embraced a discussion of all these matters. It appearing from the testimony that contestant had received a majority of the votes, the committee recommended that on account of his death the seat be declared vacant. The House concurred.

Clayton vs. Breckinridge, 51st Cong Rowell, 679-781

Where certificates in due form had been presented by two candidates, and the clerk of the House, before the second certificate was received, had placed on the roll the name of the candidate declared elected in the certificate first issued and filed, the clerk refused to strike the name from the roll, "having already exercised the authority given to him by law," and submitted the matter to the House at the opening of the session. When the name of the certified member on the roll was reached, he was requested to stand aside. Motions were made and rejected to seat each claimant. The matter was finally referred to the Committee on Elections, which reported in favor of seating the claimant first certified, the other claimant to have the right to contest under the general law, except that the time should begin with the date of the adoption of the resolution. The House concurred.

Belknap vs. Richardson, prima facie case, 53d Cong.

Where a contest growing out of a special election was necessarily begun too late to be completed in the ordinary process of filing briefs, etc., under the law before the date of final adjournment of Congress, the clerk of the House addressed a letter to the Speaker calling attention to this fact. The case was then referred to the committee at once, and the next day a resolution was passed instructing the committee to go on with the case.

Benoit vs. Boatner (2d case), 54th Cong.

A member-elect, accused of polygamy, was requested to step aside at the organization of the House on the protest of a member, and a special committee was appointed to consider both the *prima facie* and final right to the seat. The committee reported in favor of excluding him by resolution, and the House concurred.

Roberts, 56th Cong Report 85

NATURALIZATION.

Papers illegally issued; votes deducted.

The votes of persons voting on illegally issued naturalization papers were deducted.

Van Wyck vs. Greene, 41st Cong. 2 Bart., 631-660

A certificate of naturalization improperly issued is void.

Cannon vs. Campbell (Mr. Thompson), 47th Cong 2 Ells., 618

Can not be attacked in collateral proceeding.

Where the testimony showed that a voter had procured his naturalization papers by fraud the committee refused to reject his vote, on the ground that naturalization papers issued by a court of competent jurisdiction "can not be attacked in a collateral proceeding." The minority held that the vote should be rejected. (See McCrary, 2d ed., sec. 21.)

Wigginton vs. Pacheco, 45th Cong 1 Ells., 16, 47

A certificate of naturalization duly issued by a court of competent jurisdiction can not be attacked in a collateral proceeding.

Cannon vs. Campbell (Mr. Calkins), 47th Cong 2 Ells., 610

Must be granted by judge, but witnesses may be examined by clerk.

The judicial function of deciding whether an alien has proved his claim to be admitted to citizenship belongs to the judge only; but the execution of the certificate, swearing of witnesses, and the like are ministerial functions, which may properly be exercised by the clerk of the court. Witnesses may be examined by the clerk, if in the presence of the judge.

Campbell vs. Morey, 48th Cong Mobley, 229

Must be established by the record.

Naturalization, being a solemn judicial proceeding of a court of record, must be established by the record, and in the absence of any record parol testimony is inadmissible.

Lowry vs. White, 50th Cong Mobley, 625

Informality in record immaterial.

A citizen duly naturalized before a competent court can not be deprived of citizenship because of informality in the record.

Cannon vs. Campbell (Mr. Calkins), 47th Cong 2 Ells., 610

May be proved by parol testimony.

Where the officers of the court were derelict in their duty and failed to enter of record the naturalization of a person, the fact of naturalization may be established by parol testimony.

Lowry vs. White (minority report), 50th Cong Mobley, 641

Failure to record immaterial.

When an applicant for naturalization does all that is required of him by law and has obtained his certificate of naturalization in due form, he is from that time vested with citizenship without regard to any further act to be performed by the officers of the court.

Lowry vs. White (minority report), 50th Cong Mobley, 641

Issue of certificate makes a record.

"The making out of a certificate of naturalization, reciting all the requisite facts, under the seal of the court, is an entry of record of the proceedings, even though that certificate is carried away from the court instead of being left with the clerk."

Lowry vs. White (minority report), 50th Cong Mobley, 641

May be conferred by county court in a Territory.

Under the act of April 14, 1802, providing that naturalization might be conferred by the "supreme, superior, district, or circuit court of some one of the States, or of the Territorial jurisdictions of the United States, or a circuit or district court of the United States," and the later section of the same act declaring "that every court of record, in any individual State, having common-law jurisdiction, and a seal, and clerk or prothonotary, shall be considered as a district court within the meaning of this act," held, that a county court of Michigan Territory coming within the above description, except in being in a Territory instead of a State, was empowered to grant naturalization. The latter section above quoted was held to be merely declaratory of what should be understood by the term "district court."

Biddle vs. Richard, 18th Cong C. and H., 408, 409

Conferred by county court.

The county courts in Iowa have jurisdiction to grant naturalization papers.

Frederick vs. Wilson, 48th Cong Mobley, 405

In Florida certificates must be presented to election officers.

Where the law requires foreign-born persons to present their naturalization certificate or declaration of intention before being allowed to vote, held, that votes received without the production of such evidence should be rejected.

Bisbee vs. Finley, 47th Cong 2 Ells., 175
Contrary authorities quoted in minority report *Ib.*, 238

NOTARY.

See EVIDENCE, before wrong officer, and WAIVER.

NOTICE OF CONTEST**SERVICE OF.**

Allegations must be made within the time required by State law, if that law be followed.

Where the testimony was taken by both parties under the law of Virginia (there being no law of Congress in force), and the allegation that the officers in one precinct were not sworn was not made within the time required by the Virginia law, the committee refused to consider it. The minority held that reasonable notice having been given, the testimony should be considered.

Botts vs. Jones, 28th Cong. 1 Bart., 77, and report 520, 1st sess. 28th Cong.

Time in which service may be made.

The law of Ohio provided that the result should be determined "within ten days after the 1st day of December;" but there was no provision for proclamation or other notice to anyone on which day within this limit the determination was made. The committee held that the thirty days within which notice of contest must be served commenced to run on December 10, unless knowledge was brought home to the contestant of a determination on an earlier day.

Follett vs. Delano, 39th Cong. 2 Bart., 116

If not served within the time, testimony taken under inadmissible.

Where a second notice of contest was served, if at all, after the legal time had expired, and there was no evidence except the certificate of a deputy sheriff that it had been served at all, the committee excluded this notice and the testimony offered under it.

Boyd vs. Kelso, 39th Cong. 2 Bart., 122

Two may be served, if both within the time.

"More than one notice may be served under the act of 1851, provided they shall be served within the time required by that act, and they may be treated as one notice, or as supplemental notices, or the contestant may, with notice to the opposite party, withdraw an insufficient notice and serve a sufficient notice in place thereof. All the act of 1851 contemplates is fair notice of the subject-matter of contest within the time specified by the act itself."

Daily vs. Estabrook, 36th Cong. 1 Bart., 304

Must be personally served on contestee.

Under the law of 1851, providing that contestant should "give notice in writing," the committee held that contestee was entitled to personal notice, and that service by leaving it at his house was not sufficient.

Follett vs. Delano, 39th Cong. 2 Bart., 115

Served by leaving at home of contestee.

The service of notice of contest by leaving the same at the home of the contestee, he being absent from the Territory, within the time prescribed by the statute, was ample service.

Manzanares vs. Luna, 48th Cong. Mobley, 61

Not proved by ex parte affidavit.

Where contestee does not by his answer admit the service of the notice of contest or waive proof of it, the fact of service should be proved by deposition, and not by *ex parte* affidavit.

Follett vs. Delano, 39th Cong. 2 Bart., 115

Not sufficiently proved by ex parte affidavit.

Under the decisions in *Follett vs. Delano* and *Boyd vs. Kelso* it is a valid objection to testimony taken in behalf of contestee that there is no proof of the service of the answer to the notice of contest except an *ex parte* affidavit. But the committee waived this point as too technical.

Cook vs. Cutts, 47th Cong......2 Ells., 251

Within thirty days after result proclaimed.

The returns were first canvassed by the secretary of state, in the presence of the acting governor, on December 14, 1872, but no proclamation of the result was made or certificate issued until February 18, 1873, when proclamation was made by the new governor. Notice of contest was served March 13, 1873, and the committee held that it was served within the thirty days.

Gunter vs. Wilshire, 43d Cong......Smith, 234, 235

Right to amend doubtful.

Where contestant, within the time, had served an amended or additional notice of contest, the committee said: "The right of the contestant to serve amended specifications in the case is doubtful and is not here passed upon, but the amended specifications are considered the same as if served with the original notice of contest."

McDuffie vs. Turpin, 52d Cong......Stofer, 55

"An intelligent and intelligible notice in writing, actually in the hands of contestee."

Notice of contest in writing was sent contestee by registered mail and reached him in time. "That the notice was in writing and that it reached the proper party are sufficient for this committee to hold the contestee to the necessity of his answer and proofs. In all such cases the rules as to service may naturally be somewhat flexible, according to the circumstances, provided that no clear right be thereby denied or infringed. An intelligent and intelligible notice in writing, actually in the hands of a contestee within the thirty days established by statute, ought to be sufficient."

Wilson vs. McLaurin, 54th Cong......Report 1566

SUFFICIENCY OF.**Petition should be specific.**

A petition of contest ought to state the grounds of objection to the sitting member with such certainty as to allow the merits of the case to be fully tried.

Varnum, 4th Cong......C. and H., 112

Leib, 9th Cong......C. and H., 165

Should be certain and include all the charges.

"A petition against the election of any person returned as a member of the House of Representatives ought to state the ground on which the election is contested with such certainty as to give reasonable notice thereof to the sitting member and to enable the House to judge whether the same be verified by the proof, and, if proved, whether it be sufficient to vacate the seat; and the petitioner ought not to be permitted to give evidence of any fact not substantially alleged in his petition." A case not conforming to these requirements was dismissed.

Leib, 9th Cong......C. and H., 165

Should put contestee on notice and prevent surprise.

"Much discussion has arisen as to what is to be understood by the words, 'shall specify particularly the grounds of contest on which he relies.' It may be doubted whether any definition can be formulated which will accurately fix the limits of these words so as to determine by such definition whether the ground of contest is in substantial conformity to the statute or not. It is evident that it was the purpose of the framers of the law to require the averments in the notice of contest to

be as certain and definite as the facts of the case would permit. The notice ought to be sufficiently specific as to the time, place, and nature of the charge to put the returned member on notice and enable him to prepare his defense and thus prevent any surprise."

Abbott vs. Frost (minority report), 44th Cong......Smith, 626

Substantial compliance with the law should at least be required.

Where a notice of contest consisted merely of vague and general charges of bribery, undue influence, and illegal voting, the committee held that it was clearly insufficient under the statute. "While it is true that this statute should receive a liberal construction, yet it will not do to permit parties to disregard its provisions. The House, in sanctioning its violation in cases heretofore determined, has created precedents that are now frequently and pertinently cited to justify similar infractions. This practice, if tolerated, will finally result in the virtual abrogation of the statute. The only safe course to pursue is to require at least a substantial compliance with its provisions." But the contestee, in an agreement in regard to taking testimony, had expressly waived his objections. "If these defects had not been waived we should feel fully justified, by reason of the insufficiency of the notice, in dismissing this case or excluding the evidence offered in support of the alleged grounds of contest, but in view of this waiver we are compelled to examine the evidence and determine the merits of this contest.

Duffy vs. Mason, 46th Cong......1 Ells., 363

A general allegation applies to each particular precinct.

A notice of contest was served in which the following specification was the only one relied on: "That the returns made by the returning officers, as officially announced, are incorrect, and that the poll books of the several counties in this district show that I received a majority of the legal votes polled in the said district for the said office, and am entitled to the certificate of election therefrom." Evidence was introduced to show that a recount at one of the polls showed a result different from the first count. The contestee objected to the notice as insufficient. The committee held that the notice was sufficient to authorize an investigation of the correctness of the returns in any of the precincts, as much as if each one had been specifically mentioned. The minority held that the notice was insufficient, in that it contained no particular specification of the grounds relied on.

Archer vs. Allen, 34th Cong......1 Bart., 170, 174

Where notice too vague to be good, contestant permitted to specify orally.

An allegation that "a recount of all the ballot boxes in said district at said election will show that you were not elected, and that I was elected," was held by the committee to be clearly insufficient, and strongly condemned by them. But to avoid all possibility of injustice, the contestant was permitted to specify orally the grounds relied on, and the testimony was considered.

Kline vs. Verree, 37th Cong......1 Bart., 382

Where both notice and answer insufficient, neither party can object.

Where the pleadings of both contestant and contestee were vague and indefinite, the committee strongly condemned them, but as neither party was in a condition to except to the pleadings of the other, the committee considered the case as found in the record.

Knob vs. Blair, 38th Cong......1 Bart., 523

Where names to be set forth.

The allegation that votes were given by proxy is sufficiently certain without setting forth the names, but an allegation that votes were given by persons not qualified to vote must set forth the names.

Varnum, 4th Cong......C. and H., 113

Names of voters attacked need not be given.

Where the notice of contest alleged the reception of illegal votes at one poll, sufficient in number to change the result of the election, and also specific irregularities committed at the same poll, the majority of the committee held that the notice was sufficient without giving the names of the alleged illegal voters. The minority

held that the names should have been given, and also that it should have been alleged more particularly by whom, and in what manner, the irregularities were committed. On the whole case the House substantially adopted the conclusion of the minority, but the case turned on other issues.

Wright vs. Fuller, 32d Cong 1 Bart., 154, 161

The committee held that allegations that in specified precincts a specified number of votes of persons who had elected to retain their Mexican citizenship under the treaty stipulations had voted illegally for the contestee were sufficient without giving the names of the voters objected to.

Otero vs. Gallegos, 34th Cong 1 Bart., 178

The names of the voters objected to need not be set out in the notice of contest; it is sufficient to designate them by the class to which they belong, as minors, aliens, etc. This is especially true, as under the law (of 1851) each party is required to give ten days' notice of the names of the witnesses to be examined.

Vallandigham vs. Campbell, 35th Cong 1 Bart., 229

Names of voters and disqualification claimed must be given.

Where the ground relied on is the admission or exclusion of voters, the only way in which this ground can be particularly specified is by naming the voter and the legal objection to his admission or exclusion.

Vallandigham vs. Campbell (minority report), 35th Cong 1 Bart., 236

Facts in which illegality of votes alleged to consist should be specified.

The minority held that allegations that in specified precincts a specified number of illegal votes had been cast for contestee were insufficient. It should at least have been specified what the specific facts were in which the alleged illegality consisted.

Delano vs. Morgan (minority report), 40th Cong 2 Bart., 176

Vague and general allegations insufficient.

Where votes were asked to be rejected for bribery, the minority held that the notice should have specified the number of votes charged, and when, where, and for whom they had voted. It was fatally defective in merely charging "many votes," and that they were cast "in the said Congressional district."

Abbott vs. Frost (minority report), 44th Cong Smith, 626

Allegation liberally construed.

An allegation that the votes cast for contestant in a precinct were illegal by reason of nonregistration is broad enough to permit the whole poll to be rejected if it appear that there was no legal registry.

Lowe vs. Wheeler (minority report), 47th Cong 2 Ells., 144

Specific allegation of false counting sufficient.

Where the notice of contest alleged that in certain specified precincts the judges of election fraudulently counted for contestee votes cast for contestant, it was held to be sufficiently specific.

McDuffie vs. Davidson, 50th Cong Mobley, 578

Evidence under somewhat general allegation received.

The committee allowed contestee certain votes proved to have been illegally rejected, but not otherwise included in the answer to the notice of contest than by an allegation that "many other votes" were thus lost in addition to those specified. But on the same principle they also allowed contestant a few such votes, in regard to which the evidence was all taken during the time for rebuttal, considering the evidence as being in rebuttal of that above allowed for contestee. The minority held that these last votes should not be counted, the testimony being evidence in chief taken in time for rebuttal.

Mudd vs. Compton, 51st Cong Rowell, 153, 168

Vague notice disapproved, but case heard upon merits.

Where contestant sought to impeach the title of contestee by a general allegation of "fraud in the election, and bribery, intimidation, and corruption of voters * * * in every election district in the Twelfth Congressional district of Pennsylvania," "the committee took no formal action upon the exceptions filed to the notice of contest, nor pronounced their decision upon it. But we are of opinion that the notice of contest, in its various charges upon which there was any testimony, is too vague and indefinite, and does not conform to the act of Congress referred." The committee, however, heard the whole case upon its merits.

Reynolds vs. Shonk, 52d CongStofer, 50

Liberal construction favored.

Where the answer to the notice of contest was one or two days late, and some of the specifications in the notice of contest were objected to, the committee said: "We believe, however, that the real question to be determined is not so much whether this or that bit of evidence offered by contestant certainly relates to something clearly specified in his notice of contest as a ground upon which he relies, nor yet whether the contestee's answer and countercharge were made in due time, but rather which of the two claimants, according to the record, was really elected and is really entitled to a seat in the House of Representatives."

Moore vs. Funston, 53d CongReport 1164, p. 2

Leave to amend refused, when testimony already considered and found insufficient.

Contestant had not included all the precincts in his notice of contest which he desired to have rejected, and a resolution was introduced in the House and referred to the committee giving him leave to amend the notice so as to cover them, but as the committee had considered all the evidence as if the notice had covered it, and had still found contestant's case not made out, they presented an adverse report on the resolution.

Rosenthal vs. Crowley, 54th CongReport 197

Number of votes charged falsely counted, sufficient.

A notice of contest charging that at specified precincts a specified number of the votes returned were in fact not cast was held to be sufficiently definite.

Aldrich vs. Robbins, 54th CongReport 572

BINDING FORCE OF.**Issues not raised in the notice not considered.**

Where, in conducting a recount of ballots, a precinct was accidentally recounted, which was not mentioned in the notice of contest, and an error of 5 votes was found, the committee unanimously refused to consider the recount of this precinct.

Buller vs. Lehman, 37th Cong1 Bart., 356

When the issues are made, the inquiries of the committee "should be directed solely to the determining of those issues, as presented by the parties, and to the consideration of such testimony only as should be found pertinent to sustain them as in proceedings at law."

Buller vs. Lehman (minority report, sustained by House), 37th Cong1 Bart., 358

Polls not excluded unless specifically demanded in notice.

Where there were frauds and illegalities sufficient, in the opinion of the committee, to throw out the entire vote of two precincts, but the contestant did not specifically demand their rejection in the notice of contest, the committee did not recommend their rejection.

Van Wyck vs. Greene, 41st Cong2 Bart., 646

Parties should be bound by pleadings.

A point not raised in the answer to the notice of contest, and claimed for the first time on the argument, held to have come too late to be considered.

Finley vs. Walls, 44th Cong. Smith, 390

Where contestee asked to have certain votes thrown out under a charge not contained in his answer, the committee said: "There is no allegation in the answer that can, under any rule of pleading known to your committee, be construed so as to admit such evidence. We are disposed to extend the rule in this case as far as possible, in order to let in all the evidence, but when there is a total failure to plead, as in the case here, we can not consider the evidence in determining a fact which tends to change the vote of either candidate. Your committee will say, however, that the proof on this point wholly fails to sustain such an allegation were it averred."

Finley vs. Bisbee, 45th Cong. 1 Ellis, 101

NOTICE OF ELECTION. (See also Vacancy.)**When time fixed by law, voters may take notice.**

"The law is well settled that where the time and place for holding an election are fixed by statute any voter has a right to take notice of the law, and to deposit his ballot at the time and place appointed, notwithstanding the officer whose duty it is to give notice of the election has failed in that duty."

Patterson vs. Belford, 45th Cong. 1 Ellis, 54

No notice necessary, when time fixed by law.

"When the time and places of holding an election are fixed by law, no notice by the officials is essential."

Strobach vs. Herbert, 47th Cong. 2 Ellis, 6

Failure to give notice of election not fatal.

Where the sheriff, without fraud, failed to notify two towns of a second election, and it did not appear that the votes of these towns could have changed the result, the election was held not to be invalidated; and it subsequently appearing that the votes of the two towns *might* have changed the result, but probably would not, the former decision was adhered to.

Lyon vs. Smith, 4th Cong. C. and H., 101, 110

NOTICES TO TAKE TESTIMONY.

See EVIDENCE, Notices to Take.

OATHS of election officers.

See OFFICERS OF ELECTION.

OFFICE, disqualifying.

See QUALIFICATIONS OF REPRESENTATIVES.

OFFICERS OF ELECTION.**PRESUMPTION IN FAVOR OF ACTS OF.****Fraud not to be presumed.**

"In the absence of anything to rebut it, the presumption must be in favor of the correctness of the record kept by the officers of the election and of their return. 'Fraud is not to be presumed' is a maxim not only of law, but of common justice. The means of knowledge, the facilities for accuracy, the impossibility of inattention, and the responsibilities connected with the failure to discharge their duty all unite to secure a credence to the acts of the officers which can not be justly accorded to the acts of others."

Littell vs. Robbins, 81st Cong. 1 Bart., 140

Their decision upon qualifications of voter final, when election by ballot.

Where the election is by ballot the voter can not be compelled to disclose for whom he voted, and it would be vain to inquire into his qualifications with a view to purging the polls. The decision of the officers of election must be taken as final, and if they exercise their authority improperly the remedy is in their punishment under State laws.

Easton vs. Scott (committee overruled by House), 14th Cong. C. and H., 276

Their decision upon sufficiency of affidavit in Iowa final.

Under the Iowa law requiring the presentation of an affidavit by an unregistered voter the decision of the election judges upon the sufficiency of that affidavit is final, and the vote can only be thrown out on a contest by proof that the voter was not in fact qualified. "The judges of election have no power to pass upon the legal and essential qualifications of the elector; * * * but as to whether the affidavits comply with the statute * * * is a matter addressed to their judgment, and when that judgment has allowed and received the vote it is final. The proof has been sufficient to justify the reception of the ballot, and henceforward the only question that can be raised must relate to the essential qualifications of the voter. Of course it is not necessary to add that this proposition may be modified by the proviso that the paper offered as an affidavit is intended as such in good faith and is not palpably an evasion or subterfuge."

Campbell vs. Weaver, 49th Cong. Mobley, 464

Where the location of the polls is in their discretion, their decision is final.

The laws of Maryland vested in the judges of the election the power of locating the polls "at such places in the several wards as they shall in their discretion deem convenient for holding the same." The minority (whose conclusions were substantially adopted by the House) held that "it is not the province of the committee to dispute with the judges the question of a convenient location."

Whyte vs. Harris (minority report), 35th Cong. Report 538, p. 44

May use their own discretion as to the manner of rejecting an illegal vote.

Where certain persons not entitled to vote were around the polls, intoxicated and raising a disturbance, and the judges of election, to avoid trouble, pretended to receive their votes, but threw them on the floor, it was held that "the judges had authority to do as they did, and that the mode in which they shall reject a vote known to them to be illegal is in their discretion."

Whyte vs. Harris (minority report), 35th Cong. Report 538, p. 46

Presumed to have acted under the law.

Where the law provided that the justice of the peace, if present, should preside at the election, and another person appeared to have presided, the committee presumed that the justice was absent and the other person had acted under the provision of the law for the case of the absence of the justice.

Easton vs. Scott, 14th Cong. C. and H., 280

It is presumed that the officers of election did their duty.

Frost vs. Metcalfe, 45th Cong. 1 Ells., 290

"The presumption that the sworn officers of the law have done their duty must obtain until the contrary clearly appears."

Boynnton vs. Loring, 46th Cong. 1 Ells., 350

"The presumption of law is that the officers charged with the duty of ascertaining and declaring the result of the election have faithfully performed their duty."

McDuffie vs. Davidson, 50th Cong. Mobley, 581

Best judges where inspection of the ballot necessary.

The inspectors of election, from the nature of their position, must be presumed to be more competent to decide a question which must be decided from an inspection of the ballot than any other persons could be, and the committee are not inclined to interfere with their decisions.

Adams vs. Wilson, 18th Cong. C. and H., 375

DISQUALIFICATION OF (*and see* NOT SWORN).**If disqualified, fatal to the election.**

Under the law of Georgia requiring three magistrates to preside at elections, *held* that a return by three persons, two of whom were not magistrates, was defective.

Jackson vs. Wayne, 2d Cong......C. and H., 47

If officers of election not legally qualified, votes received by them void.

The sheriff was required to open the polls "by 10 o'clock," and he was empowered, in case either of the judges appointed by the county court did not appear, to appoint suitable persons to act in their stead. In one county a sheriff opened the polls at 9 o'clock, and one of the judges declining to serve and the other not having appeared, appointed others to take their places. About 10 o'clock the absent judge appeared and took his place, the one appointed by the sheriff giving way to him. The committee rejected all the votes given up to the time the regularly appointed judge appeared, although all but two or three of them were proved to have been cast by qualified voters, holding, "It is unnecessary to inquire whether the persons thus voting were qualified and entitled to vote, if the officers or persons presiding were not qualified to hold the election and receive the votes. The State has the right to prescribe the manner of holding the election, and those votes were not taken in the manner prescribed by the laws of Kentucky, and were therefore illegally received." The minority held that informalities in the appointment or conduct of the officers not affecting the substance of the election should not defeat the expressed choice of the people, and the House sustained the minority.

Letcher vs. Moore, 23d Cong......C. and H., 754-757, 814-824, 844

The law prescribed that the voters should, "in presence of said judges and the sheriff, vote personally and publicly *visa voce*." In one county the sheriff was called away by the sudden illness of his wife, and the deputy sheriff being absent, the duty of crying the votes, which the sheriff had been performing, was performed by other persons for about three hours, until the arrival of the deputy sheriff. The committee rejected all votes taken during the absence of the sheriff; but the minority reported that inasmuch as they were proved to have been cast by legal voters they should be counted, and the House sustained the minority.

Letcher vs. Moore, 23d Cong......C. and H., 754-757, 814-824, 844

Where three required and only two served, returns rejected.

Where the law required that the board of election inspectors should be constituted of three persons and there were but two, the poll was rejected. "As there was no board of inspectors known to the law, your committee see no way by which any legal effect can be given to the returned vote."

Howard vs. Cooper, 36th Cong......1 Bart., 282

Only one acted, election void.

On a *prima facie* case, where only one judge appeared to have been appointed, or sworn, or acted, the law expressly requiring three, the committee were unanimous in holding the return to be invalid.

Koontz vs. Cuyfroth (prima facie case), 39th Cong......2 Bart., 32

Two out of three disqualified, election void.

The military election law of Pennsylvania, as interpreted by the committee, permitted all officers in the Volunteer Army to act as judges of election. Where two of the judges were officers in the Regular Army the committee rejected the votes received by them.

Fuller vs. Dawson, 39th Cong......2 Bart., 136

If officers disqualified, election void.

The committee at first declined to decide whether polls at which returned rebels, not authorized to act under the laws of Kentucky, acted as election officers should be rejected or not. Afterwards, the case having been recommitted by the House,

it was decided that the polls should be rejected. "It has long been held that if the officers of election are not capable of holding the office, the election has no more validity than would an election where no officers whatever were appointed. It is otherwise where persons capable of holding the office are appointed, although they may not have complied with the forms of the law." The latter report was sustained by the House.

McKee vs. Young, 40th Cong......2 Bart., 431, 460

Where one judge disqualified, election void.

Where one of the judges was a deserter, and hence not an elector and not competent to act, the committee rejected the return. "If a return is untrustworthy when one of the judges is absent, it is certainly more so if the vacancy is filled by a person disqualified to act. Two competent judges are certainly more reliable when acting by themselves than when advised, directed, and in part overruled by a third, pronounced by the law unfit for the trust."

Delano vs. Morgan, 40th Cong......2 Bart., 171

Where one member of county canvassing board disqualified, whole vote of the county thrown out.

Where the law required the county canvassing board to be composed of the county auditor and two justices of the peace (a majority to have power to act), *held* that when the board was composed of the auditor, one justice of the peace, and the probate judge it was illegally constituted, its returns must be rejected, and the vote thrown out.

Donnelly vs. Washburn (majority report), 46th Cong......1 Ells., 463

Must be coexistent with the election to affect its validity.

Where no certificate of the election of one of the inspectors was transmitted as required by law, the committee unanimously held that the election was not vitiated. "It was not necessary that a certificate of the election of the inspector should have been transmitted to the clerk of common pleas either before or during the election; and the omission to do so afterwards can not have a retrospective effect to defeat the will of the people expressed in conformity with law. The disqualification of an officer, to affect the legality of an election, must evidently be coexistent with the election."

New Jersey case, 26th Cong......1 Bart., 30

Only part of officers served, election not vitiated.

Where "certain of the judges, favorable to the contestant, did, apparently by preconcert, at an early hour of the day, and when it was apparent that their candidate was probably beaten, desert their duty and withdraw from the polls," the committee held that the election was not affected.

Harrison vs. Davis, 36th Cong......1 Bart., 345

Will not vitiate poll or return.

"Ineligibility or want of statutory qualification on the part of an officer of election, otherwise capable, and acting in good faith, and with the acquiescence of the voting public, will not of itself vitiate or impair the poll or return."

Gooding vs. Wilson (minority report), 42d Cong......Smith, 85

Apparent disqualification of one member of a county canvassing board not fatal to the canvass.

"It is hard to conceive how a mere ministerial board of officers can be rendered illegal and all its acts declared to be void simply because one person does not sign himself as an attesting witness to a certificate annexed to an abstract by such designation as to show affirmatively that he was a proper officer to do so."

Donnelly vs. Washburn (minority report), 46th Cong......1 Ells., 512

Where appointed by electors present, under the law, their acts legal.

Where the electors present are empowered by law to elect officers of election, if for any cause they are not regularly appointed, the acts of managers so elected are legal.

Strobach vs. Herbert, 47th Cong......2 Ells., 6

One out of three not acting or disqualified, immaterial.

Where only two managers acted, or where three acted, but only one was sworn, and the returns had been rejected by the county canvassers, the committee counted the votes; but where only one manager acted and he held the election in entire disregard of the forms of law, they sustained the rejection of the return.

Smalls vs. Elliott, 50th Cong Mobley, 670

Former secessionists not permanently disqualified in Kentucky.

The statute of Kentucky, passed in 1862, declaring that adherents to the rebellion should not be considered one of the political parties entitled to representation on the election boards had reference to the secession party in existence at the time the act was passed. After that party had ceased to exist the persons who had belonged to it were not disqualified from serving as members of other parties.

Barnes vs. Adams, 41st Cong 2 Bart., 762

Not fatal, in absence of fraud.

Where the clerk was not a citizen of the United States, and the oath of the officers of election was not returned, but there appeared to be no unfairness and there was no evidence of fraud, the committee declined to reject the returns, but held that these irregularities, if in connection with circumstances tending to show fraud, might have compelled the rejection of the vote.

Finley vs. Walls, 44th Cong Smith, 377

Candidate serving as registrar, fatal to the election.

The law of North Carolina prohibited any candidate from acting as registrar or judge of election. The committee rejected the return of a precinct on the ground that the contestee had acted for a short time as registrar. The minority disagreed on the ground that contestee had not acted as registrar, but had merely assisted in checking off names in the presence of the duly appointed registrar.

Yeates vs. Martin, 46th Cong I Ells., 387, 406

Judge alleged to have been interested in a wager.

Where it was alleged that one of the officers of election was disqualified by being interested in a wager on the result of the election, but the evidence showed that he had withdrawn his interest in the bet on account of being appointed inspector, and there was nothing to show any unfairness in the election, the committee refused to reject the precinct.

Kidd vs. Steele, 49th Cong Mobley, 513

Law of South Carolina requiring three managers, directory.

"If South Carolina had intended that an election held by less than three managers should on that account be void, she would have said so in her statute. She did not say so; hence the law fixing the number of managers is simply directory."

Smalls vs. Elliott (minority report), 50th Cong Mobley, 723

De facto officers; technical title will not be inquired into.

"The superintendents of a separate election, having been appointed by a court or other tribunal having the general appointing power for that purpose, which superintendents act as such, *colore officii*, no other person appearing or acting as conflicting claimants for the office, the committee will not inquire whether they were appointed at the particular term of the court contemplated by the act or whether there was a 'vacancy' within the meaning of the law."

Draper vs. Johnston, 22d Cong C. and H., 712

Acts of officers de facto valid.

Where it was alleged that the election officers were elected at a meeting in April, whereas they should have been elected in March, but no fraud was alleged, the committee unanimously held that the persons officiating were officers *de facto*, acting in good faith, and that the votes received by them were properly counted.

Milliken vs. Fuller, 34th Cong 1 Bart., 177

Where there was evidence that the supervisor of election had been disloyal, and could not truthfully take the oath required by the constitution of Missouri, but so far as appeared he had taken it, the committee held that he was at least an officer *de facto*,

"whose acts are not to be questioned in a collateral proceeding, but only in some proceeding bringing his title to the office directly in question."

Burch vs. Van Horn, 40th Cong......2 Bart., 206

If all the election officers belonged to the same party, in violation of law, nevertheless, if they were regularly appointed, and held a fair election, they were at least officers *de facto*, and the election should stand. Similarly with polls where some of the officers were returned rebels, who were alleged to be disqualified.

McKee vs. Young (minority report), 40th Cong......2 Bart., 437

"It is well settled in law that so far as the public is concerned the acts of one who claims to be a public officer, judicial or ministerial, under a show of title or color of right, will be sustained. Such a person is an officer in fact, if not in law, and innocent parties or the public will be protected in so considering and trusting him."

Eggleston vs. Strader, 41st Cong......2 Bart., 901

Where a registrar had been removed a short time before the election, but not having been notified of his removal and his successor not having qualified or made any attempt to assume the duties of the office, he had continued to exercise the duties of the office and had certified the returns to the governor, who, with the other officers comprising the State canvassing board, had rejected them on the ground that "no official returns had been received," the committee held that he was at least an officer *de facto*, whose official acts affecting third parties and the public must be held valid. But in this case, the true result having been proved outside the returns by the testimony of the officers of election, the vote must in any event be counted, without regard to the validity of the certificate.

Giddings vs. Clark, 42d Cong......Smith, 94

Where it was objected that the majority of the election officers of a precinct were "unofficial persons, not authorized by law" to act, but there was no evidence of fraud or unfairness, the committee held that they were "*ipso facto*" officers and refused to reject the returns.

Finley vs. Walls, 44th Cong......Smith, 390

Where part of the officers of election were not regularly chosen, but were *de facto* officers, and there was nothing shown to impeach their action, it was held that the poll was not vitiated by the irregularity of their appointment.

Cox vs. Strail, 44th Cong......Smith, 436

An election held by one regularly appointed inspector and one officer *de facto* acting under color of authority, in the absence of fraud, is valid.

Smalls vs. Elliott (minority report), 50th Cong......Mobley, 718, 722

It takes but little to constitute an officer *de facto*.

"It takes but little to constitute an officer *de facto* as affects the right of the public. The exercise of apparent authority under color of right, thus inviting public trust and negating the idea of usurpation, is sufficient. There need have been no vacancy in the office claimed to be holden; indeed, no such office may have ever existed."

Eggleston vs. Strader, 41st Cong......2 Bart., 901

A mere usurper not an officer *de facto*.

Where a person was appointed to an office in which no vacancy existed, and was appointed by the county court, though the power of appointment resided exclusively in the governor, he was held to be not even an officer *de facto*, but a mere usurper, all of whose acts were illegal and void.

Sheafe vs. Tillman, 41st Cong......2 Bart., 911

A probate judge acting on a canvassing board where a justice of the peace is required to act is not an officer *de facto* in the meaning of the law, because he is not acting under color of title as a justice of the peace.

Donnelly vs. Washburn (majority report), 46th Cong......1 Ells., 464

One personally disqualified can not be an officer *de facto*.

Persons can not be officers *de facto* who do not possess the qualifications required for officers *de jure*. "One may be an officer *de facto* who has been irregularly or improperly appointed or selected, and his acts may be binding on third persons; but in a case of personal disqualification of the officer for reasons which could not be cured by a change in the manner of his selection, the rule is universal that he can have no jurisdiction, and all his acts are void from the beginning for want of authority."

Reid vs. Julian, 41st Cong. 2 Bart., 835

NOT SWORN.

Not sworn, fatal to the election.

The committee recommended that the vote of a county be excluded because the officers of election had refused to take the oath prescribed by law. The House did not act on the report.

McFarland vs. Purviance, 8th Cong. C. and H., 31

Where the officers of election in three counties were shown not to have been sworn, and there were indications that the officers in the other two counties were also not sworn, the election was set aside.

McFarland vs. Culpepper, 10th Cong. C. and H., 221

Where there was no certificate on the returns of several counties that any oath had been administered to the clerks of the poll the committee held the election void, but the House refused to concur.

Taliaferro vs. Hungerford (2d contest), 13th Cong. C. and H. 250

A return was rejected, among other reasons, because the officers were not sworn.

Easton vs. Scott, 14th Cong. C. and H. 276

"The neglect by the sheriff, or other officer conducting the election, to take the oath required by law vitiates the poll for the particular precinct or county, and the whole votes of such precinct or county are to be rejected," even "although he now swears 'that he conducted the election impartially and legally, according to the best of his knowledge.'"

Draper vs. Johnston, 22d Cong. C. and H. 710, 712

Where the officers of election had been sworn by a notary public, who, in Nebraska, was not authorized to administer oaths in such cases, the majority of the committee held that under the precedents this vitiated the election, but they preferred to reject only the illegal votes.

Chapman vs. Ferguson (majority report), 35th Cong. 1 Bart., 269

Returns rejected where there were indications of fraud.

Where there was no proof that the officers of election in three precincts were sworn, and there were gross irregularities and indications of fraud, the committee rejected the polls. If it were not for the taint of fraud the committee would not have wished to deprive the voters at these precincts of their votes, but in view of all the suspicious circumstances, they held that the contestant ought either to have proved that the officers in fact were sworn or that the returns represented the result of a fair election and a correct count. Neither of these things having been shown, the returns were rejected on the ground that the election officers were not sworn.

Blair vs. Barrett, 36th Cong. 1 Bart., 308-328

Where intimidation prevails, slight irregularities fatal.

The vote of a precinct should not be rejected, in the absence of fraud, simply because the officers were not sworn, but where, in a county, there had been general organized intimidation against a certain class of voters, the precincts in that county where the law was not strictly complied with and the officers were not sworn should be thrown out.

Sheafe vs. Tillman, 41st Cong. 2 Bart., 912

With other circumstances, fatal to the election.

Where four judges and the registrar were required to conduct the election, and only two judges acted, and they were sworn by an officer not authorized to administer the oath, the committee rejected the returns on this ground among others. The minority held that the officers were *de facto* officers and their acts valid.

Yeates vs. Martin, 46th Cong. 1 Ells., 387, 398

Whether failure to be sworn vitiates election.

Where an election was attacked on the ground, among others, that the officers of election at one precinct were not sworn, the committee held that this would certainly not vitiate the whole election, and, as it would not affect the result to throw out the precinct, did not decide the question of its rejection.

Arnold vs. Lea, 21st Cong. C. and H., 605

Not sworn, sufficient if sworn after the election.

Where the clerks of the poll were required to be sworn before the election "that they would take the poll fairly and impartially," and they were not sworn until the next day, when they swore "that the same did contain a just and true account of all the votes taken at the said election to the best of their knowledge and belief," it was held to be sufficient.

Porterfield vs. McCoy, 14th Cong. C. and H., 268

Two out of three not sworn may not be fatal.

Where the election had been held by the sheriff and two superintendents, and evidence of doubtful admissibility was introduced to show that one of the superintendents and the sheriff were not sworn, the committee held that even if the evidence were admitted, they would not be inclined on this ground to set aside an election where no fraud or unfairness was alleged and from which the illegal votes had already been purged under a rule very favorable to the party attacking them. The minority held that the oath was essential and that the poll should be rejected.

Botts vs. Jones, 28th Cong. 1 Bart., 78, and Report 520, 1st sess. 28th Cong.

Judges sworn by officer of doubtful authority, election not vitiated.

Where the judges were sworn by an officer whose authority to administer the oath was questionable, and where the clerk failed to act during the entire day, and the votes were recorded (the election being *viva voce*) by the judges, the committee unanimously refused to reject the votes.

Chrisman vs. Anderson, 36th Cong. 1 Bart., 338

Not fatal to the election.

Where the county board of canvassers had rejected a return (in Florida) on the ground that the return did not show that the officers were sworn, but the evidence showed that they were in fact sworn, the committee counted the vote. "Even the fact that the inspectors of election were not sworn will not of itself, in the absence of fraud, render the election void."

Finley vs. Bisbee 45th Cong. 1 Ells., 99

Election not vitiated, even in West Virginia.

Under the statute of West Virginia forbidding the county canvassers from counting a precinct return unless it was shown either by the regular certificate or other evidence that the officers of election had been sworn, a precinct return had been thrown out by the county canvassers. The committee refrained from deciding the question whether the law should be construed as mandatory or directory, and of its constitutionality, but counted the votes of the precinct.

McGinnis vs. Alderson, 51st Cong. Rowell, 638

The acts of unsworn *de facto* officers valid.

"The mischiefs which society would suffer were the acts of *de facto* officers declared void would be great, indeed, and in no case would the consequences of declaring the acts of such persons void be more inconvenient, or subject to juster disapproval, than in the case of election officers. To disfranchise and defeat the declared will

of a whole community for no fault of their own or of the candidate on whom their suffrages were bestowed, through the mere omission of a judge or clerk to subscribe his name to the oath, would be an intolerable hardship and wrong."

Blair vs. Barrett (minority report), 36th Cong Report 563, p. 85

Where the election officers were sworn by an officer not authorized to administer oaths, but without fraud, the committee held that "the judges and clerks became, by taking the oath in good faith, public officers *de facto*, for the purpose of conducting the election, and their acts are valid."

Koontz vs. Coffroth, 39th Cong 2 Bart., 144

"In order to give validity to the official acts of an officer of election so far as they affect third parties or the public, and in the absence of fraud, it is only necessary that such officer shall have *color* of authority. It is sufficient if he be an officer *de facto* and not a mere usurper." (Leading case; many authorities cited.)

Barnes vs. Adams, 41st Cong 2 Bart., 765

Where all the officers are not shown to have been sworn, but no harm has resulted, it will not vitiate the election, they being *de facto* officers. And in West Virginia, where it is provided that the fact of taking the oath must either appear on the poll books or be proved to the satisfaction of the commissioners of the county court before they can count the vote of a precinct, and the county commissioners did count the vote of a precinct where the oath was not sufficiently certified on the poll books, it will be presumed that they had satisfied themselves of the fact by other evidence before counting the vote.

Smith vs. Jackson, 51st Cong Rowell, 21

Where oath of loyalty not taken, invalid.

Where neither election officers nor voters took the oath of loyalty prescribed by the convention organizing the provisional government of Missouri the committee unanimously rejected the vote of the precincts.

Lindsay vs. Scott, 38th Cong 1 Bart., 571

Oaths not on file, may not prove that they were not taken.

Where the oaths of the officers of election of a precinct were not on file in the office of the prothonotary, where they were required to be filed, but it appeared that the papers were carelessly kept by the prothonotary, and allowed to be taken from the office by different persons, the committee disregarded the absence of these papers.

Ingersoll vs. Naylor, 26th Cong 1 Bart., 35

Taking of oath irregularly certified.

Where the judges were required to be sworn, and the fact to be certified on the returns in a given form, and the certificate was not in form of law, but the committee were satisfied from it that the judges were in fact sworn, the return was allowed to stand.

Easton vs. Scott, 14th Cong C. and H., 281

Proved to have been in fact sworn; votes counted.

Where precinct returns were rejected by county canvassers on the ground that the judges were not certified to have been sworn, but it appeared from the evidence that they were in fact sworn, the committee unanimously counted the votes.

Miller vs. Thompson, 31st Cong 1 Bart., 119

Taking of oath, etc., not properly certified.

On a *prima facie* case, where "the law in relation to the certifying, signing, and returning with the poll book the evidence of the administering the oath to the officers of the election was wholly disregarded," the committee rejected the returns, but on the case on the merits, it appearing that the officers were in fact sworn, the votes were counted.

Koontz vs. Coffroth, 39th Cong 2 Bart., 32, 142

Oath not certified, returns rejected.

Where the statute required the fact of taking the oath to appear on the poll book, and it did not so appear, the returns were rejected.

Burch vs. Van Horn, 40th Cong 2 Bart., 206

Oath not certified, and return signed by only two out of three officers.

Where there was no evidence that the managers were sworn, and the return was signed by only two out of the three managers, the minority of the committee held that it was incumbent on the contestant to supplement the return with parol evidence, and as he had not done so, rejected the return. This precinct is not mentioned in the majority report.

Sloan vs. Rawls (minority report), 43d Cong......Smith, 177

Oath not subscribed, and returns irregularly forwarded.

Where the managers did not subscribe the oath, and forwarded their returns irregularly, the committee were of the opinion that strict rules of law would require the rejection of the return. It had been rejected by the county managers, but there being no evidence of fraud and some evidence of the correctness of the vote, the committee unanimously counted it.

Sloan vs. Rawls, 43d Cong......Smith, 151, 177

Vote counted.

The committee counted the vote of a precinct which had been rejected by the county canvassers on the ground that one of the judges was not sworn.

Brown vs. Swanson, 55th Cong......Report 1070, p. 2

Does not invalidate election.

The failure of the judges and clerks of election at a precinct to take the oath prescribed by law, if such was the case, did not invalidate the election. The vote can not be affected by the failure of an election officer to perform a duty that is purely ministerial and directory.

Goode vs. Epes, 53d Cong......Report 1952, p. 8

Requirement merely directory.

"It is the opinion of the committee that the statute [of North Carolina] with reference to swearing officers of election is simply directory."

Williams vs. Settle, 53d Cong......Report 337, p. 4

PARTISAN APPOINTMENT OF.

Officers of election not all of the same party; how proved.

Where the law requires the election officers to be appointed from different political parties, the way in which they vote at an election after their appointment is not sufficient evidence of their political character at the time of their appointment.

Blakey vs. Golladay, 40th Cong......2 Bart., 419

Where it is required that the officers of election shall not all be of one party except in certain contingencies the burden of proof is upon the party charging illegality to show that these contingencies did not exist.

Thobe vs. Carlisle, 50th Cong......Mobley, 527

Strong proof of conspiracy.

Where the law is violated by appointing officers of election, all of one political party. "it is in itself a very strong proof of conspiracy and fraud."

Donnelly vs. Washburn (majority report), 46th Cong......1 Ells., 458

Condemned, but election saved by presence of United States supervisors.

Where the officers of election appointed to represent one party were selected because of their illiteracy and incompetency the committee condemned it as a clear abuse of the law, and held that but for the counteracting effect of the United States supervisor's law "we would be strongly inclined to apply a corrective to this manifest abuse of power."

Buchanan vs. Manning, 47th Cong......2 Ells., 295

May be one link in a chain of evidence to show conspiracy.

"The appointment of managers of election, in fairness and common decency, should be made from opposite political parties. A refusal to do so in the face of a statute directing it to be done may in some instances be evidence of fraud, and it might form an important link in the chain of circumstances tending to establish a conspiracy." But in this case the committee were not satisfied, from all the evidence, of the existence of a conspiracy.

Buchanan vs. Manning, 47th Cong. 2 Ells., 297

May shift burden of proof.

"The appointment of illiterate inspectors and commissioners takes away from the return of the election officers that presumption of truth which otherwise it would have, and a party claiming a seat on the return of such officers must show the utmost good faith in the election."

Buchanan vs. Manning (minority report), 47th Cong. 2 Ells., 337

Impairs credit of returns.

Returns are only *prima facie* correct, meaning simply that a rebuttable presumption of law stands behind them. Their credit is greatly impaired where the election is entirely under the control of one party.

English vs. Peelle, 48th Cong. Mobley, 170

May be evidence of conspiracy.

"Where the course is systematically pursued of appointing on the election boards to represent the minority or opposition party persons not indorsed by that party, and as to whose loyalty to the party whose interests they are expected to guard there is a question, or of appointing persons who are unable to read and write, when there would be no difficulty in finding men well qualified in those respects, this ought of itself to be considered evidence of conspiracy to defraud on the part of the election officers."

Threet vs. Clarke, 51st Cong. Rowell, 182

Raises suspicion of conspiracy.

"Where the law provides that each of the two political parties shall have representation on the election board of inspectors it is a provision to prevent dishonest partisans from making false returns; and in such case the appointment of men incompetent to determine whether the return is honest or not to represent the party opposed to the appointing power tends to prove an intent to prevent that watchfulness intended to be secured by the statute, and raises a strong suspicion (if it does not fully prove) of conspiracy to falsify the returns."

McDuffie vs. Turpin, 51st Cong. Rowell, 265

Weakens prima facie force of returns, but standing alone not fatal.

"A statutory provision for allowing opposing parties to have representation on all election boards having charge of the conduct of elections is usually deemed necessary to secure honest results, and when fairly executed in letter and spirit may, as a rule, be relied on, at least so far as counting and returning the vote is involved. A general and willful disregard by the appointing power, either of the letter or spirit of the law, raises a strong presumption of an intent on the part of the appointing officers to afford opportunity for fraud. * * * While the statute does not direct how the appointing bodies shall make selections, its spirit clearly requires that in selecting representatives of the different parties the wishes of those representing the party organization shall be considered, and that the appointees shall be men having the confidence of their political associates. The selection of men to represent a political party on an election board who habitually vote the opposite ticket, who are not trusted in their party, or who are notoriously incompetent, is not a compliance either with the letter or the spirit of the statute. * * * While suspicion attaches to all such precincts, such suspicion is not sufficient to invalidate the return, in the absence of other evidence, but it does have the effect of requiring less evidence to overturn the *prima facie* correctness of the returns."

Hill vs. Catchings, 51st Cong. Rowell, 804

Requirements (in Alabama) directory.

The requirements (in Alabama) for the appointment of election officers from both parties are not mandatory. "In order for the failure to do certain specified acts or the doing of certain prohibited specified acts to be fatal to the validity of the election, the statute must declare such acts or the omission to do such things as fatal to the election." * * * "Nor are statutory provisions relating to elections rendered mandatory by the circumstance that the officers of the election are criminally liable for their violation."

Aldrich vs. Robbins (minority report), 56th Cong Report 327

Evidence of fraud.

In precincts where the county electoral boards had refused to obey the law for giving both parties representation on the precinct election boards the returns showed a result the reverse of the usual and expected vote, and there were many other indications of fraud, the committee threw out the whole vote.

Thorp vs. McKenney, 54th Cong Report 1531

May help establish conspiracy, even under directory statute.

"The provision of law requiring judges of election to be able to read and write and selected from voters known to belong to different political parties is wise and salutary, as evidenced by its being recognized and incorporated in the election laws of all the States which claim to have honest election laws." "This provision might ordinarily be considered as mandatory." But, in Virginia, where it was expressly directory, this fact "never was intended as a shield for fraud," and when the circumstances justify it the general refusal to obey the law may be one of the facts which establish conspiracy.

Thorp vs. McKenney, 54th Cong Report 1531, p. 6

A conspiracy to defraud reasonably inferred.

"It is, of course, possible for a board composed wholly of men of one party to properly and honestly discharge the duties of such board, and the law presumes that their duties were so discharged," but in this case, where the conduct of the officials was generally and grossly unfair, "the presumption of law in their favor is overthrown; and, construing their action in the light of the conduct of the supervisors of registration and Democratic challengers, a conspiracy, involving them all, to defraud the colored voters of their ballots in the interest of the contestee, is reasonably inferred." The vote of a whole city, in which this conspiracy was carried out, was excluded.

Murray vs. Elliott, 54th Cong Report 1567

When deliberate, evidence of fraud.

Where the law for giving both parties representation on the election boards was violated, not by inadvertence but through deliberate partisan design, and there were other circumstances indicating fraud at the polls at which contestant's party had no representation, the committee threw out these polls.

Thorp vs. Epps, 55th Cong Report 428

Prima facie evidence of fraud.

"The appointment on the election boards, to represent one of the opposing parties, of persons not in sympathy with or objectionable to that party, or of persons unable to read and write and without the necessary mental capacity to enable them to serve intelligently, should of itself be regarded as evidence of conspiracy to defraud on the part of the election officials, and that the appointment of such persons was prima facie evidence of fraud and misconduct on the part of those charged with the constitution of these boards and the conduct of the election, where it was possible to appoint competent and well-known representatives of the complaining party to act as judges or inspectors of election." This presumption is still more emphatic when timely and proper application was made for the appointment of proper persons.

Patterson vs. Curmack, 55th Cong Report 895, p. 5

One circumstance showing conspiracy.

The committee held that a conspiracy to control the election of one county by fraud was shown by the organization of the election boards all in the interest of one party, by the conduct of these election boards at the election, and the conduct of the registration officers before the election.

Aldrich vs. Plowman, 55th Cong. Report 284, p. 4

Only regular party committees recognized in Louisiana.

Under the law of Louisiana providing for the representation on the election boards of all parties casting 10 per cent of the vote at the previous election, the committee held that contestant, who was nominated by petition as an Independent Republican candidate, was not deprived of any legal right by the failure to appoint election inspectors from a list of Republicans selected by him, and the appointment of those proposed by the regular Republican committee instead.

Romain vs. Meyer, 55th Cong. Report 1521, p. 3

CHANGE OR DELAY IN APPOINTMENT.**Suspicious, but standing alone not fatal.**

Unwarranted changes in judges of election, made without reason or excuse, only a few days before the election, are suspicious circumstances, but standing alone, and not supported by evidence of fraud at the polls affecting the result of the election, are disregarded, and the certified returns permitted to stand as made.

Langston vs. Venable, 51st Cong. Rowell, 439

Delay in appointment not fatal.

"Delay in appointing commissioners or inspectors does not vitiate an election held by them; otherwise it would be in the power of the board of supervisors to defeat every election by delaying such appointments."

Romain vs. Meyer, 55th Cong. Report 1521, p. 4

PAUPERS (see also Residence).**May vote.**

Paupers have a right to vote unless deprived of that right by statutory enactment.

Koontz vs. Coffroth, 39th Cong. 2 Bart., 145

Persons "employed" in a poorhouse probably not paupers.

The committee held that it was doubtful whether persons "employed" on a poorhouse farm and receiving their board and clothing in lieu of wages could be called paupers. But the minority held that as the compensation for the work was *extra* food, clothing, privileges, etc., these persons were as much paupers as the inmates who did no work.

Le Moyne vs. Farwell, 44th Cong. Smith, 415, 427

One continuously supported in whole or in part out of public funds.

"Upon the question of what constitutes a pauper, there is some disagreement in the authorities, but we think the following may be taken as a fair definition: A pauper is one who is continuously supported in whole or in part out of funds provided by the public authorities for that purpose. One who has been a public charge, and afterwards becomes self-supporting for a sufficient time before the election to show that his ability to support himself is not a mere temporary condition, may legally vote. One who, under temporary misfortune or sickness, receives public aid, but is ordinarily self-supporting, is not a pauper."

Smith vs. Jackson, 51st Cong. Rowell, 28

PETITION.

See NOTICE OF CONTEST.

PLACE OF ELECTION.

See POLLING PLACES.

PLEADINGS.

See NOTICE OF CONTEST.

POLLING PLACES (see also Irregularities, in Place of Election).

Establishment of, in Georgia.

Precincts established in Georgia by the ordinary of a county, in 1868, used at the election of 1868 but not at that of 1870, the latter election being held under a special law providing other precincts, were held to be in legal existence for the election of 1872 and until formally abolished by the ordinary a month after the election.

Sloan vs. Rawls, 43d Cong Smith, 148

The minority held that the precincts had been established for the election of 1868 alone; that in any case the law of 1870 had abolished them by implication, and that the circumstances of the election of 1872 were such as to render the return from these precincts untrustworthy.

Sloan vs. Rawls (minority report), 43d Cong Smith, 171

Not abolished, in Georgia, by removal of county seat.

The law of Georgia provided that the court-house in each county should be a voting place, and that other voting places might be established by the ordinary. The majority of the committee held that a law removing the county seat from one town to another did not necessarily abolish the voting place at the former town. The minority held that the voting place was abolished and that votes cast at it must be rejected.

Sloan vs. Rawls, 43d Cong Smith, 151, 176

When abolished, votes that would have been cast not counted.

Where it was alleged that the contestee had been deprived of votes by the abolition of voting places, leaving large numbers of those who would have voted for him from 35 to 47 miles from the nearest polls, the committee held that votes thus lost to him could not be counted unless the provisions of the enforcement act had been strictly followed, which in this case no one claimed had been done.

Lawrence vs. Sypher, 43d Cong Smith, 342

Removal of, fatal.

Where the voting place of a precinct had been conveniently located on the public road, but it was removed the day before the election to the "negro quarters," about a mile distant, apparently for the purpose of depriving contestant of votes, and the only votes cast were for contestee, the committee excluded the vote of the precinct.

Acklen vs. Durrall, 45th Cong 1 Ells., 131, 183

Where the election was held three-quarters of a mile from the usual place and there was no proof that the voters generally had notice of the change, and it was proved that the registering officer had kept his office closed so as to deprive many voters of registration, and also that he had placed on the list the names of persons of his own party not qualified to vote, the committee held that "while the holding of the election at a different place from that provided by law would not vitiate the poll, provided due notice was given of the change, so that knowledge of the fact

would come to both political parties, yet, in this case, the change without notice, added to the conclusive evidence of the fraudulent acts of the registrar and his deputy, * * * so vitiate the integrity of the poll as to destroy the value of the return and make it impossible to say that the election at this poll was a fair one."

Goodrich vs. Bullock, 51st Cong Rowell, 588

Change of, not fatal.

When the election is held at a different place from that required by law it does not vitiate the election if injury has not resulted and the place of voting was generally understood.

Smith vs. Jackson, 51st Cong Rowell, 24

Where the regular inspectors of election had refused to open the poll, and the inspectors appointed by the voters present under the law, fearing danger, had adjourned the poll to a point three-quarters of a mile distant from the regular polling place, and all the voters had notice of the change, but the partisans of contestee refused to recognize the election or vote, and all the votes cast were for contestant, and the return had been rejected by the county canvassers, the committee counted the votes. The minority refused to count the votes, holding that if the place of voting was changed without proper authority and due notice no voter could be legally bound to take notice of the change, and that an election so held was illegal.

Goodrich vs. Bullock, 51st Cong Rowell, 592, 615

Election in each precinct independent.

"There is no doubt of the power of the House to reject for sufficient reasons the entire poll of an election district. In every precinct the election is a separate and independent one. The machinery for carrying it on is complete in itself. The election of a precinct when conducted and returned according to law is a finished work."

Hurd vs. Romeis (minority report), 49th Cong Mobley, 429

New registration not necessary for new precinct.

Where a new polling place for the Congressional election had been established in a different part of the precinct from the polling place for State officers, a separate registration for the new polling place was not necessary under the South Carolina law.

Smalls vs. Elliott (minority report), 50th Cong Mobley, 720

Law for place of holding elections mandatory.

Where the election was held 1 mile from the place established by law and out of sight of it, the committee sustained the rejection of the returns, even though evidence was introduced to show that the election was otherwise full and fair.

Goode vs. Epes, 53d Cong Report 1952, p. 4

Time of establishment of, in New Orleans.

A new law had gone into effect in the city of New Orleans requiring the redistricting of the city into many small precincts of not over 200 votes each, "the boundaries and precincts to be fixed as above not to be changed within three months prior to any general election." The first redistricting was not entirely accomplished until within one month prior to the election in contest; but the committee held that the three months' limit of the law did not apply to the first establishment of the districts.

Romain vs. Meyer, 55th Cong Report 1521, p. 4

Election at wrong place void.

"There is less latitude allowed in changing the place at which an election is held than in varying the time of opening or closing it, and it is a rule to which there are very few exceptions that an election held at any improper place will be held absolutely void without proof of any fraud or injury."

Patterson vs. Carmack (minority report), 55th Cong Report 895, part 2, p. 2

POLL TAX.

See TAX.

POLYGAMY.**A cause for expulsion.**

The committee, under instructions of the House to inquire into the charges of polygamy against the Delegate from the Territory of Utah, reported that the charges were established and recommended his exclusion. The minority recommended that no action be taken. The House did not consider the reports.

Cannon, 43d Cong......Smith, 259-275

A Territorial Delegate guilty of polygamy may be excluded from his seat by a majority vote.

Cannon vs. Campbell (Mr. Calkins), 47th Cong......2 Ells., 613

Polygamy is not a disqualification for a Member nor for a Delegate unless made so by statute, but it may be a cause for expulsion.

Cannon vs. Campbell (Mr. Ranney), 47th Cong......2 Ells., 646

A disqualification in a Representative from Utah.

The committee held that polygamy was a disqualification in a Representative elected from Utah, both by reason of his violation of the Edmunds law, by reason of his open defiance of the law of the land, and because his election was "an explicit and offensive violation of the understanding by which Utah was admitted as a State."

Roberts, 56th Cong......Report 85, p. 3

Technical bigamy not a disqualification.

Where it was charged that the sitting Delegate had married a second wife before the granting of a valid divorce from his first wife, but "there was no pretense that he undertook to live with two wives at the same time, or to maintain two establishments, or to hold himself out as the husband of two women, your committee therefore were of opinion that no question of ineligibility was raised, and that this case bore not the slightest resemblance to the Roberts case, which was presented as a precedent."

Wilcox, 56th Cong......Report 3001

PRIMA FACIE RIGHT (see also Burden of Proof, and Credentials).**What is.**

"A *prima facie* right must be founded upon and established by *prima facie* evidence, and *prima facie* evidence is that evidence which is sufficient to establish the fact unless rebutted."

Hunt vs. Sheldon (minority report), 41st Cong......2 Bart., 538

Member certified and sworn in, prima facie right concluded.

Where the contestee had been sworn in on the first day of the session, and on the second day a resolution was offered referring all the papers in the case to the Committee on Elections to report on the *prima facie* right, but instead of this resolution a resolution was adopted referring this resolution "with instructions to report on the legal question involved therein," the committee held that they were not empowered to examine other evidence than the certificate, and reported a resolution that in the absence of authority to examine any other evidence the certificate was conclusive of the *prima facie* right.

Garrison vs. Mayo, 48th Cong......Mobley, 53

Returned member entitled to the seat until final decision of the contest.

Where it was shown that the petitioner was elected on the face of all the returns which should have been counted by the governor, and he asked that the sitting member be unseated and he be given the seat pending a contest on the merits of the case, the application was refused.

Easton vs. Scott, 14th Cong......C. and H., 277-279

Candidate holding certificate has a right to the seat until a final determination, even though not elected on the face of the returns.

Where the Territorial board of canvassers in Michigan had received evidence and thrown out certain votes for illegality, thereby giving the seat to a candidate not elected on the face of the returns, they were held to have exceeded their authority; but this should not prejudice the right of either party in the determination of the case. The evidence showing that the votes were in fact illegal, the committee excluded them and recommended that the sitting member retain the seat.

Biddle and Richard vs. Wing, 19th Cong......C. and H., 513

Unsuccessful claimant may contest.

The privilege of contesting has always been given the unsuccessful claimant on a *prima facie* case.

Belknap vs. Richardson, prima facie case, 53d Cong.

The House has a right to stop a member-elect at the threshold.

"Both Houses of Congress have in innumerable instances exercised the right to stop a member-elect at the threshold and refuse to admit him to be sworn in until an investigation has been made as to his right to a seat. In some cases the final right was accorded to the claimant; in many cases it was denied. The question as we view it is always to be answered from the standpoint of expediency and propriety. The inherent right exists of necessity."

Roberts, 56th Cong......Report 85, p. 6

Where governor threw out a forged return candidate certified elected by him admitted.

Where the returns as canvassed by the district canvassers showed a majority for the contestant and he was declared elected by this board, but one of the county returns was subsequently shown to be a forgery, and the return judge was convicted and sentenced for the commission of the forgery, the governor took notice of the fact and issued the certificate of election to the contestee, who had the majority on the original returns. The House admitted the contestee, over objections made in behalf of contestant. When the committee came to decide the case on the merits they declined to consider the question of the propriety of the governor's action, on the ground that the *prima facie* right had already been settled by the action of the House.

Buller vs. Lehman, 37th Cong......1 Bart., 354

Claimant holding governor's certificate admitted.

Mr. Jayne had the certificate of the governor of the Territory, and also the proclamation of the secretary and acting governor. Mr. Todd had a certificate from the secretary that after the time prescribed by law for canvassing the votes another return had been received, which, if counted, would have changed the result. Mr. Jayne was admitted to be sworn in and held the seat pending the contest.

Todd and Jayne, 38th Cong......Report No. 1, 1st sess. 38th Cong.

Returns as canvassed settle prima facie right.

Where the State canvassing board rejected a large number of returns the committee held that "whatever might be the result of a contest involving the validity of these returns and the sufficiency of the reasons assigned for rejecting the parishes which were rejected, the returns are to be received as *prima facie* evidence of the result of the election."

Hunt vs. Sheldon, 41st Cong......2 Bart., 533

Party holding certificate should be seated.

A person having the governor's certificate in due form is entitled, *prima facie*, to the seat.

Colorado case (minority report), 48th Cong......2 Bart., 166

"It is enough for a *prima facie* case if the certificate came from the proper officer of the State and clearly shows that the person claiming under it has been adjudged to be duly elected by the official or board upon whom the law of the State has imposed the duty of ascertaining and declaring the result."

Clark, 42d Cong......Smith, 9

The returned member has the right to hold the seat pending a contest with the person who would have been returned but for a clerical error, even though the fact be admitted by the returned member.

Chalmers vs. Manning (views of Mr. Cook), 48th Cong Mobley, 26

Letter from governor, in absence of certificate, insufficient.

Where the governor of Pennsylvania refused to certify either candidate as elected, but in a letter to the Clerk of the House transmitting certain affidavits he expressed the opinion that these affidavits "indicated the election" of Mr. Covode, and this letter was, with other papers, referred to the committee with instructions to report who, on these papers, appeared to have the *prima facie* right to the seat, the majority of the committee reported that this letter, having been made evidence by the resolution of reference, it established the *prima facie* right of Mr. Covode. The minority held that neither candidate had a *prima facie* right, and the House sustained the minority.

Poster vs. Covode (prima facie case), 41st Cong 1 Bart., 521

Members under charges of disloyalty not sworn in.

Where charges of disloyalty were made against members elect they were not allowed to be sworn in pending an investigation of the charges.

Kentucky members, 40th Cong 2 Bart., 327-370

Where credentials and returns of doubtful authority, neither party sworn in.

Where the authority of a returning board to canvass the returns was doubtful, and the correctness of their returns was "challenged by evidence which shows *probable cause*, abundantly sufficient (certainly more so than common fame, upon which the House might act) to put the House upon inquiry before these returns are accepted as conclusive," the majority of the committee recommended, and the House ordered, that the seat remain vacant until further testimony could be taken. The minority held that the returns were not impeached and ought to be accepted.

Sheridan vs. Pinchback, 43d Cong Smith, 200-206, 229-232

Members elected on face of the returns seated pending contest in spite of the certificate of election.

Where one set of claimants presented regular certificates of election and another set presented certificates from the secretary of state that they had received the largest number of votes, the House at first refused to admit either set of claimants, but afterwards admitted the contesting claimants (the Committee on Elections having reported that they received the largest number of votes cast) to hold the seats without prejudice to the final right of the commissioned claimants. The investigation on the merits having shown that the members thus admitted received the legal majority, their titles were confirmed.

New Jersey case, 26th Cong 1 Bart., 19

Where a Territorial governor gave the certificate to the person who appeared not to have received the highest number of votes, the committee held that a certificate so issued, though regular in form, did not confer a *prima facie* right to the seat. The House went further than the committee and seated the opposing candidate.

Colorado case, 40th Cong 2 Bart., 164

Candidate elected on face of county returns admitted.

Where the regularly appointed return judges of four of the five counties in the district assembled and canvassed the vote of the four counties and certified the result thereon, but the governor refused to proclaim the election of either candidate, the committee were inclined to the belief that the certificate of the four return judges gave sufficient *prima facie* title to the seat and held that it was certainly sufficient *prima facie* evidence of the vote of the four counties, and as the vote of the fifth county was undisputed and would not change the result, they recommended that the candidate thus shown to have the majority be sworn in. The minority went behind these returns to the precinct returns and arrived at a different result, but the House sustained the majority.

Koontz vs. Coffroth (prima facie case), 39th Cong 2 Bart., 27

In case of conflicting certificates.

Contestee had a certificate that he had been elected by a majority of the votes; contestant a certificate that he had been elected by a majority of the *legal* votes. Both certificates bore the same date, but it was evident from all the circumstances that the certificate of contestant must have been issued long after that date. There was also a "statement" from the board of canvassers showing that contestee had received the highest number of votes, but claiming that, on account of his ineligibility, contestant ought to be seated. The minority held that the *prima facie* title was in contestee, and, he being ineligible, they recommended that neither party be sworn in. The House sustained the minority.

Wallace vs. Simpson (minority report), 41st Cong 2 Bart., 557

Certificate not based on canvass of votes of no effect.

Where a candidate presented a certificate in due form, signed by the legal governor, but conceded that at the time the certificate was issued the returns had never been canvassed, the committee unanimously held that the certificate did not establish a *prima facie* right and proceeded to inquire into the case on the merits.

Sheridan vs. Pinchback, 43d Cong Smith, 198, 227

QUALIFICATIONS OF ELECTORS.

(See also **ILLEGAL VOTES; RESIDENCE; AGREEMENT; TAX; INDIANS.**)

Freehold title to land in Virginia.

Under the Virginia law permitting only freeholders of six months' standing to vote, it is sufficient if a freehold title be obtained at any time before the election, if there has been six months' actual possession.

Taliaferro vs. Hungerford (2d contest), 13th Cong C. and H., 253

Bassett vs. Bayley, 13th Cong C. and H., 258

Under the law of Virginia requiring a freehold estate as a qualification for voting, all votes given by virtue of title bonds not conveying a legal freehold estate should be rejected.

Porterfield vs. McCoy, 14th Cong C. and H., 270

"Persons possessed of a mere equitable interest in lands or holding a bond for a deed are not to be deemed 'possessed of an estate of freehold in land,' so as to entitle them to vote" under the constitution of Virginia.

Draper vs. Johnston, 22d Cong C. and H., 711

Definitions of "Housekeepers."

Under the provisions of the constitution of Virginia granting the right of suffrage to "housekeepers and heads of families," held: (1) "That unmarried persons who are living with their mothers or with younger brothers and sisters, in the absence or after the death of their father, taking charge of and providing for the family, are to be deemed 'housekeepers and heads of families' within the meaning of the constitution in Virginia."

(2) "That where the voter keeps house, having a woman living with him as his wife, he is the 'head of a family' within the meaning of the constitution, and that the committee will not inquire whether he is legally married or not."

Draper vs. Johnston, 22d Cong C. and H., 711

Residence.

If the State law requires that electors shall vote only in counties where they reside and at designated places, votes given at other places should not be counted.

Miller vs. Thompson, 31st Cong 1 Bart., 121

Must vote in county where qualified, in Virginia.

"Where the land of the elector upon which he claims the right to vote lies in a different county, or where the other required qualifications are in a different county from that in which the elector offers his vote, such vote ought to be rejected, the constitution giving the right only in the county 'wherein such land shall lie or such housekeeper and head of a family shall live.'"

Draper vs. Johnston, 22d Cong C. and H., 711

By land, votes must be cast in county where land lies.

Under the law of Virginia the votes of freeholders residing out of the district, but having a competent estate within it, were legal, but all votes not given in the county where the land upon which they were given was situate were illegal, even when they had been admitted by the consent of parties.

Porterfield vs. McCoy, 14th CongC. and H., 269

If by residence, gives right only in county of residence.

The constitution of Tennessee provided that "every freeman of the age of 21 years and upward, possessing a freehold in the county wherein he may vote, and being an inhabitant of this State, and every freeman being an inhabitant of any one county in the State six months immediately preceding the election, shall be entitled to vote for members of the general assembly for the county in which he shall reside." The committee held that the branch of the article which prescribed the second qualification of the voter restricted him to vote in the county wherein he had been an inhabitant six months immediately preceding the election and permitted him to vote nowhere else.

Kelly vs. Harris, 13th CongC. and H., 262

By tax paying, in Virginia.

Under the constitution of Virginia giving the right to vote to those who for twelve months have been housekeepers and heads of families, "who shall have been assessed with a part of the revenue of the Commonwealth within the preceding year, and actually paid the same," held, by a majority of the committee, "that where taxable property is owned and possessed by the son and is assessed in the name of the father, but the tax is actually paid by the son, he, having all the other qualifications required, is entitled to vote, but that if the property is both assessed to and paid by the father, the vote is to be rejected."

Draper vs. Johnston, 22d CongC. and H., 711

Under the above provision of the constitution, held also "that where a revenue tax is duly assessed and the sheriff has paid the tax himself, and has not returned the party delinquent, as he has the right to do if he is insolvent, or the sheriff is not able to collect the tax, that this is to be deemed a payment by the party, so as to entitle him to vote."

Draper vs. Johnston, 22d CongC. and H., 711

Under the above provision, held also "that the assessment and payment of taxes required by the laws of Virginia are to be for the year preceding the election, and not for the same year in which the election is held."

Draper vs. Johnston, 22d CongC. and H., 712

Persons having a visible mixture of African blood not white.

The constitution of Ohio required, among other things, that the qualified voters should be "white male citizens of the United States." The committee "are clearly of opinion that men of the African race, of mixed negro blood, having a distinct and visible admixture of African blood, are not white within the meaning of the constitution, and they have no doubt that they are comprehended within the spirit and letter of the decision of the Supreme Court of the United States, in the case of *Dred Scott vs. Sanford*, 19 Howard, 393, and therefore not citizens of the United States. Any other doctrine would entitle them to seats upon the floor as members of this House."

Vallandigham vs. Campbell, 35th Cong1 Bart., 233

Deserters disqualified.

The votes of deserters were rejected.

McKee vs. Young, 40th Cong2 Bart., 461

The fact of desertion a disqualification, even without conviction.

Under the law of Ohio providing that voters must be citizens of the United States, and the law of the United States providing that all deserters not reporting before a certain time should be considered as having forfeited their citizenship, deserters were not qualified voters in Ohio, and the disqualification consisted in the fact of desertion and not in conviction of desertion. The officers of election or the House

might judge of this fact, just as they might judge of the fact of lunacy or nonresidence, or as the House might reject votes for bribery where there had been no conviction. Under this principle the votes of all persons proved to have been deserters were rejected by the committee.

Delano vs. Morgan, 40th Cong 2 Bart., 169

Rebel soldiers, in Kentucky, disqualified.

The committee first held that as there was no statute of Kentucky disfranchising returned rebel soldiers their votes could not be rejected. Afterwards, the case having been recommitted to the committee, it was held that rebel soldiers from Kentucky, having surrendered under parole, and having been expressly excepted from the President's proclamation of amnesty, were still prisoners of war, unpardoned, and that they had no more right to vote than armed enemies in the field. The report embodying the latter decision was sustained by the House.

McKee vs. Young, 40th Cong 2 Bart., 422-461

Returned rebel soldiers in Kentucky not permanently disqualified.

In the absence of any law to the contrary, ex-rebel soldiers had a right to vote in Kentucky. Their *status* as paroled prisoners of war, on account of which their votes had been rejected in a former case, had certainly ceased to exist three years after the war had closed.

Barnes vs. Adams, 41st Cong 2 Bart., 762

Voter once registered, in Arkansas, qualified.

Under the constitution and laws of Arkansas in force in 1872 a person possessing a registration certificate, and whose name was on the registry list when the registration was closed by the board of review, was a legal voter, and no action of the board or any member of the board, or of any other power, could invalidate his right after that time.

Bell vs. Snyder, 43d Cong Smith, 250

Ability to read and write, in Massachusetts.

"We think that it is a reasonable regulation that the officers in charge of registration should see to it that persons offering to vote possess the necessary qualifications; and we can not see that because persons not qualified to vote have been allowed to violate the law on one or more occasions they can be heard to plead such violation as a bar to the enforcement of the law against them thereafter. Whenever the disqualification of voters appears it is clearly the duty of the registration officers to refuse to register them. If the registration officers refuse in an illegal way to register this class of persons or give a wrong reason for their refusal, still this would give such persons no right to vote while they admit that they are clearly disqualified under the constitution. We therefore hold that all persons who could not read and write, as required by the constitution of Massachusetts, were not legal voters, and can not be heard to complain of any technical violation of law by the registration officers whereby they were deprived of registration, while admitting at the same time that they did not possess the constitutional qualifications of electors."

Boynston vs. Loring, 46th Cong 1 Ells., 350

One whose faculties are enfeebled by age is not an idiot.

"The vote of a man otherwise qualified, who is neither a lunatic nor an idiot, but whose faculties are simply greatly enfeebled by age, ought not to be rejected." (Sinks vs. Reese, 19 Ohio St., 307.)

Campbell vs. Morey, 48th Cong Mobley, 227

Person of unsound mind.

"A person having sufficient intelligence to make a valid will, or to bind himself by ordinary contracts, or to be criminally responsible for his acts, is a person of sound mind. One whose will would be held invalid for no other reason than mental incapacity is a person of unsound mind.

"In the record we find the oft-recurring question, 'Was the voter in your opinion a man of unsound mind?' put to a nonprofessional witness without any attempt to define what was meant by unsoundness of mind. To the answer to such question, unaccompanied by any explanation of what the witness understood by the term, we attach very little weight. The condition of the voter, his acts and speech, how

he is regarded by those who know him as to his competency to contract, judicial determinations, and the like evidence has been given due weight. The term 'idiot' is so well understood that the statement of a witness that a person is an idiot is given more weight, as being the statement of a fact within the knowledge of the witness, and not a mere opinion."

Smith vs. Jackson, 51st Cong Rowell, 28

"Soldiers" not necessarily disqualified.

The designation of certain voters by witnesses as "soldiers" is not sufficient without further proof to show the votes illegal.

Botkin vs. Maginnis, 48th Cong Mobley, 378

QUALIFICATIONS OF REPRESENTATIVES. (See also Delegate, Inhabitant, Ineligibility, Citizenship.)

May be restricted to one county of a district.

The State of Delaware being entitled to one Representative in Congress, it was provided by the statute that every person offering to vote should "deliver in writing, on one piece of paper, the names of two persons, inhabitants of the State, one of whom at least should not be an inhabitant of the same county with himself." Held, that the law is constitutional, and that the ballots containing only one name and those containing the names of two persons, inhabitants of the county in which the ballots were cast, should be rejected; but those containing the names of two persons, both inhabitants of the same county but of a different county from the one in which the ballots were cast, should be counted.

Latimer vs. Patton, 3d Cong C. and H., 69

States can not superadd to those prescribed by the Constitution.

The States can not superadd qualifications for membership in Congress to those fixed by the Constitution. A State law requiring that in a district entitled to send two Representatives one should be a resident of the city and the other of the county held by the committee to be unconstitutional. The House avoided a direct decision.

Barney vs. McCreery, 10th Cong C. and H., 167

The States have no power to prescribe qualifications for Representatives in Congress additional to those prescribed by the Constitution. "By the Constitution the people have the right to choose as Representative any person having only the qualifications therein mentioned, without superadding thereto any additional qualifications whatever. A power to add new qualifications is certainly equivalent to a power to vary or change them. An additional qualification imposed by State authority would necessarily disqualify any person who had only the qualifications prescribed by the Federal Constitution."

Although the constitution of Illinois declared that all votes cast for the judges elected to the supreme or circuit courts, for any other office within the term for which they were elected or one year thereafter, should be void, the House held that persons clearly coming within this disqualification were elected.

Turney vs. Marshall and Fouke vs. Trumbull, 34th Cong 1 Bart., 167-169

The States have no power to superadd to the qualifications prescribed by the Constitution of the United States for a Representative in Congress.

Wood vs. Peters, 48th Cong Mobley, 80

Neither States nor Congress can superadd qualifications.

If the States have no power to superadd qualifications for Representatives in Congress to those prescribed by the Constitution, it is equally clear that Congress possesses no such power, and the "test-oath" act of July 2, 1862, being in effect the requirement of an additional qualification, is unconstitutional.

McKee vs. Young (minority report), 40th Cong 2 Bart., 450

States have power to superadd.

The enumeration of certain negative qualifications for Representatives in Congress in the Constitution of the United States does not exclude the requirement of other qualifications. The right to require additional qualifications is among the reserved rights of the States.

Wood vs. Peters (Mr. Bennett), 48th Cong Mobley, 82

The House has the right to exclude a member-elect for other than the constitutional disqualifications.

The House has the right to exclude a member-elect for polygamy, insanity, disloyalty, or other obvious disqualification, without permitting him to be sworn in. It has no right to expel him except for causes connected with his membership as such.

Roberts, 56th Cong. Report, 85

The qualifications enumerated in the Constitution are exclusive.

The qualifications of Representatives enumerated in the Constitution are exclusive, and can not be added to by law or by the action of the House. The House has the power to exclude any person, with or without reason, and no tribunal can review its action, but it has no right to do so.

Roberts (minority report), 56th Cong. Report 85, part 2

A member of Congress is an "officer."

A member of Congress is an "officer" within the meaning of the Constitution.

Roberts, 56th Cong. Report 85, p. 36

He is not such an officer.

Roberts (minority report), 56th Cong. Report 85, part 2, p. 65

Seat vacated by acceptance of disqualifying office.

The acceptance of any office under the United States by a member after he has taken his seat operates a forfeiture of the seat. The seat of a member who had accepted the office of major of militia in the District of Columbia was vacated by a unanimous yea-and-may vote.

Van Ness, 7th Cong. C. and H., 122

Holding any office under the United States is incompatible with membership in the House, whether the duties of the office be exercised or not.

Hammond vs. Herrick, 15th Cong. C. and H., 289

Disqualifying office does not disqualify if resigned before the beginning of the first session.

A member-elect who continued to hold an office under the United States after election and after the March 4 on which the previous Congress expired, but resigned it in November before taking his seat, held not to have forfeited his membership.

Hammond vs. Herrick, 15th Cong. C. and H., 286

A postmaster elected to Congress, continuing to hold his office after election and after the March 4 on which the previous Congress expired, but resigning before taking his seat, held not to have forfeited his seat in Congress.

Earle, 15th Cong. C. and H., 314

Disqualifying office can not be held beyond the beginning of the first session of the Congress.

"When the time arrives at which the duties of two incompatible offices are by law to be discharged, a man at liberty to choose between the two as effectually declines one not entered upon by continuing in the one already held as he would vacate the former if he did enter upon the latter." A Representative-elect may hold an incompatible office subsequent to his election, and subsequent to the 4th of March on which the previous Congress ceases to exist, but at the beginning of the first session of the Congress to which he is elected he must choose between the two offices, and if he continues to hold his former office after the beginning of the session he is held to have declined his election to Congress and can not afterwards qualify as a member.

Schenck and Blair, 38th Cong. Report No. 110, 1st sess., 38th Cong., p. 10

Where disqualifying office has practically expired by limitation a formal resignation not necessary.

A member of Congress who had held the office of principal assessor of taxes under the direct-tax law and had never resigned his office was permitted to retain his seat in Congress on the ground that the duties of the office had ceased and the law under which it was created had expired before he took his seat, and a formal resignation was hence not necessary.

Mumford, 15th Cong. C. and H., 316

Where contestant had been employed as "special assistant" to a United States district attorney, but the special work for which he was retained had been completed before the beginning of the session of Congress, the committee, without deciding whether or not the position was an "office" within the meaning of the Constitution, held that as the connection of the contestant with the position had practically ceased, no resignation was necessary, and contestant was not disqualified as a member of Congress. Mr. Ranney, and those signing a report made by him, held that the position was not an office, and also called attention to the fact that a contestant was not a member of Congress. Mr. Davis, in a minority report, held that the position was a disqualifying office, and that contestant not having resigned it until after the opening of the session of Congress, he ought not to be admitted to his seat.

Chalmers vs. Manning, 48th Cong......Mobley, 35-58

Petitioner's right not waived by the acceptance of an incompatible office if resigned before beginning of session of Congress.

The petitioner claimed to have been elected to Congress in September, 1828, for the term beginning March 4, 1829. In January, 1829, he accepted a State office, for which a member of Congress was disqualified by the State constitution, for a term which would have extended beyond March 4, 1829; but in February he resigned the office on account of sickness in his family. He was held not to have waived any rights under his claimed election to Congress.

Washburn vs. Ripley, 21st Cong......C. and H., 682

Acceptance of disqualifying office by contestant destroys his right to the seat.

Contestant, on the same day on which he claimed to have been elected to Congress, was elected to the legislature of South Carolina; he took his seat and served his term. Before the determination of the contest he was elected to and held the office of sheriff. Both these offices were incompatible, by nature and by the constitution of South Carolina, with the office of Representative in Congress, and the committee refused to award the seat to contestant, on this ground among others.

Bowen vs. De Large, 42d Cong......Smith, 100

Whether acceptance of seat in Congress operates as resignation of disqualifying office.

It was contended by the sitting member that a person holding an office under the United States who accepts the office of member of Congress by qualifying and performing its duties, should be held to have vacated his former office without a formal resignation, and be permitted to retain the latter. But the committee seems not to have sustained the point.

Mumford, 15th Cong......C. and H., 318

Acceptance of disqualifying office a resignation of former office.

"That the acceptance by the same person of an office incompatible with another held by him is a virtual resignation or forfeiture of the office first held is too plain a proposition to need illustration. It results from the presumption that no man can intend, as well as from the policy that no man shall be permitted, to hold a trust the duties of which he has disqualified himself from performing."

Byington vs. Vandever, 37th Cong......1 Bart., 397

"The acceptance and entering upon the discharge of the duties of an office which, from the nature of its duties, or from express legal or constitutional prohibition, is incompatible with another previously held, vacates the former office from the time of such acceptance and entering upon the duties assigned to the latter office. And, consequently, when a person elected to Congress accepts that office, or qualifies and enters upon the discharge of its duties, he vacates or forfeits any office he may then hold under the United States. And when any member of Congress, after he has qualified or entered upon the discharge of his duties as such member, accepts or enters upon the discharge of the duties of 'any office under the United States,' he *ipso facto* vacates or forfeits his seat as a member of Congress."

Schenck and Blair, 38th Cong......Report No. 110, 1st sess., 38th Cong., p. 9

Acceptance of commission in the Army vacates seat.

The office of colonel in the Volunteer Army (in the Mexican war) held to be incompatible with that of Representative in Congress and that the acceptance of the former vacates the latter.

Baker and Yell, 29th Cong......1 Bart., 92

The acceptance of an office in the military service of the United States was held to vacate a seat in Congress, even though the commission of the officer styled him an officer in the "militia of Iowa." The committee were of opinion that the volunteer army was part of the Army of the United States, and its officers officers of the United States.

Byington vs. Vandever, 37th Cong 1 Bart., 396

British pensioner eligible.

A native American who had been an officer in the British army during the Revolution, and had drawn half pay up to within six months of his election to Congress, when he had renounced it, but who had never taken the oath of allegiance to Great Britain, and had held office and taken the required oaths in Maryland, held to be eligible to Congress.

Key, 10th Cong C. and H., 231

Inhabitaney.

A person having moved into a State two weeks before the election, announcing his intention to make it his permanent residence, but intending to spend his winters at his former residence in the District of Columbia, held to be an inhabitant of the State and eligible to Congress.

Key, 10th Cong C. and H., 224

Employment of an attorney in United States case not a disqualifying office.

Where an attorney is employed or retained by the Attorney-General to assist in a given case or cases, and for a stipulated compensation, it does not make him an officer of the United States so as to disqualify him from holding a seat in Congress.

Massey vs. Wise, 48th Cong Mobley, 367

"Special assistant to the district attorney" a disqualifying office.

The office of "special assistant to the district attorney" of the United States is an office of the United States within the meaning of the Constitution, and disqualifies from holding the office of member of Congress.

Massey vs. Wise (minority report), 48th Cong Mobley, 371

Disloyalty a disqualification.

A candidate who had sympathized with the rebellion and had aided it by feeding rebel soldiers, pointing out the hiding place of a Union soldier and advising his arrest, etc., was held not to be entitled to be sworn in.

McKee vs. Young, 40th Cong 2 Bart., 422

Where one claimant had been the editor of a disloyal newspaper during the war and the other had served as an ensign in the rebel army, the committee held that neither of them was entitled to be sworn in.

Christy vs. Wimpy, 40th Cong 2 Bart., 465

Where the disloyalty of contestee was shown by a letter published by him in a newspaper, at the beginning of the war, it was held that he was not entitled to be sworn in.

Smith vs. Brown, 40th Cong 2 Bart., 395

A really loyal person eligible, though not technically within the fourteenth amendment.

Where contestee had done acts in violation of the letter but not of the spirit of the fourteenth amendment, and it appeared that he had been really loyal throughout the war, he was held to be eligible.

Tucker vs. Booker, 41st Cong 2 Bart., 772

Disloyal acts prior to complete annexation of Hawaii overlooked.

Where it was charged that, after the annexation of Hawaii but before Congress had provided a system of government, the sitting Delegate (who had been of the Royalist party) was guilty of acts disloyal to the United States, the committee said, "We do not think that the conduct of a native of the Hawaiian Islands a year or more prior to the adoption of that organic act, however improper it may have been, abstractly viewed, ought to deprive the Hawaiian people of the representative whom they have solemnly sent."

Wilcox, 56th Cong Report 3001

Polygamy a disqualification.

Where a member was duly elected, duly returned, and had all the constitutional qualifications, but was a polygamist, the House vacated the seat by the following resolution: "*Resolved*, That under the facts and circumstances of this case, Brigham H. Roberts, Representative-elect from the State of Utah, ought not to have or hold a seat in the House of Representatives, and that the seat to which he was elected is hereby declared vacant."

Roberts, 56th Cong Report 85, p. 52

REBUTTAL.

See EVIDENCE in Chief in Time for Rebuttal.

RECOUNT.

Application for recount should show some probability of fraud or error.

Where contestant had made an unsuccessful effort to procure a recount of the ballots within the sixty days, and applied for an order of the House to send for the ballot boxes and recount the votes, "the committee were of opinion that such an application should be founded upon some proof sufficient, at least, to raise a presumption of mistake, irregularity, or fraud in the original count, and ought not to be granted upon the mere suggestion of possible error." * * * "To adopt a rule that the ballot boxes should be opened upon the mere request of the defeated candidate would occasion more fraud than it could possibly expose."

Kline vs. Myers, 38th Cong 1 Bart., 574

In West Virginia demand need not be made on day of first count.

Under the statute of West Virginia providing for a recount on the demand of either party this demand need not be made on the day of the announcement of the result of the first count. The governor of West Virginia erred in refusing to count the returns based on the result of a recount legally had.

Smith vs. Jackson, 51st Cong Rowell, 15

Can not be made in Pennsylvania by the officer taking testimony.

Under the law of Pennsylvania permitting the ballot boxes to be opened only upon oath as to the facts expected to be shown by them, and by a tribunal authorized to try the merits of the election, the minority (whose report was sustained by the House) held that the magistrate taking testimony "was not a person nor a tribunal authorized to try the merits of the election and had no authority under the law of Pennsylvania or of Congress to order those boxes to be broken open. In the opinion of the undersigned, the objection of the sitting member to the opening of these boxes was well taken, and if that objection had not been waived at the hearing, the testimony as to the recount should have been overruled."

Buller vs. Lehman (minority report), 37th Cong 1 Bart., 361

Commissioner taking testimony authorized to require production of ballots.

Where the contestant, acting under the impression that the language of the statute "to answer the call of any person or tribunal authorized to try the merits of such election" did not authorize the officer taking depositions to require the production of the ballots, had called the voters instead to testify how they voted, the committee said: "In the opinion of the committee the contestant would have found ample authority for the production of the ballots in sections 122 and 123 of the Revised Statutes of the United States. In section 123 full power is given to the officer engaged in taking depositions in a contested election case in the House of Representatives 'to require the production of papers,' and if 'any person refuse or neglect to produce and deliver up any paper or papers in his possession pertaining to the election' he is made liable to heavy penalties. The ballots were papers pertaining to the election."

Greeny vs. Scull, 52d Cong Stofer, 157

The notary has a right to require production of ballots.

Under the Federal statute for taking testimony in election cases the notary has the right to require the production of the ballots, even under a statute (of Illinois) permitting the ballots to be opened only in open court or in open session of the body trying the contest. It is obviously impossible to open the ballots in open session of the House, and the notary fully represents the House and constitutes a tribunal for the purpose of reducing to written form such evidence as the ballots may contain.

Rinaker vs. Downing, 54th Cong Report 1400, p. 8

The Constitution and the statute [for taking testimony] enacted in pursuance thereto are the supreme law of the land, and under this law the ballots can be required to be produced in a Congressional contested election case, anything in the constitution or laws of a State to the contrary notwithstanding. A State court would have been under obligations to compel the production of the ballots under the Federal law.

Van Horn vs. Tarsney, 54th Cong Report 355, part 1, p. 17

Right not enforceable by State courts.

The minority held that while Congress itself could not be prevented by State laws from ascertaining the result, "we do not agree with the majority that any court in the land has power, in aid of that Congressional prerogative, to compel officers * * * contrary to a State law to exhibit ballots * * * to any officer or commissioner other than a duly authorized representative of either of the Houses of Congress."

Van Horn vs. Tarsney (minority report), 54th Cong Report 355, part 3, p. 5

Not to be received where ballots could have been tampered with.

Where the evidence showed a possibility that the ballots might have been tampered with, the minority held that no recount could be received.

Archer vs. Allen (minority report), 34th Cong 1 Bart., 176

Where ballot boxes were kept by the official custodians, but in such a manner as to expose them to the danger of being tampered with, and there were indications that they were tampered with, the committee unanimously refused to receive the results of a recount.

Kline vs. Verree, 37th Cong 1 Bart., 384

Rejected, where ballots improperly kept and not legally in existence.

Where the ballots recounted had no legal existence, were not recounted by the full board of inspectors, and had not been in legal custody nor kept under effective precaution, the committee rejected the recounts, holding that under the New York law for the destruction of ballots there could be no legal recount and that in any case no confidence could be placed in a recount made under such circumstances.

Noyes vs. Rockwell, 52d Cong Stofer, 28-30

Ballots must be the same and in the same condition.

It is well settled that before resort can be had to the ballots as means of proof absolute proof must be made that the ballots offered are the identical ballots cast at the election; that they had been safely kept as required by law; that they are in the same condition they were when cast; that they had not been tampered with, and that no opportunity had been had to tamper with them. The burden of making this preliminary proof rests on the party who seeks to use the ballots as evidence.

English vs. Hilborn, 53d Cong Report 614, p. 4

Ballots must be so kept as to rebut a presumption of being tampered with.

In order to command confidence in a recount "it is necessary for the contestant, first, to establish the identity of the ballot boxes; and, secondly, to show that those boxes had been so kept as to rebut any reasonable presumption that they had been tampered with."

Butler vs. Lehman (minority report, sustained by House), 37th Cong 1 Bart., 358

Identity and integrity of ballots must be shown.

"The law regards with jealousy and suspicion recounts of ballots and is slow to sanction any change from results originally declared to results effected by such recounts. The rules of law governing recounts of ballots are plain and positive. Before courts or legislative bodies will give weight to results of recounts of ballots it must be shown absolutely that the ballot boxes containing such ballots had been safely kept; that the ballots were undoubtedly the identical ballots cast at the election; and when these facts are established beyond all reasonable doubt, then full force and effect are given to the developments of the recount." In this case the committee found the evidence sufficient and accepted the results of recounts, which changed the result of the election.

Acklen vs. Darrall, 45th Cong......1 Ells., 132

"The temptation to tamper with and change the ballots after an election is so great, especially when the election is close and a slight change will elect the one and defeat the other candidate, that courts and the House have uniformly required the party offering the ballots to overcome the official count made at the time of the election to show that the ballots have been kept strictly as required by law. Upon the person offering the ballots is cast the burden of showing that the ballots offered for recount are the identical ones cast at the election and have been in no way tampered with or changed."

Wallace vs. McKinley (minority report) 48th CongMobley, 210

The returns of election officers are *prima facie* correct, and a recount showing a different result can not be regarded unless it affirmatively appears that the ballots recounted are the same as those originally counted, and in the same condition.

Atkinson vs. Pendleton, 51st CongRowell, 47

In order to justify a recount it ought to appear that the statutory requirements have been complied with "or clearly shown that the failure to comply therewith has resulted in no injury. If proper care is not taken to so preserve the ballots that they may not be changed they will always be the subject of a natural suspicion, and when a material difference appears between the original count and the recount the weight to be given to the recount must depend wholly upon the methods used in preserving the ballots free from suspicion or opportunity to do wrong. In the conflict between the first and second count it is evident that the one or the other does not show the true result. If every opportunity to change the ballots has been prevented, and if the law in relation to a recount has been complied with, the recount becomes entitled to the greater credit and should prevail. But if, on the other hand, the ballots have been so kept that they may be readily changed, our observation upon this committee would hardly justify us in indulging in the conclusion presumptive that no one had been found wicked enough to make the change."

McGinnis vs. Alderson, 51st CongRowell, 636

Ballots must be shown to have been safely kept.

"In order to sustain a recount the parties seeking the benefit of it must prove conclusively that between the time of the first and second count there was no opportunity given for tampering with the ballots. It is not in this case for the contestant to show that the ballots might have been tampered with, but the contestee, who relies upon the recount, must establish affirmatively that the ballots had been safely kept, and that they had not been exposed to the public or handled by unauthorized persons."

Dean vs. Field, 45th Cong1 Ells., 212

Must be honest, fair, and correct.

"Recounts to be of value must be honest, fair, and correct. It must be shown that the ballots were never out of the custody to which the law assigned them, and that they must be free from the imputation that they could have been tampered with by the party claiming under the recount."

English vs. Peelle, 48th CongMobley, 170

Must have been conducted as carefully as the original count.

The House does not "favor the setting aside of official and formal counts, made with all the safeguards required by law, on evidence only of subsequent informal and unofficial counts without such safeguards." In no instance has a person entitled to the seat by an official count been deprived of it by a subsequent unofficial count. "On principle it would seem that if such a thing were, in the absence of fraud in the official count, in any case admissible, it should be permitted only when the ballot boxes had been so kept as to be conclusive of the identity of the ballots, and when the subsequent count was made with safeguards equivalent to those provided by law. In the absence of either of these conditions, the proof, as mere matter of fact and without reference to statutory rules, would be less reliable and therefore insufficient."

Gooding vs. Wilson, 42d Cong Smith, 79

In Massachusetts, can be made by board of aldermen only when law strictly followed.

A statute providing that the board of aldermen, or a committee of their number, may examine the ballots and "determine the questions raised," on the presentation of a petition of 10 qualified electors stating that they have reason to believe that the original returns are erroneous "and specifying wherein they believe them to be in error," confers upon the board of aldermen, or their committee, a special jurisdiction, and must be strictly construed, and such board of aldermen can not proceed except in strict accordance with the provisions of the statute. If they assume to act in a manner different from that prescribed by the statute their acts are absolutely void.

A petition stating that the petitioners believe the returns to be in error in that there were more votes counted for one candidate and less for the other than were cast for him does not sufficiently "specify wherein they believe them to be in error," and confers no jurisdiction. Such a statute does not make the board of aldermen a general returning board, and does not contemplate a general policy of recounting the ballots, or that a recount shall be granted merely because the vote is close. And if the ballots are so recounted all the proceedings and the certification of the result must be strictly in the form prescribed by the statute, otherwise the original count made and returned by the precinct officers must stand.

The minority held that the petitions were sufficiently specific to confer jurisdiction; that the law contemplated that the count made by the aldermen should prevail over the original count, and, there being no evidence going behind the returns to show the correctness or incorrectness of either count, the second count should stand.

Dean vs. Field, 45th Cong 1 Ells., 190-223

Where ballots exposed to danger of tampering, recount not accepted.

Where the ballot boxes had been privately opened, in some cases two or three times, and the ballots handled and counted by a paid agent of contestant, and the boxes had been otherwise exposed to the danger of being tampered with, the minority held that no valid recount of such ballots could be made.

Frederick vs. Wilson (minority report), 48th Cong Mobley, 406, 419

Privately made, without due precautions, not considered.

A recount privately made by an unofficial person, where there was no proof of the identity of the ballots and where it affirmatively appeared that they could have been tampered with, was not considered.

Cook vs. Cutts, 47th Cong 2 Ells., 252

Privately made by agent of one of the candidates, not to be accepted.

A recount privately made by an unsworn agent of one of the candidates ought not to be permitted to overturn the sworn returns of the officers of election, especially when no memoranda are presented and the testimony does not attempt to show the vote of either candidate in any precinct or the changes in any precinct, but merely the net result of the recount.

Englisch vs. Peelle (minority report), 48th Cong Mobley, 179

Privately made, accepted where official recount prevented by contestee.

Where contestant had undertaken to have all the ballots recounted, but had been prevented by an injunction issued at the instance of contestee, the committee accepted the result of a private recount of part of the precincts, made by an outsider during a recount of the votes on local officers, on the ground that contestee had made this recount admissible by himself preventing an official recount from being held. But the House agreed with the minority and voted to recommit the case for a recount.

Rinaker vs. Downing, 54th Cong Report 1400

When it showed the election of contestant he was seated.

Where the case had been recommitted to the committee for a recount of the ballots, and the recount conducted under the direction and supervision of the committee showed the election of contestant, the committee reported in his favor.

Rinaker vs. Downing, 54th Cong Report 2247

Votes gained on recount added to vote.

A recount of the ballots having been made, at which contestant gained 131 votes, the committee added that number to his vote.

Booze vs. Rusk, 54th Cong Report 849

A recount of ballots where return discredited, proof aliunde of vote.

Where the ballot box had been taken away over night and counted the next day the committee rejected the return, but accepted a recount of the ballots as proof aliunde of the vote.

The minority held that, as the ballots were the very thing discredited, a count of them was not proof aliunde of the vote.

Pearson vs. Crawford, 56th Cong Report 199

Parol evidence to correct original count.

The tally sheet was kept by an unsworn outsider and was the only actual count made. Two witnesses swore that they watched the tally and that it was 16 votes more than the returns showed. The tally keeper was not called as a witness. The committee counted the extra votes; the minority dissenting.

Martin vs. Lockhart, 54th Cong Report 2002

Accepted to change the result of an election.

Where a recount of the ballots in one precinct, made six months after the election, and during the taking of testimony in the case showed a change of enough votes to overcome the sitting member's returned majority of one vote, and the committee were satisfied that the ballots had not been tampered with, they accepted the result of the recount.

Archer vs. Allen, 34th Cong 1 Bart., 172

Made by ward officers, in Massachusetts, accepted.

Under the statutes of Massachusetts (in force in 1862) the ward officers had a right to make an amended return, to correspond to the truth, within a certain time after the election. This was held to include the right to ascertain the truth by a recount of the ballots, and an amended return, based on a recount made seven days after the election, was held to be legal.

Sleeper vs. Rice, 38th Cong 1 Bart., 476

Where ballots could have been tampered with, but were not, recount received.

Where the ballots had been kept unsealed in a trunk in the attic of the house of the clerk of the ward, and had once been privately recounted by him without untying the packages, but he testified that they had not been tampered with, and the coincidences of the recount with the original tally sheets, after correcting mistakes obvious on the face of the tally sheets, were such as strongly to confirm the recount and to render the correctness of the first count very improbable, the result of the recount was accepted.

Sleeper vs. Rice, 38th Cong 1 Bart., 477

To be received unless ballots shown to have been tampered with.

Where the contestant produced boxes from legal custodians, sealed up and in the same apparent condition as when left with the custodians, the majority (not sustained by the House) held that under these circumstances the burden of proving them to have been tampered with rested upon the contestee, and that it was not enough to show merely a *possibility* of their being tampered with.

Buller vs. Lehman (majority report), 37th Cong. 1 Bart., 357

Made by unauthorized person should be received unless impeached.

Recounts of the ballots made within a few weeks after the election by persons who were unimpeached and credible witnesses, and in the absence of any evidence tending to show that the ballots had been tampered with, should have been received to overthrow the official count made on the evening of the election.

Gooding vs. Wilson (minority report), 42d Cong. Smith, 83

Made by unofficial person accepted if his capacity and veracity shown.

The value of a recount unofficially made by a private individual must turn upon his capacity and veracity. "If these are both established, as much weight should be given to his count as if he had been directed by the court to make it."

English vs. Peelle, 48th Cong. Mobley, 171

Accepted if preponderance of evidence in its favor.

Where it is a question between the original count and a recount the preponderance of evidence must prevail.

English vs. Peelle, 48th Cong. Mobley, 173

Where large changes explained by circumstances, recount accepted.

Where a recount showed a change of over a thousand votes in five precincts, but the seals on the ballot boxes were intact, and it was shown that Republican tickets were in circulation bearing the name of contestant or bearing no name for Congress, and that the judges of election, not being aware of this fact, counted the ballots hastily, crediting to contestee all ballots appearing to be straight Republican tickets, the committee counted the votes according to the recount. The minority held that the evidence was insufficient to show that the ballot boxes had not been tampered with, and that the recount could not be accepted. Part of the minority held that the circulation of the "bogus" tickets at some polls cast doubt upon the accuracy of the first count also, and that neither count should be accepted.

Acklen vs. Darrall, 45th Cong. 1 Ells., 124-189.

Where ballots properly kept, and error in original count probable, recount accepted.

Where (in Iowa) there is no law providing for a recount, the only question before the committee is, Are they the same ballots as cast, and what is the correct count? If the circumstances of the original count indicate error of a certain sort, and the ballots being so kept that they could not have been tampered with, a recount shows such error, it should be accepted.

Frederick vs. Wilson, 48th Cong. Mobley, 403

Where original count fraudulent, recount accepted.

Where the original count was tainted with fraud, the result of a recount may be accepted in lieu of throwing out the poll.

Sullivan vs. Felton, 50th Cong. Mobley, 751

Where identity of ballots proved, recount accepted.

The result of a recount of the ballots conducted according to the State law was unanimously accepted by the committee, though the majority expressed some doubt as to the sufficiency of the evidence showing the identity of the ballots. The minority held that the identity of the ballots was conclusively proved, and that they were the best evidence of the vote.

Mudd vs. Compton, 51st Cong. Rowell, 155, 164

REJECTED VOTES.

See VOTES, ILLEGALLY REJECTED.

REGISTRATION.

Required proof of qualification not presented by nonregistered voters. *See* Illegal votes, required proof of qualification not presented at the polls.

May be made the necessary evidence of qualification.

Where registration is not a constitutional qualification for voting it may be made the necessary evidence of qualification. A registration list is presumed to be correct, and the votes of persons whose names were not on the registration list were properly rejected.

McLean vs. Broadhead, 48th Cong. Mobley, 386

Power of legislature to enact registration law.

"The right of suffrage is regulated by the States, and while the legislature of a State can not add to, abridge, or alter the constitutional qualifications of voters, it may and should prescribe proper and necessary rules for the orderly exercise of the right resulting from these qualifications. It can not be denied that the power to enact a registration law is within the power to regulate the exercise of the elective franchise and preserve the purity of the ballot."

Goodrich vs. Bullock (minority report), 51st Cong. Rowell, 598

Purpose of.

"The intention of the legislatures of all the States in providing for registration lists is to guard against fraudulent voting, to prevent colonizing and men without fixed habitations from depositing their ballots wherever they may chance to be on an election day, and to require residence sufficiently long in a community that the voter may become known and regarded as a bona fide resident, and not a mere floater or bird of passage."

Greery vs. Scull, 52d Cong. Stofer, 161

Where registration required, election invalid without it.

Under a law requiring the registration of voters in all towns of over 2,500 inhabitants, the committee threw out the vote of a town of more than 2,500 population in which no registration was made.

Thrasher vs. Enloe, 53d Cong. Report 842, p. 7

Effect of setting aside by governor, in Arkansas.

The governor of Arkansas had the power, under certain circumstances, to set aside the registration of a county and order a new one. In some counties a new registration ordered by the governor had not been completed by the day of election, and the county clerks refused to certify the returns of counties and precincts not yet registered. The committee held that the governor "was not authorized to set aside the old registration, except by making a new one," and did not "think that a fair construction of this law can give the governor the authority to disfranchise a county by setting aside the registration." The committee counted the votes as shown by duplicate original precinct returns.

Gause vs. Hodges, 43d Cong. Smith, 305, 316, 320

Imperative, in California.

The votes of persons whose names are not on the "Great Register" in California were rejected by the committee.

Wigginton vs. Pacheco, 45th Cong. 1 Ells., 13

Registration not mandatory, in Alabama.

The constitution of Alabama does not make registration an absolute prerequisite for voting, nor do the statutes of the State.

Lowe vs. Wheeler, 47th Cong. 2 Ells., 76

Registration is required in Alabama, and unregistered votes should be rejected.

Lowe vs. Wheeler (minority report), 47th Cong. 2 Ells., 137-145

Requirement of affidavits, in Iowa, directory.

"Where the elector, acting in good faith and honestly supposing himself to be registered, deposits his vote, and the same is received by the judges, it is a valid vote. But where the elector does not act in good faith, and knows he is not registered, his vote should be rejected." The burden of showing the want of good faith is on the party attacking the vote.

Campbell vs. Weaver, 49th Cong Mobley, 462

Requirement of affidavits in Iowa, mandatory.

The statute of Iowa requiring an affidavit of unregistered voters is mandatory both upon the officers of election and the voters, and both as to the production of the affidavit and its contents.

Campbell vs. Weaver (minority report), 49th Cong Mobley, 472

In North Carolina registration transfers to newly established precincts should be made without personal application.

Where two precincts in North Carolina which had been consolidated for several years were again separated shortly before the election, and the judges of election at the new precinct refused to receive the votes of voters who did not present certificates that their names had been erased from the registry of the other precinct, the majority of the committee held that they were properly rejected under the North Carolina law. The minority held that the names should have been transferred without personal application, or on personal application on the day of election, and that the votes rejected should be counted.

Yeates vs. Martin, 46th Cong 1 Ells., 389, 412

Transferred voters registered on election day, in Virginia.

Where voters were required to be registered at least ten days before the election, except those having transfer certificates, who might be registered at any time, including the day of election, the majority refused to count as illegal the votes of transferred voters registered on election day. The minority did not mention this point, but excluded the votes in question as illegal.

Platt vs. Goode, 44th Cong Smith, 656, 682

When new certificate necessary under Florida law.

A new certificate of registration is not a condition precedent to voting, under the Florida law, when a voter has moved from one house to another within a voting district. "While the law provides for issuing a new registration certificate to a voter who has changed his residence, either within the precinct or to another one, it does not require such a new certificate as a condition precedent to voting when the change of residence is within the precinct or voting district. On the contrary, it expressly provides that a new certificate shall be necessary if the change of residence is from one voting district to another, thus implying that it shall not be necessary if the change is not from one voting district to another. *Inclusio unius, exclusio alterius.*"

Goodrich vs. Bullock, 51st Cong Rowell, 585

Reregistration is not necessary in Florida when a voter has changed his residence from one place to another in the same voting precinct. "While section 8 of the act of June 7, 1887, may possibly admit of a different construction, we are inclined to the opinion that a mere change of residence from one house to another in the same voting precinct should not deprive an elector of his right to vote."

Goodrich vs. Bullock (minority report), 51st Cong Rowell, 612

May be proved by parol evidence.

It was not necessary (in Virginia) to have introduced the registration lists to show that rejected voters were in fact qualified. "The registration books in Virginia are not public records to which verity can be attached. In fact, they are only prima facie evidence that a man is a voter, and may be attacked by parol evidence in various ways." Where the question at issue was whether the excluded person was a qualified voter, not merely whether he was registered, the committee accepted his own testimony that he was qualified.

Thorpe vs. Epes, 55th Cong Report 428

The books should be introduced.

Where the qualifications of voters asked to be counted as unlawfully excluded were shown by their own testimony, the minority held that the registration books should have been introduced. The election officers (in Virginia) were not permitted to receive parol evidence of qualification, and the party seeking to have counted on a contest votes not cast must furnish proof of equal dignity.

Thorp vs. Epes (minority report), 55th Cong Report 428, part 2, p. 9

Can be shown by parol evidence.

The fact of registration can be proved by parol evidence. "Registration does not create the right to vote, but it is an official memorandum of an existing right, and parol evidence is as near the fact as the books. In fact, the books are made from parol evidence."

Brown vs. Swanson, 55th Cong Report 1070, p. 7

No registration in a county, vote thrown out.

Where the State constitution provides that no person not registered shall be allowed to vote, and there was no valid registration in one county, *held* that there was no valid election and the returns from such county must be set aside.

Bisbee vs. Finley, 47th Cong 2 Ells., 188

No registration in a county, vote counted.

Where the governor failed to appoint a supervisor of registration for a county, and there was consequently no registration as provided by law, but the election was held under the old registration, and no harm appears to have been done, *held* that the vote of the county should be counted. "The committee are clearly of opinion that voters complying with all other requirements of the law can not be disfranchised by the neglect of public officials to furnish them opportunity to register." The committee were unanimous in this opinion.

Goodrich vs. Bullock, 51st Cong Rowell, 585, 613

REGISTRATION LAWS.**Registration law of Missouri unconstitutional.**

The registration law of Missouri, prescribing qualifications for voters not found in the Constitution, is unconstitutional. Where names are stricken from the registry without proper investigation and in disregard of the forms of law, voters should not thereby be disfranchised.

McLean vs. Broadhead (minority report), 48th Cong Mobley, 394-399

Registration ordinance of St. Louis invalid.

"The Constitution of the United States having declared that the legislatures of the several States shall provide for choosing members of Congress, and the constitution of Missouri having authorized the general assembly, and that alone, to enact a registration law," the registration law of the city of St. Louis, passed by the municipal assembly as a city ordinance and never ratified by the legislature, was held to be invalid.

Sessinghaus vs. Frost, 47th Cong 2 Ells., 387

Registration law for St. Louis constitutional.

The Missouri registration law of 1881 for St. Louis *held* to be constitutional, and that the votes of persons whose names had been stricken from the list and duly advertised according to law, and who had not applied to the board of revision for reinstatement, were properly rejected by the election officers.

Frank vs. Glover, 50th Cong Mobley, 655

Registration law of South Carolina unconstitutional.

The registration law of South Carolina is unconstitutional, because it is not a reasonable regulation of the right to vote, but is, under the pretense of regulation, an abridgment, subversion, and restraint of that right. Its unreasonable or restrictive features are (1) that it does not provide sufficient facilities for registration, and leaves to the registering officer a dangerous discretion; (2) that it attaches the penalty of permanent disfranchisement for failing for any cause to register for the

first election at which the citizen would be entitled to vote if registered; (3) that it affixes a like penalty for parting with or destroying a registration certificate; (4) that all applications for transfer or renewal of certificates must be made at the county seat of the county where the original certificate was issued; (5) that when the board of appeals has decided against an applicant for registration, he may appeal, but must give notice in writing within five days, and commence proceedings in court within ten days thereafter, or be forever debarred from voting. This is a special remedy with a fifteen days' statute of limitations; (6) that the supervisor is given arbitrary power to strike names from the registry list without posting the names and without notice to anybody.

The minority held that the law was reasonable and constitutional.

Miller vs. Elliott, 51st Cong Rowell, 509-515, 537

Under the constitution of South Carolina, which provided that every male person otherwise qualified who had resided in the precinct sixty days should have the right to vote, the committee held that the registration law of the State which required all voters to be registered by July 1 preceding the election was in conflict with this provision and was unconstitutional.

Johnston vs. Stokes, 54th Cong Report 1229

The constitutionality of the registration law of South Carolina being brought in question, the committee said: "A majority of this committee has reached the conclusion that the voters of the district now in consideration, who were qualified under the constitution of South Carolina, and who were rejected under color of the enforcement of the registration law, are entitled to be heard in this contest. In this conclusion no violence is done to the doctrine that 'where the proper authorities of a State have given a construction to their own statutes that construction will be followed by the Federal authorities.' While the supreme court of South Carolina has not passed decisively upon the statute in question, the people themselves, the highest authority in that State, have decreed its disappearance from the statute book."

Wilson vs. McLaurin, 54th Cong Report 1566

Contestant claimed that the registration law of South Carolina was unconstitutional, and that votes rejected because of nonregistration should be counted. But as, even on the most favorable construction of the law and the evidence, these votes were too few to change the result, the committee did not pass on the question.

Moorman vs. Latimer, 54th Cong Report 626

Whether registration law of Alabama unconstitutional.

It was objected that the registration law of Alabama was in conflict with the constitution of the State, and that all registrations under it were therefore unlawful. But the committee did not consider the objection, calling attention to the fact that no vote in this case was shown to be affected by the only point on which the law could be claimed to be unconstitutional.

Goodwyn vs. Cobb, 54th Cong Report 1122, p. 5

Alabama registration law clearly unconstitutional.

The minority said on this point: "This statement seems to be made on the idea that an enactment may be unconstitutional as to a class of persons and valid as to all others, and also that no one can attack an enactment as unconstitutional unless he shall first be able to show that he has been injured by it. Our view is that as soon as an unconstitutional enactment is presented to the court, in any way, which affects the cause before it, it will be declared void, not only as to the parties litigant, but as to all other persons. It is on this view that enactments similar to the one now under consideration have been declared void by the supreme courts of Pennsylvania, North Carolina, and other States of the Union. * * * That the registration law was unconstitutional and void can not, we are confident, be seriously doubted."

Goodwyn vs. Cobb (minority report), 54th Cong Report 1122, part 2, p. 8

REPRESENTATIVES, QUALIFICATIONS OF.

See QUALIFICATIONS OF REPRESENTATIVES.

RESIDENCE.

WHAT CONSTITUTES.

Chiefly a question of intention.

"The question of domicile has been a fruitful source of difficulty to courts. It is because no fixed or universal rule can be adopted for its test. The *animus manendi* is the principal point looked to in the ascertainment of domicile. If the intention to establish a permanent residence be ascertained, the recency of the establishment, though it may have been for a day only, is immaterial. The *intent* is, in each case, the real subject of inquiry, 'and the circumstances requisite to establish the domicile are flexible and easily accommodated to the real truth and equity of the case.'"

Lery, 27th Cong 1 Bart., 43

Actual abode is prima facie residence.

To constitute residence there must be intention to remain, but this intention is consistent with a purpose to change the place of abode at some future and indefinite day. Actual abode is *prima facie* residence.

Miller vs. Thompson, 31st Cong 1 Bart., 120

Presumption in favor of actual residence.

The presumption should be in favor of actual residence, as against a claimed intent to return to an abandoned residence, when the intent only appears by the act of voting.

Atkinson vs. Pendleton, 51st Cong Rowell, 56

"Where a man has his home."

The word "residence" used in the constitution of Pennsylvania is equivalent to "domicile," not in the sense in which a man may have a commercial domicile or residence in one country, while his domicile of origin and of allegiance is in another, but in the broadest sense of the term. Either word, as used in law, is incapable of exact definition. "Inquiries into it are very apt to be confused by taking the tests which have been found satisfactory in some cases and attempting to apply them as inflexible rules to all. Probably the definition which is most expressive to the American mind is that a man's domicile is 'where he has his home.' Two or three rules, however, are well established. A man must have a domicile somewhere; a domicile once gained remains until a new one is acquired; no man can have two domiciles at the same time. With these exceptions, it will, we believe, be found that nearly every rule laid down on the subject in the books, even if generally useful, fails to be of universal application, and would be opposed to the common sense of mankind if extended to some states of fact that may arise."

Cesena vs. Meyers, 42d Cong Smith, 61

Presence and engagement in business sufficient.

"In the opinion of the committee, 'having resided' simply means that a man shall, in good faith, have lived in Illinois for twelve months, not as a mere itinerant or visitor, but that he shall have been substantially engaged in business there during that time."

Le Moyne vs. Farwell, 44th Cong Smith, 420

Both act and intention required.

"It takes both act and intention to constitute a residence. An intention to retain a residence which has been left must be an intention actually to return to it and reside in it."

Smith vs. Jackson, 51st Cong Rowell, 28

Residence to be more liberally construed for purposes of suffrage than for other purposes.

A strict rule should be applied in the definition of the terms "residence" and "domicile" where the rights of property, the law of descent and distribution, or the law of the duty of the citizen or the subject to his government are involved. But in regard to suffrage the strictness of the rule should not apply in our Govern-

ment. Under this principle a decision of a State court in regard to the residence of paupers, made in a case arising under the statute providing for the support of paupers by the township of their residence, was held not to be a binding precedent upon the question of the *voting* residence of paupers. But the minority held it to be conclusive.

Le Moyne vs. Farwell, 44th Cong Smith, 415

"Colonisers" do not acquire residence.

Where the law only required ten days' residence in the precinct, and persons came into a ward ten days before the election under an agreement that they would be furnished board and drinks on condition of voting a certain ticket, the committee held that ten days' presence in the ward, under such circumstances, did not constitute residence.

Howard vs. Cooper, 36th Cong 1 Bart., 282

Domicile of minor at home of his father.

Domicile of the father is domicile of the son during his minority, while the son is under the control and direction of the father.

Levy, 27th Cong 1 Bart., 47

Must be intention to leave permanently to lose residence.

The committee, by a majority vote, adopted as a rule of decision "That an individual having the right of suffrage in Kentucky does not lose it by removal from the State *merely*, but there must be evidence of his *intention* at the time he departs to leave the State *permanently*, or proof of his permanent location elsewhere, to forfeit his right as a voter." The House disagreed with the committee in regard to some of the individual cases decided under this principle, but did not overrule the general principle.

Letcher vs. Moore, 23d Cong C. and H., 749, 825, 844

Lost by traveling with a circus.

Where a voter left the place of his residence to travel with a circus, saying he had "left for good," but returned on election day and swore his vote in, the committee held that the vote was illegal. The minority held the evidence to be insufficient to overthrow the presumption of legality.

Wigginton vs. Pacheco, 45th Cong 1 Ells., 11, 25

A department clerk in Washington presumed to have lost his residence in Indiana.

The constitution of Indiana provided that "no person shall be deemed to have lost his residence in the State by reason of his absence on the business of the State or United States." A person who had been in the Government service at Washington for nine years offered to vote, and his vote was accepted by the election officers. The minority of the committee held: "To bring him within the exception of the Indiana constitution above quoted, the *onus* was upon the contestee to show the intent to return to reside, in order to overcome the opposite presumption arising from the fact of a continuing residence elsewhere for more than nine years."

Gooding vs. Wilson (minority report), 42d Cong Smith, 86

Nonresidence not proved by mere statement of a witness.

The mere statement by a witness that a voter was or was not a resident, without giving facts to justify his opinion, is not sufficient to throw out such a vote.

Gooding vs. Wilson, 42d Cong Smith, 82

Temporary employment does not give residence.

Surveyors, whose families resided out of the Territory, who were in the Territory merely for the purpose of working on a contract of surveying, who lived in tents, and who left soon after the election, their return depending on the securing of future contracts, were held not to be residents of the Territory.

Todd vs. Jayne, 38th Cong 1 Bart., 557

OF LABORERS.

At the place of employment.

The votes of journeymen mechanics and other laborers having no fixed and settled residence, but remaining for the time where they could get employment, were received when cast in the place of employment.

Letcher vs. Moore, 23d Cong......C. and H., 752

The residence of journeymen mechanics and like laborers is the place where they happen, for the time being, to be employed. (Cited, with approval, from *Letcher vs. Moore.*)

Campbell vs. Morey, 48th Cong......Mobley, 228

May be acquired at place of employment.

"The habits of our people, compared with many other nations, are migratory. To persons, especially young men, in many most useful occupations, the choice of a residence is often experimental and temporary. The home is chosen with intent to retain it until the opportunity shall offer of a better; but if it be chosen as a home and not as a mere place of temporary sojourn, to which some other place, which is more truly the principal seat of the affections or interest, has a superior claim, we see not why the policy of the law should not attach to it all the privileges which belong to residence, as it is quite clear that it is the residence in the common and popular acceptance of the term."

Cessna vs. Meyers, 42d Cong......Smith, 63

"The statute which declares that employees of the State shall not thereby become residents of the place where employed does not prevent their becoming residents if they so elect. The presumption of nonresidence can be overcome by proof."

Atkinson vs. Pendleton, 51st Cong......Rowell, 56.

Where the statute provides that no person shall be deemed a resident in any county or district by reason of being employed therein by any corporation, such employment is not to be construed as *preventing* anyone from acquiring a residence at the place of his employment.

Smith vs. Jackson, 51st Cong......Rowell, 32

Railroad laborers may or may not gain residence at place of employment.

A person coming into an election district for the purpose of working on a railroad in process of construction may or may not be a resident. The cases should be determined by the following rules:

"First. Where no other fact appears than that a person, otherwise qualified, came into the election district for the purpose of working on the railroad for an indefinite period, or until it should be completed, and voted at the election, it may or may not be true that his residence was in the district. His vote having been accepted by the election officers, and the burden being on the other side to show that they erred, we are not warranted in deducting the vote.

"Second. Where, in addition, it appears that such voter had no dwelling house elsewhere, had his family with him, and himself considered the voting place as his home until his work on the railroad should be over, we consider his residence in the district affirmatively established.

"Third. On the other hand, where it appears that he elected to retain a home or left a family or a dwelling place elsewhere, or any other like circumstances appear negating a residence in the voting precinct, the vote should be deducted from the candidate for whom it is proved to have been cast."

Cessna vs. Meyers, 42d Cong......Smith, 64

Chiefly a question of intent.

"It may be, and often is, difficult to determine the home or domicile of a boatman, or one who is constantly engaged in steamboating or on railroads, but as the law contemplates every man has a domicile or residence, it is often only known to the party himself. It is a question of *intent*, known alone to the party."

Frost vs. Metcalfe, 45th Cong......1 Ells., 290

Not acquired in place of temporary employment.

"A temporary sojourner is not a resident within the legal sense of that term. A person who goes to a place for a specified purpose, and with the intention of leaving it when that purpose is accomplished, does not gain a residence, however long he may remain. It follows that such persons as went into any of the precincts in question for the purpose of working on the railroad and with the intention of leaving when the road should be completed had no right to vote. * * * Whenever it appears that a person came into the precinct for the purpose of working on the railroad, that he resided in a temporary habitation, and was generally regarded as a temporary inhabitant, and that he actually left very soon after the road was completed and soon after the election, his vote should be rejected."

Barnes vs. Adams, 41st Cong. 2 Bart., 771

OF SOLDIERS.**Can not acquire residence by being quartered in a place.**

"The well-recognized rule of law * * * is this: That the fact that an elector is in the Army does not disqualify him from voting at his place of residence; but he can not acquire a residence so as to qualify him as a voter by being stationed at a particular place while in the service of the United States."

Wigginton vs. Pacheco, 45th Cong. 1 Ells., 12

Under the law for the government of Michigan Territory, requiring citizenship and a year's residence as a qualification for voting, *held*, that soldiers long quartered in the Territory, but discharged from the United States Army less than a year before the election, could not vote, their residence not beginning until the date of their discharge.

Biddle and Richard vs. Wing, 19th Cong. C. and H., 512

May be gained at barracks by reenlistment.

Where soldiers permanently garrisoned at a place voted there, the committee retained the votes of such as had originally enlisted from that place or, having served one enlistment, had reenlisted there, but deducted the others. The minority counted all the votes.

Taylor vs. Reading, 41st Cong. 2 Bart., 664

OF SOLDIERS IN SOLDIERS' HOME.**At their original place of residence, under Michigan decision.**

Where the supreme court of the State of Michigan had, since the election, passed on the legality of votes of inmates of the Soldiers' Home, and had decided that only those could vote at the precinct in which the Home was located who were residents of that precinct at the time of their admission, the committee followed this decision and threw out the votes for nonresidence.

Mr. Thomas, in a dissenting opinion, argued that the opinion, having been rendered since the election, was either not retroactive, or, if retroactive, the subsequent action of the people in amending the constitution so as to reverse the effect of this decision was also retroactive.

Belknap vs. Richardson, 53d Cong. Report 1946, part 1, p. 1; part 2, p. 1-6

OF PAUPERS AND PRISONERS.**Of paupers; in the place from which sent to the poorhouse.**

Under the law of New York providing that "no person shall be deemed to have lost or acquired a residence by living in any poorhouse, almshouse, hospital, or asylum in which he shall be maintained at public expense," all the committee held that the legal residence of paupers in the almshouse was the place of their residence before entering the almshouse. The majority of the committee also held that, "independent of all legislation, * * * by the common law, living in an almshouse or other place of public charity for any length of time would not create a residence or give the pauper the rights of a resident in the town, ward, or city in which such charity is situated."

Monroe vs. Jackson, 30th Cong. 1 Bart., 101

The committee held that paupers sent to the county poorhouse from other precincts did not acquire a residence or the right to vote in the poorhouse precinct. "Their residence at this place was not their own voluntary act, but the act of the public authorities, who, for reasons of economy and convenience, sent them here that they might be supported at the public expense."

Covode vs. Foster, 41st Cong 2 Bart., 609

Not acquired in poorhouse precinct.

The legal residence of a pauper is the place from which he entered the poorhouse.

Campbell vs. Morey (minority report), 48th Cong Mobley, 235

Residence not acquired in poorhouse precinct.

In California, under the statute, the legal residence of a pauper is the precinct from which he entered the almshouse. Paupers voting in the almshouse precinct are not to be presumed without proof to have come to the county almshouse from that precinct.

Sullivan vs. Felton, 50th Cong Mobley, 765

Whether acquired at poorhouse precinct.

There are authorities for the opinion that a pauper can not acquire a residence at the almshouse, and there are many strong reasons both for and against this opinion. (For a full discussion see the report quoted in full in this volume.)

Cessna vs. Meyers, 42d Cong Smith, 65

May be acquired in the poorhouse precinct.

The committee, after reviewing the conflicting decisions of courts and committees, held that the weight of authority was that a pauper in a county poorhouse might acquire a voting residence in the poorhouse precinct, though another township was liable for his support. The minority held that the weight of authority was the other way.

Le Moyne vs. Farwell, 44th Cong Smith, 416-420, 425

"An inmate of a county infirmary who has adopted the township in which the infirmary is situated as his place of residence is (in Ohio) a resident and voter in the township in which the infirmary is situated." (Sturgeon vs. Korte, 34 Ohio St., 525.)

Wallace vs. McKinley (minority report), 48th Cong Mobley, 198

Campbell vs. Morey, 48th Cong Mobley, 228

Prisoner in jail does not acquire a residence there.

Where the only residence of a voter in the place where he voted consisted in having been kept in jail there, the committee held that "he could not acquire a residence * * * while in prison."

Wigginton vs. Pacheco, 45th Cong 1 Ellis, 12

OF STUDENTS.

Student votes legal.

The committee, by a majority vote, adopted as a rule of decision "that the residence of young men from other States and counties at schools, academies, or colleges as scholars or students is not such a residence as entitles them to the right of suffrage in the county where they are for the time being, and that all such votes be stricken from the poll book." The students were mostly theological students, at Center College, Kentucky, were all of full age, had left their former homes with no intention of ever returning permanently, were generally supported by themselves or their churches, but in some cases by their parents; they paid taxes, worked the roads, and did militia duty in the college town. They all swore that they considered the college town their home, and that they had no definite intentions in regard to residence after their educations were completed. They had most of them spent their vacations at the homes of their parents, and had been heard to speak of "going home" when going to the homes of their parents. Their votes had been unanimously accepted by the election officers. The minority reported in favor of allowing their votes, and the House sustained the minority.

Letcher vs. Moore, 23d Cong C. and H., 750, 826-830, 844

Students of mature years, who were not supported by their parents, and who had left their last residences *animo non revertendi*, and regarded the college town as their residence, not having any definite intentions in regard to residence after the completion of their studies, were held by the committee to be legal voters.

The minority held that, though they had left their last residences *animo non revertendi*, they had not come to the college town *animo manendi*, and were consequently not legal voters. The House sustained the majority on this point by the casting vote of the Speaker.

Farlee vs. Runk, 29th Cong. . . 1 Bart., 91, and Report 310, 1st sess., 29th Cong., p. 8

May be acquired in college town.

The fact that persons voting are students in a university does not of itself create any presumption that they were not legal voters. Where there was no other evidence against the legality of the votes, and the circumstances were such as to render it very improbable that any students voted who were not legal voters, the committee unanimously refused to reject their votes.

Duffy vs. Mason, 46th Cong. 1 Ells., 376

Students emancipated from parental control and having no other home may acquire a residence in the town where they attend college. (Very fully discussed and cases cited.)

Campbell vs. Morey (minority report), 48th Cong. Mobley, 237-25

Where young men have entirely severed their connection with the home of their parents and are relying on their own resources, efforts, and means, having no fixed determination as to their future place of abode, they may acquire a voting residence in the place where they are attending college.

Worthington vs. Post, 50th Cong. Mobley, 652

May be acquired in college town, though presumption to the contrary.

"Residence is a mixed question of fact and intention. The fact without also the intention is not sufficient of itself to establish a legal residence; and it is a well-settled principle of the cases that one who leaves his home to go to college for the purpose of an education does not from continuance there the required time gain a residence. On the contrary, the very object of his stay raises a presumption against such result." The question in the case of students is "whether they have ever given up their last residence and undertaken to acquire another at the college. To do so they must either directly have renounced their former home and assumed the obligations of citizens in their place of adoption or done acts, open and acknowledged, inconsistent with the one and assertive of the other. Everyone has a well-recognized right to change his place of residence, and may do so if he proceed in consonance with known principles." Where students testified that they had made the college town their residence, and there was no evidence that this intention was not formed and acted on in good faith, the committee held that they would not be justified under the state of the evidence in rejecting their votes.

Posey vs. Parrell, 51st Cong. Rowell, 190, 191

Students may or may not gain residence in college town.

"The fact that the citizen came into the place where he claims a residence for the sole purpose of pursuing his studies at a school or college there situate and has no design of remaining there after his studies terminate is not necessarily inconsistent with a legal residence or want of legal residence in such place. This is to be determined by all the circumstances of each case. Among such circumstances the intent of the party, the existence or absence of other ties or interests elsewhere, the dwelling place of the parents, or, in the case of an orphan just of age, of such near friends as he had been accustomed to make his home with in his minority, would of course be of the highest importance.

Cessna vs. Meyers, 42d Cong. Smith, 63

Barely acquired in college town.

Persons residing in a college town for the purpose of attending college do not, except in very rare instances, acquire a voting residence there. (Very fully discussed and many precedents cited.)

Campbell vs. Morey, 48th Cong. Mobley, 218-224

RESIGNATION.

See QUALIFICATIONS OF REPRESENTATIVES, AND VACANCY.

RES INTER ALIOS ACTA.

See EVIDENCE in other proceedings.

RETURNS.

AS EVIDENCE.

Which best evidence.

Where the return of a county, as forwarded to the governor, contained two more votes for the sitting member than the return filed with the county clerk, and it appeared by adding together the votes credited to all the candidates on the former return that there were two more than the total number of votes certified to have been given, the committee deducted two votes from the vote of sitting member.

Kelly vs. Harris, 13th Cong......C. and H., 260

Precinct returns primary evidence.

"It is well settled that the primary returns of votes, made under State authority, such as these division returns, are *prima facie* evidence of their legality, of the number of votes cast, and the rights of the respective candidates."

Butler vs. Lehman (minority report, sustained by House) 37th Cong1 Bart., 358

Precinct returns better than county returns under certain circumstances.

The provision of the Alabama statute of 1868 empowering the county board to reject votes or returns on proof of fraud or intimidation was characterized by the committee as "extraordinary, not to say dangerous," "yet it is believed by the committee that the action of such a board under the statute in question, and in pursuance of the power conferred thereby, is to be regarded as *prima facie* correct, and to be allowed to stand as valid until shown by evidence to be illegal or unjust." But where it was shown that the board had not obtained the evidence which they were empowered to obtain, by the statute, and had decided the case upon a comparison of the poll book with registry lists shown to be exceedingly imperfect, the presumption in favor of the correctness of the decision of the officers of election in admitting the votes is stronger than that in favor of the action of the canvassing board in throwing them out.

Norris vs. Handley, 42d CongSmith, 73

Return higher evidence than tally sheet.

Under the laws of Iowa the returns made to the county auditor to be canvassed by the county canvassers are higher evidence than the tally sheet.

Frederick vs. Wilson, 48th CongMobley, 402

Precinct returns better evidence than county returns.

"According to the law of Maryland, the duties of the presiding judges when assembled at the county seat are purely ministerial. They are to add up the votes of the precinct returns on the books of the polls and to certify the results of this addition to the governor. They can neither throw out votes certified by the precinct judges nor return votes not certified by the precinct judges. It is presumed, of course, that the presiding judges will do their work accurately, and that their returns to the governor will contain a correct summary of the votes in their county. This presumption is, however, merely a *prima facie* one, and can be rebutted at any time by showing that these returns were, in fact, not a correct summary of the precinct returns; and when this is done, the returns to the governor must be disregarded and resort had to the primary evidence of the result of the election; that is, to the precinct returns themselves."

Mudd vs. Compton, 51st CongRowell, 150

When unimpeached, better evidence than the ballots.

Where certain precinct returns were not forwarded for several days, owing to the neglect of the secretary of state to furnish blanks, but there was no testimony to show that the returns were incorrect, and there was oral testimony to their correctness, contestant claimed that their correctness should be established by producing the ballots, as the best evidence. The minority of the committee said: "The contestee has given the vote as cast in these three precincts, as found by the officers who held the election, on an *actual count* of the ballots made by them as soon as the polls closed. It is hard to conceive how it is possible for a new count of the ballots by unauthorized persons long after the election would constitute higher evidence of the true state of the vote in these precincts than we have already given. It would be exactly the same character of evidence, but given by persons not authorized under the law to make the count."

Donnelly vs. Washburn (minority report), 46th Cong......1 Ells., 506

Not conclusive on the House.

Returns made by State authorities are *prima facie* evidence only and not conclusive on the House. The power of the House to judge of returns is not confined to the mere judging of the authenticity of the certificate of the final returning officer.

Spaulding vs. Mead, 9th Cong......C. and H., 159

County return signed by majority of return judges (in Pennsylvania).

The committee were of the opinion that a county return signed by a majority of the return judges was valid, and on a *prima facie* case conclusive, though a minority of the return judges protested and made out a different return. The minority of the committee thought that it would be safer to allow a dishonest majority temporarily to deprive a duly elected candidate of his seat than to allow a dishonest majority to give the seat to a person not elected. The House sustained the majority.

Koontz vs. Coffroth (prima facie case), 39th Cong......2 Bart., 29, 42

In New York, numbers on face of returns and not on sample ballots.

Under the New York law requiring a statement of the result to be made on the face of the returns and sample ballots to be pasted on the back, with another statement of the number of each sort cast written across them, the committee, in accordance with the decision of the court of last resort of the State, counted the votes as written on the face of the returns.

Noyes vs. Rockwell, 52d Cong......Stofer, 28

Discrepancy between tally sheet and return not conclusive of falsity of either.

Where there were conflicts between the tally sheets and the returns, the committee examined all the circumstances and adopted whichever count appeared to be correct, but the mere fact of a discrepancy between the tally sheet and the return was not considered conclusive of the falsity of the return. The minority followed the tally sheet in all cases.

Taylor vs. Reading, 41st Cong......2 Bart., 661-698

A duly certified and recorded county return stands until shown not to represent the true vote.

Where the record of a county board of supervisors, in California, showed a vote of 986 for a candidate and the certificate of the vote signed by the president and clerk of the board and forwarded to the governor showed the same amount, the committee held that this certificate and record imported verity, and that the burden of proof was on the party attacking it to show that it did not represent the true state of the vote. Evidence of doubtful admissibility was presented. If admitted, it showed that the vote, as taken down by the clerk of the board in his notes of the proceedings, was 988, and that it had been changed to 986 on the minutes and certificate by the clerk, in consultation with part of the members of the board, after the adjournment. But the evidence did not show that 986 was not the true vote, and rather indicated that it was, and the committee held the evidence insufficient to impeach the record. Mr. Springer, in a dissenting report, held that the vote as *found* by the board, rather than that recorded and certified, was *prima facie* correct, and that the burden of proof was on the party sustaining the accuracy of the altered record.

Wigginton vs. Pacheco, 45th Cong......1 Ells., 7, 19

Only prima facie evidence.

"The precinct returns are merely *prima facie* evidence of the vote, and may be attacked, rebutted, or impeached by evidence from any source."

McDuffie vs. Davidson (minority report), 50th Cong......Mobley, 599

A rebuttable presumption of law stands behind them.

Returns are only *prima facie* correct, meaning simply that a rebuttable presumption of law stands behind them. Their credit is greatly impaired where the election is entirely under the control of one party.

English vs. Peelle, 48th Cong......Mobley, 170

Presumed to be correct until the contrary proved.

"The action of a board of supervisors of election, when in due form, is *prima facie* correct, and it must stand until it is shown by extrinsic evidence to be illegal and unjust. The presumption is always against the commission of a fraudulent or illegal act and in favor of the honesty and correctness of the official acts of a sworn officer."

Bromberg vs. Haralson, 44th Cong......Smith, 358

Weakened when election officers of bad character.

"When public officers are shown to be corrupt *men*, their acts as officers are not entitled to the same presumption of fairness extended to officers of unimpeachable character."

Buchanan vs. Manning (minority report), 47th Cong......2 Ella, 321

"In considering the evidence with reference to particular precinct returns it is first necessary to inquire by whom the election was held in order to determine what weight should be given to the returns. Returns are, as a rule, *prima facie* evidence of the result; but if the integrity of the inspectors is in any way impeached, either by showing that their character is such as to cast suspicion on their acts, or that their belief is that frauds upon elections are justifiable, or that the manner of their selection was such as to indicate a purpose to procure a false statement of results, then the returns lose much of the weight that would otherwise attach to them."

McDuffie vs. Turpin, 51st Cong......Rowell, 264

Should be presented by authorized officer.

Where the returns, ballots, and other election papers of a county had disappeared, and it was sought to prove the vote of a precinct by one of the original returns, presented by an unauthorized person, but identified and its correctness sworn to by the judges of election, the committee hesitated to accept the return as evidence, but threw out the vote of the precinct on account of other evidence indicating fraudulent action on the part of one of the judges of election.

Spencer vs. Morey, 44th Cong......Smith, 444-447

Unidentified ballots not to be counted as returns.

Where a number of ballots, unaccompanied by any affidavits or other evidence, were handed to the secretary of a political committee on election day, by him handed to the county clerk, and by him certified as votes to the secretary of state, the committee deducted them.

Bell vs. Snyder, 43d Cong......Smith, 255

True return to be counted.

Where the return counted by the governor was made by an unauthorized person, not based on a canvass of the precinct returns, and was false and fraudulent, and the return made by the county clerk, based on a full canvass of the precinct returns, showed a much less majority for the contestee, the committee held that if the testimony establishing the facts had not been inadmissible because taken out of time, the difference between the returns should have been deducted from the vote of contestee.

Bell vs. Snyder, 43d Cong......Smith, 256, 257

WHEN SET ASIDE.

See also Election, when whole election set aside; Fraud; Irregularity; Intimidation; Officers of election, disqualification of; and Not sworn.

For gross irregularity.

A precinct return rejected by the county returning board, irregularly forwarded to the governor, and showing important defects on its face, but counted by the governor, rejected by the committee for this among other reasons.

Easton vs. Scott, 14th Cong......C. and H., 276

If irregularity not sufficient to set aside returns under State law, allegation immaterial.

It being alleged that more votes were cast for petitioner in a town than were returned for him, *held*, that inasmuch as this irregularity would not be sufficient, if proved, to set aside the vote of the town, under the laws of New York, where the contest originated, the allegation was immaterial.

Van Rensselaer vs. Van Allen, 3d Cong......C. and H., 74

For fraud, uncertainty, or bribery.

A return may be rejected and the entire poll thrown out (1) when the return is proved to be false and the vote not proved *aliunde*; (2) where the irregularities of the officers of election involve the result in uncertainty; (3) where the ballots may have been tampered with; (4) where there has been general bribery, and the bribed votes can not be separated from the honest ones.

Hurd vs. Romeis (minority report), 49th Cong......Mobley, 431

For fraud, irregularity, or disqualification of officers.

"An entire poll should always be rejected for one of the three following reasons: (1) Want of authority in the election board; (2) fraud in conducting the election; (3) such irregularities or misconduct as render the result uncertain."

Reid vs. Julian, 41st Cong......2 Bart., 831

More votes than voters.

A return was sought to be set aside on the ground that more votes were returned than there were qualified voters, as shown by the tax lists, and the House seems to have sustained the charge and set aside the return.

Jackson vs. Wayne, 2d Cong......C. and H., 47

Not set aside if possible to ascertain result.

An entire poll should never be rejected unless it is impossible to ascertain the result. The proper course is not to reject the return and allow each party to prove the legal votes, but to require the parties to prove the illegal votes, and reject these.

Covode vs. Foster (minority report), 41st Cong......2 Bart., 613

Void if not made by officers required by law.

Where, from an examination of the various laws of Florida governing elections, it appeared that the only officers authorized to make returns of Congressional elections to the secretary of state were the probate judges and (in certain contingencies) the county clerks, the committee refused to count returns made to the secretary of state by the precinct inspectors direct. But they held that if any returns of precinct inspectors were to be counted, all should be counted, which would produce the same result.

The minority held that, under the decision of the committee, returns of precinct inspectors made to the secretary of state after the legal time should not be counted, though returns made after the legal time by the proper officers were counted. But the original tabulated statement of returns on which the certificate of election was based having been put in evidence by the contestant, he could not be heard to object to counting all the votes included in it, including those made by the precinct inspectors.

Brockenbrough vs. Cabell, 29th Cong......1 Bart., 79-87, and Report 35

Received too late.

Under a special statute of Pennsylvania requiring army returns to be filed by November 10 and canvassed by November 15, *held*, that a return received between November 10 and 15, and regularly examined, should be counted, but one received three months later, substantially defective, not accompanied by a list of voters, not regularly filed nor examined by the county judges, should be rejected.

Richards, 4th Cong C. and H., 95

Where the law required the return to be made in October or (under certain circumstances) in November, and it was not made until May, the committee sent for the original county returns, and these confirming the district return, the election was held not to be invalidated.

Bard, 4th Cong C. and H., 116

Where, under the law of Georgia, returns were required to be transmitted within twenty days after the election, and the result certified within five days thereafter, *held*, that returns transmitted after the legal time could be counted by the House, though not by the governor.

Spaulding vs. Mead, 9th Cong C. and H., 157

A law requiring the poll books to be returned to the clerk's office within a certain time held to be directory merely, and that a failure to return them within the required time would not vitiate the election, it appearing that the returns were afterwards returned and filed and had been in the meantime in the hands of the agent of the party asking for the rejection of the returns.

Draper vs. Johnston, 22d Cong C. and H., 712

The committee held that the provision of the Florida law requiring returns to be made to the secretary of state within thirty days was only directory, and counted all returns otherwise legal, though not received by the secretary of state until after the thirty days.

Brockenbrough vs. Cabell, 29th Cong 1 Bart., 84

Where a precinct return was not received by the county managers until the day after they had consolidated the return, and was not included in their return to the governor, the committee unanimously counted the vote.

Sloan vs. Rawls, 43d Cong Smith, 147, 168

Properly certified, to be accepted.

A return, if properly identified, to be accepted even if found in the possession of an unauthorized person.

Spencer vs. Morey (minority report), 44th Cong Smith, 467

No returns made, vote counted on outside evidence.

In a number of precincts from which returns were not made or not counted the committee counted the vote on outside evidence, which in other precincts from which returns were made they did not hold sufficient to overcome the returns.

McDuffie vs. Turpin, 52d Cong Stofer, 53-62

Not transmitted, vote shown by record in clerk's office.

Where, through the neglect of the town representative in the legislature, to whom the town return had been legally intrusted, it was not delivered to the State canvassing committee, but the record in the town-clerk's office showed how the votes were cast, the committee counted them as cast.

Mallory vs. Merrill, 16th Cong C. and H., 331

Not signed.

The return from a precinct which gave a larger majority for the sitting member than his total majority was not signed by the poll keepers. This was alleged as a ground for setting the election aside, but the committee decided the case on other grounds.

Randolph vs. Jennings, 11th Cong C. and H., 240

Where one of the returns was not signed by the judge, as required by law, the committee were unanimously of the opinion that the objection to it on this ground ought not to prevail.

Bulter vs. Lehman, 37th Cong. 1 Bart., 354

An unsigned paper purporting to be a return is void.

Bisbee vs. Finley, 47th Cong. 2 Ells., 190

Where it was properly canvassed by the county canvassing board, and there is no indication of fraud, it must be presumed to have been correctly received.

Bisbee vs. Finley (minority report), 47th Cong. 2 Ells., 230

Where poll books, tally lists, and returns were without signatures, and also where the poll book was signed by the judges, the tally list by the clerks, and there was no return proper, the committee refused to count the votes.

Fuller vs. Dawson, 39th Cong. 2 Bart., 133

An unsigned statement counted as a return by the county commissioners was rejected by the committee.

Langston vs. Venable, 51st Cong. Rowell, 444

"The committee are of opinion that where the law requires the certificate to be made by three officers, a majority at least must sign it to make the certificate evidence. This is not a merely technical rule; it is substantial, because the refusal or failure of a majority of the board to sign the return raises a presumption that it is not correct."

Niblack vs. Walls, 42d Cong. Smith, 103

Not certified.

Where a poll book (in a *viva voce* election) was not certified by any of the officers of election, the committee rejected the votes, though they had been counted by the county and State canvassing boards.

Chrisman vs. Anderson, 36th Cong. 1 Bart., 334

The law of Kentucky requiring the poll book to be certified over the signatures of the election officers is directory merely, and an uncertified return, especially when it has already been counted by the county and State canvassers, ought not to be rejected.

Chrisman vs. Anderson (minority report), 36th Cong. 1 Bart., 337

Where poll books (in a *viva voce* election) were not certified to be correct by any officer of election the precincts were rejected. "This objection is substantial and not technical. The paper purporting to be a poll book from this precinct proves nothing whatever. To admit such a paper as evidence would be to set aside all rules and open wide the door for fraud."

Barnes vs. Adams, 41st Cong. 2 Bart., 771

Cured by a certificate of their contents from county canvassers.

Where the law required the county commissioners to transmit to the secretary of state "a statement of the whole number of votes given in their county for each candidate," and the commissioners rejected certain precinct returns because not certified to by the inspectors, but transmitted a statement of the number of votes for each party shown by the rejected returns, the committee held that this statement cured the defect in the returns.

Lynch vs. Chalmers, 47th Cong. 2 Ells., 356

Not cured by certificate of its contents from county canvassers.

A return not certified by the inspectors proves nothing, and its rejection by the county commissioners was proper. A certificate from the commissioners stating the fact of its rejection and also the number of votes shown by it for each party can not cure the defect.

Lynch vs. Chalmers (minority report), 47th Cong. 2 Ells., 365

Omission of the word "junior" (see also Ballots).

Votes cast for Silas Wright, junior, but returned by mistake of the inspectors as cast for Silas Wright, were counted by the committee as cast, on proof of the facts.

Wright vs. Fisher, 21st Cong. C. and H., 518

Where votes shown by the evidence to have been cast for James Guyon, junior, were, by mistake, returned for James Guyon, the House counted them as cast and seated the petitioner.

Guyon vs. Sage, 16th Cong. C. and H., 348

Where votes cast for Daniel Hugunin, junior, were, by mistake, returned for Daniel Hugunin, the committee, on proof of the facts, counted the votes as cast, and the seat was given to the petitioner.

Hugunin vs. Ten Eyck, 19th Cong. C. and H., 501

EVIDENCE TO IMPEACH. (See also EVIDENCE AND FRAUD.)

"Before the official return can be properly rejected, there must be satisfactory proof, that the proceedings in the conduct of the election or in the return of the vote were so tainted with fraud that the truth can not be correctly ascertained from the returns. In other words, the returns must be accepted as true until they are clearly shown to be false."

Goodrich vs. Bullock (minority report), 51st Cong. Rowell, 599

Outside partisan count insufficient.

"It would be an exceedingly dangerous precedent to permit the actual returns as made by the inspectors and sworn officers of election to be disregarded and impeached by returns made out by irresponsible partisan workers at the polls."

McDuffie vs. Turpin, 52d Cong. Stofer, 62

Evidence of voters not received until foundation laid by proof of fraud.

Where 124 voters testified that they voted for contestee in a precinct where he was returned as receiving only 18, but there was no other evidence of fraud, the committee said: "But it may well be questioned whether such testimony as this ought to be received to invalidate an election. It would be productive of unending frauds and perjuries to permit parties to come forward after an election by ballot and swear that they voted differently from what the ballots themselves exhibit. Especially must this principle apply under the system adopted in New Mexico, where every ticket is numbered and the number also recorded in the poll books opposite to the name of the voter. The only proof which ought to be admitted to establish a fraud such as that charged in this case would be to show, by affirmative testimony, that the judges, clerks, or some other persons actually withdrew the tickets given by the voters and substituted others for them. Until this shall be shown the oath of the voter should not be received to contradict the record and the ballots themselves. The very nature of the ballot renders this principle a necessity; otherwise every election ought to be tried over a second time by the oath of the voters instead of the ballots deposited in the boxes in the presence of the officers and of the public."

Otero vs. Gallegos, 34th Cong. 1 Bart., 184

It seems to be implied in the argument of the minority report in *Miller vs. Elliott* (as well as in several other minority reports in the Fifty-first Congress, though the ruling is nowhere explicitly made) that the minority held the law to be that the false or fraudulent character of the returns could not be proved in the first instance by calling the voters or otherwise proving that the votes received by a candidate was larger than that returned for him, but that a foundation must first be laid for this sort of proof by showing suspicious circumstances connected with the election or count sufficient to overthrow the presumption of the fairness of the returns.

Miller vs. Elliott (minority report), 51st Cong. Rowell, 571

Testimony of voters to overthrow return.

Where more voters testified to having voted for contestant than were returned for him, and there was circumstantial proof of fraud, the committee rejected the returns, and counted only the votes proved outside the returns for contestant. Where the circumstantial proof of fraud was lacking, except the discrepancy in the votes, the committee preferred not to reject the return, but counted for contestant the extra votes proved for him.

Washburn vs. Voorhees, 39th Cong 2 Bart., 60-64

The committee, by a majority vote, adopted as a rule of decision "that votes recorded upon the poll books as given to one candidate can not be changed and transferred to the other by oral testimony." The minority reported that where voters made oath that they had voted for one candidate, and their votes appeared upon the poll book (the election being *viva voce*) as voting for the other, they should be counted according to the testimony of the voters; and the House sustained the minority.

Letcher vs. Moore, 23d Cong C. and H., 750, 826, 844

Testimony of voters may be insufficient.

Where contestant called 12 more voters who swore they voted for him than were returned for him, but at least 12 of the witnesses were either impeached or showed that they did not really know for whom they voted, the committee unanimously disregarded the testimony.

Wright vs. Fuller (minority report), 32d Cong Report 136, part 2, pp. 6 and 7

Testimony of voters not sufficient.

Where in one precinct the contestant was returned as having received 35 votes, and 60 voters (or at least 55) swore that they had voted for him, the committee held that "this does not constitute such proof of fraud as to require them to reject the return, but they might properly add to it such votes as the contestant proves were cast for him above the number returned." But it not being material to the result of the present case, the committee made no count of them. The minority held that an examination of the evidence showed it to be insufficient for any purpose.

Sloan vs. Rawls, 43d Cong Smith, 150, 157

The testimony of voters as to how they voted may be overthrown by circumstances, such as the illiteracy of the voters, rendering it impossible for them to know how they voted, the circulation of mixed tickets, the improbability of the result apparently shown, etc.

Biabee vs. Finley (minority report), 47th Cong 2 Ells., 219

Testimony of voters may prevail over returns.

Where voters testified that they voted for contestant who were not returned as voting, or as voting for contestee, the committee counted their votes according to their testimony.

Blair vs. Barrett, 36th Cong 1 Bart., 318

Evidence of voters sufficient.

Where the testimony of all the voters in two townships was taken and it appeared that many more votes were cast for contestant and many less for contestee than the returns showed, the committee were unanimous in counting the vote according to the testimony and not according to the returns. The minority, however, held that no fraud was proved.

Delano vs. Morgan, 40th Cong 2 Bart., 171, 172, 179

Where contestee was returned as receiving only 475 votes at a poll, and he called 508 voters who clearly swore that they were legal voters and voted for him, and proved 48 votes more by other testimony, the committee held that this sort of testimony was admissible to show the incorrectness of the return. "In the judgment of the committee the evidence of these witnesses is as full, complete, and reliable as it is possible for human testimony to be given. It would be received in any court of justice in the country and held sufficient to establish any fact in a civil or even criminal case."

Reid vs. Julian, 41st Cong 2 Bart., 828

Where a larger number of voters than were returned as voting for contestant testified that they voted for him, and the testimony of the ticket distributors indicated a still larger number, the returns were rejected for fraud, and the vote counted according to the proof.

Lowe vs. Wheeler, 47th Cong. 2 Ells., 66-75

Where contestant was returned as having received 139 votes in a precinct, and 283 voters testified to having voted for him, and the testimony of persons who read the tickets, saw them voted, and kept a list of the voters, showed that 377 votes were cast for contestant; *held*, that this was sufficient to reject the return and count only such votes as were proved *aliunde*.

Langston vs. Venable, 51st Cong. Rowell, 452

WHEN REJECTED, WHAT VOTES COUNTED. (*See also FRAUD, EFFECT OF.*)

Only votes proved *aliunde* counted.

Where the return is so tainted with fraud that the truth can not be deduced therefrom it should be rejected. "The proposition is too plain to admit of dispute; to hold as true that which is so false and fraudulent that the truth can not be deduced therefrom is to hold an absurdity. * * * But the rejection of a return does not necessarily leave the votes actually cast at a precinct uncounted. It only declares that the return having been shown to be false shall not be taken as true, and the parties are thrown back upon such other evidence as is in their power to show how many voted, and for whom, so that the entire vote, if sufficient pains be taken and the means are at hand, may be shown and not a single one be lost, notwithstanding the falsity of the return."

Washburn vs. Voorhees, 39th Cong. 2 Bart., 58, 62

"No legal voter is disfranchised by throwing out a fraudulent poll. The only effect of such action by the proper tribunal is to destroy the *prima facie* character of the return and to deny to the official acts of such officers the legal presumption of correctness usually accorded to the conduct of faithful agents. The way is always open to every candidate upon the trial of any contested-elected case to come forward and prove the vote which he received at any and every assailed precinct."

Reid vs. Julian, 41st Cong. 2 Bart., 832

"The returns of an election must be certified by the proper officers. If not so certified they prove nothing, and when offered in evidence, if objected to, they must be rejected. * * * It does not, however, necessarily follow that the vote cast at such election is lost or thrown away. An uncertified return does not *prove* what the vote was, that is all. The duly certified return is the best evidence, but if it be shown that this does not exist we doubt not secondary evidence would be admissible to prove the actual state of the vote.

"The failure of an officer, either by mistake or design, to certify a return should not be allowed to nullify an election, or to change a result, if other and sufficient and satisfactory evidence is forthcoming to show what the vote actually was."

McKenzie vs. Braxton, 42d Cong. Smith, 25

Where the statute required the county returns to be signed by at least two of the three county canvassers, and the State canvassers rejected a county return because it was only signed by one officer, the committee sustained the action of the State canvassers in rejecting the return, but counted the vote upon proof *aliunde*.

Norris vs. Handley, 42d Cong. Smith, 73

"In the absence of the certificate prescribed by law recourse will be had to the poll lists, the ballots, or other returns, and if from these or any of them the result can be ascertained, and there is no taint of fraud, effect will be given to the result precisely as though the certificate was present."

Gooding vs. Wilson (minority report), 42d Cong. Smith, 85

In one precinct it was shown by the testimony of the sheriff, who had seen the votes counted, that at least 42 votes were given for sitting member, but the returns gave him no votes at all. The committee excluded the vote of the precinct. The contestant asked that he be allowed the vote returned for him and the sitting member

the 42 votes additional, but the committee said: "It having been shown that the return is fraudulent and false in a matter so material as the suppression altogether of the whole of the sitting member's vote, it can not be received for any purpose."

Niblack vs. Walls, 42d Cong......Smith, 102

When a return is shown to be fraudulent only such votes as are proved *aliunde* can be counted.

Lowe vs. Wheeler (minority report), 47th Cong......2 Ells., 155

When the evidence shows a return to be false, it is impeached and destroyed as evidence. The vote may be proved by the voters, and no vote not proved can be counted. (Cases cited.)

Bisbee vs. Finley, 47h Cong......2 Ells., 180

If returns are shown to be fraudulent no correction can be made on the basis of the returns. They must either be accepted as correct or rejected *in toto*. In the latter case no votes not proved *aliunde* can be counted.

Bisbee vs. Finley (minority report), 47th Cong......2 Ells., 233

Where the *prima facie* character of the returns is destroyed, only those votes proved *aliunde* can be counted.

McDuffie vs. Davidson, 50th Cong......Mobley, 596

Where the evidence shows a return to be false and not a true statement of the votes cast, such return is impeached and destroyed as evidence. But the rejection of a return does not necessarily leave the votes actually cast at a precinct uncounted. The return being shown to be false, the parties are thrown back on such evidence as it may be in their power to produce to show how many votes were cast, and for whom. All the votes may thus be proved and counted, but if only a part is proved, those proved are to be counted and the rest disregarded.

Featherston vs. Cate, 51st Cong......Rowell, 103

Where the returns were rejected for fraud, and the only votes proved aside from the returns were for contestant, *held*, that no others could be counted, for "it is evident that giving to contestee the vote not accounted for would be a direct encouragement to election frauds, as it would give him the benefit of every fraudulent vote which his friends had made it impossible for the opposition to expose, even after the proof clearly established fraud to such an extent as to destroy absolutely the integrity of the official returns. In no case has such a rule been adopted."

Langston vs. Venable, 51st Cong......Rowell, 465, 466

Where ballot boxes were proved to have been stuffed, the returns were rejected and no votes counted except those proved or conceded aside from the returns. This in spite of the fact that the excess of votes had been "purged" as provided for in the statutes of South Carolina, for "such method of disposing of extra ballots is provided for mistakes, and not for frauds."

Miller vs. Elliott, 51st Cong......Rowell, 525, 526

Where the ballot boxes had been stolen by an armed body of men, after the close of the polls, the committee counted the votes according to the evidence of the vote cast. The minority found that the evidence was insufficient to establish the vote received by each candidate.

Goodrich vs. Bullock, 51st Cong......Rowell, 592-594, 615

When returns are impeached they can not be received for any purpose, but only those votes proved *aliunde* can be counted. "If the returns have been falsified by the election officers it is a well-settled rule of law that they cease to have any *prima facie* effect, and each party can only be credited with such votes at the box in question as he may show by other evidence. This rule is one of long standing. It works no hardship upon contestee which does not fall as heavily on the contestant. The contestant is required in the first instance to show the fraud in the return, and then must follow that up by proving his vote; or, in some instances, the proof of the fraud is connected with the proof of his vote."

Clayton vs. Breckinridge, 51st Cong......Rowell, 691

Where rejection would increase the evil, true vote determined approximately.

Where the ballots of a precinct were stolen and secretly returned after having been obviously tampered with, but the rejection of the return would only increase the evil done by the fraud, the committee said: "It is the duty of the committee to ascertain, as nearly as may be, the true vote, that the right may prevail at least approximately."

Moore vs. Funston, 53d Cong......Report 1164, p. 10

Only those proved aliunde counted.

Where fraud was established by proof that a large part of those returned as voting did not vote, part of the committee rejected the returns entirely and only counted such votes as were proved *aliunde*; others of the committee eliminated the number of votes shown to be fraudulent and counted the remainder on the basis of the returns.

Aldrich vs. Robbins, 54th Cong......Report 572

Where returns impeached, votes proved aliunde counted.

"The universal rule of law is that where the evidence shows the returns to be false and not a true statement of the votes cast, such returns are impeached and destroyed, but that the true vote may be proved by calling the electors whose names are on the poll list as having voted at such election, and such votes as are proved by competent evidence should be counted for each candidate. Fraud does not invalidate the legal vote cast, but simply makes it necessary for those claiming the benefit of it to prove the vote. The rule of rejecting an entire poll is not to be adopted if it can be avoided."

Aldrich vs. Robbins (minority report), 56th Cong......Report 327

Where rejected, unjust to count votes for only one candidate on proof aliunde.

Where the returns of a poll were proved to be false and fraudulent, and the general testimony of the vote was very conflicting, and much of it impeached, the committee unanimously rejected the returns and refused to count any votes on this general testimony. But contestee had called 308 voters, who testified that they voted for him, and asked that these votes be counted. The committee held that as these voters were very ignorant and might easily have been deceived, or perhaps induced to swear falsely, the testimony was very doubtful. But even if it were accepted the votes ought not to be counted, because it would be counting the vote for only one candidate (there being proof that the other candidate received a considerable number of votes, but no definite proof of the number), and would be giving to contestee, already the beneficiary of the fraud, a larger majority than was given him in the fraudulent returns. The minority held that the votes should be counted, and referred to many cases to show that the evidence of the voter was the best evidence of the vote.

Finley vs. Bisbee, 45th Cong......1 Ells., 87, 110

"Your committee admits that if there was no evidence other than the returns, they being fraudulent and void, proving that the contestant received votes at said poll, then it would be unquestionably right to count the vote clearly proven to have been cast for contestee. But when the proof shows that a large number of votes were, in point of fact, cast for one candidate, as for the contestant in this case, but the number not being sufficiently certain to enable them to be counted, it seems to your committee to be manifest injustice to count the votes of his opponent, thereby increasing his majority to the full number of votes so counted. There is no rule of law or equity that will justify such action, but it would be a clear case of uncertainty in the proof * * * and the entire vote must be rejected."

Finley vs. Bisbee, 45th Cong......1 Ells, 88

If a return is to be rejected, and votes counted for contestant, the contestee should at least be given his well-defined party vote, which was cast for him.

Langston vs. Venable (minority report), 51st Cong......Rowell, 489

All votes not proved for contestant counted for contestee.

Where, in a case investigated by a subcommittee of the Committee on Elections, after the death of contestant, more voters in four precincts testified to having voted for contestant than were returned for him, the minority held that the truth of this testimony, considering the character of the voters, was very doubtful, but that even

if the testimony were to be believed, all the votes in the precincts attacked which were not proved to have been cast for contestant should be counted for contestee. This rule should be applied because of the unfair manner in which the testimony was taken and abruptly closed by the investigating committee, and because the rules established in contested-election cases should not apply to an investigation like this.

Clayton vs. Breckinridge (minority report), 51st Cong......Rowell, 781

Where proof aliunde shows same results as return, votes counted.

Where "concerning the precincts wherein the irregularities were of so grave and important a nature as to affect the validity of the returns, the secondary proof of the actual votes cast shows a result not differing from that shown by the returns," the committee counted the votes.

Burns vs. Young, 43d Cong......Smith, 181

Where county return fatally irregular, precinct returns counted.

Where the precinct returns were delivered to an unauthorized outsider, who kept them some time, consolidated them himself, and signed the names of the managers to the consolidated return, without their knowledge or consent, and this return, showing the vote of the county unanimous for contestee, was forwarded to the secretary of state indirectly and irregularly, the committee held that the consolidated return was of no value, and expressed the opinion that very little confidence was to be placed in any of the returns. They, however, counted the precinct returns, except one which did not show in what county or precinct the election was held.

Sloan vs. Rawls, 43d Cong......Smith, 152

Where county return rejected, only precincts proved aliunde counted.

Where a county return was based on the votes of only three of the five precincts in the county and had been rejected by the State canvassing board, the committee counted only the precincts whose vote was proved aliunde.

Niblack vs. Walls, 42d Cong......Smith, 102

Where returns not conclusive, votes counted according to the ballots.

Where the precinct returns did not show for what office votes cast for contestant and contestee were given, and the county clerk had refused to certify the vote to the secretary of state, but the ballots themselves had clearly shown that the votes were cast for Congress, the committee counted the votes.

Bell vs. Snyder, 43d Cong......Smith, 255

Must be shown to have been counted before they can be deducted from total result.

Where returns are asked to be rejected for irregularity, it must be shown "(1) that the votes embraced in these returns were actually counted, and (2) that it was unlawful to count them." The mere fact that these returns are on file with the secretary of state or the county prothonotary is not evidence that they were included in the canvass. "While it might well be claimed that the presence of regular returns in these offices would be *prima facie* evidence that they were embraced in the canvass, how can it be said that the presence of irregular returns would be *prima facie* evidence that they were counted?"

Fuller vs. Dawson, 39th Cong......2 Bart., 134

Where return stolen and ballots altered, votes counted on proof of contents of original return.

Where the seal of the box containing the returns and ballots of a precinct had been broken open after the delivery of the box to the county canvassers, the return abstracted and the ballots altered so as to show a practical reversal of the vote, and the county canvassers counted the ballots in the box and canvassed the vote according to them, the committee counted the vote according to the proved contents of the original returns.

Mackey vs. O'Connor, 47th Cong......2 Ellis, 568

WHEN REJECTED, WHAT EVIDENCE REQUIRED TO ESTABLISH THE VOTE ALIUNDE.

Legality of votes must be proved. (See also Evidence.)

Where a return was rejected because of proof that illegal votes had been received with the fraudulent connivance of the officers of election, *held*, that proof *aliunde* of the actual number of votes cast for each candidate was not sufficient; there must be proof of the number of legal votes cast.

Finley vs. Walls, 44th CongSmith, 389

Where returns rejected for fraudulent voting, proof of the vote aliunde must fully show qualifications of voters.

Where there was no legal registry in a precinct and the return was rejected because of frauds made possible by the lack of registry, the committee were, "however, of opinion that it was competent for either contestant or sitting member to prove the casting of legal votes at this poll, even without a register; but, in such case, the voter must make special proof of his qualification to vote in a manner particularly pointed out in the statute." But no such proof being made, and the fraudulent transactions upon which the return was based being such that no presumption of the legality of any vote could arise from them, the whole vote was excluded.

Dodge vs. Brooks, 39 Cong2 Bart., 85

Contents of rejected returns must be fully proved.

Where in several counties it was charged that the abstracts of the vote made out by the county clerk represented only part of the vote of the county, the committee held that the abstracts, having been regularly certified and transmitted and acted upon by the State authorities, were *prima facie* evidence of the vote, and the contestant having produced no precinct returns or other sufficient evidence of the vote of any precincts that may have been omitted, the vote as counted was allowed to stand. The minority held that precinct returns having been unlawfully rejected by the county clerks, under fraudulent instructions from the attorney-general, and a complete abstract being in each case in evidence and proved to be correct, the vote was sufficiently proved and should be counted.

Gause vs. Hodges, 43d CongSmith, 291-322

When return rejected, vote may be counted upon any evidence sufficient to show it.

"Upon the impeachment of the return, the party relying on it may show the true vote by other evidence. This may be done by a recount of the ballots or by the testimony of the voters or of anyone who was present at the election and is able to establish the true result. When this can not be shown no vote from the precinct for any of the candidates can be counted."

Hurd vs. Romeis (minority report), 49th CongMobley, 431

Parol evidence of vote inadmissible when documentary evidence accessible.

"In the absence of any evidence of the loss, destruction, or inaccessibility of the returns, parol evidence as to what the vote was should not be considered. * * * In the absence of any legal evidence as to how the vote was counted from a precinct by the county canvassers in canvassing the vote of the county, the evidence of the voters as to how they voted is immaterial."

Smalls vs. Elliott, 50th Cong Mobley, 665

Identity of names prima facie evidence of identity of persons.

Where it was shown that persons voted for the sitting member whose names were the same as names found on the register of those persons who had elected to retain their Mexican citizenship, the committee held that this was *prima facie* evidence that the persons voting were Mexican citizens and sufficient to shift the burden of proof. In the absence of contradictory testimony the votes were shown to be illegal, without further proof of the identity of the voters and the persons on the list of Mexican citizens.

Otero vs. Gallegos, 34th CongReport 90, pp. 4-6

Where identity of voters not clearly shown.

Where it was proved that persons of the same name as those voting had been naturalized since the election, and that the voters had refused to obey the subpoena of the commissioner to testify in the case, the committee held that they were proved to be illegal. The minority held that the identity of the voters was not shown.

Wright vs. Fuller, 32d Cong......I Bart., 159; and Report 136

Where returns rejected by county canvassers counted only on extrinsic proof of correctness.

"Mistakes and errors of the election officers in declaring the result and making the returns will not vitiate the election." Where the county boards had rejected the votes of a large number of precincts on technical grounds, the committee, "out of extreme caution," counted only those shown by extrinsic proof to be correct.

Craig vs. Shelley, 48th Cong......Mobley, 373-376

Vote at "side polls" indication of vote.

Where the ballot box in a precinct had been stolen after the polls were closed and before the votes were counted, but the poll list was in evidence, showing the number of votes cast, and the number of votes cast at an informal side-election held at the same poll, at which substantially all the Democratic voters voted, was also in proof, the committee counted for contestee the number of Democratic votes shown by this side-election and for contestant the remainder of the votes shown by the poll list. The minority held that this evidence of the vote was insufficient.

Goodrich vs. Bullock, 51st Cong......Rowell, 592, 615

Conflicting evidence of election officers insufficient when returns lost.

Where no returns appeared to have been made from a precinct and all the ballots and other election papers of the county, except the poll list of this precinct, had disappeared from the clerk's office, and it was sought to show the vote of the precinct by the poll list and the testimony of the judges of election as to how the votes were cast, but the testimony of the judges varied by two or three votes, the committee said: "The uncertain memory of two or three witnesses as to the result of an election six months after it took place can not be permitted to take the place of the testimony of the voters themselves." And in this case the fact that part of the time the votes had been called and part of the time the tally sheets had been kept by unsworn outsiders further weakened the testimony to such an extent that it could not be considered evidence of the vote. The minority held that if contestant were given the largest number testified to for him and contestee the least number testified to for him, contestant would have no right to object.

Spencer vs. Morey, 44th Cong......Smith, 448

Where the evidence of the vote of a precinct from which the returns were lost was the testimony of one of the judges from memory, and evidence that another judge had made an affidavit immediately after the election stating the vote, but the affidavit was not produced, and the testimony and the proved contents of the affidavit agreed in giving 7 votes to contestant and the remainder to contestee, but did not exactly agree as to the total number of votes cast, the committee held the evidence to be insufficient to establish the vote. The minority held that it was sufficient.

Spencer vs. Morey, 44th Cong......Smith, 449

Testimony of election officers adds little weight to the returns.

Where the contestee attempted to rebut the evidence offered by recounts of the ballots by calling the election officers who made the precinct returns to testify that those returns were correct, the majority (whose report was not sustained by the House) expressed the opinion that "this testimony neither impairs the case of the contestant nor strengthens that of the respondent. Officers who had declared upon their official oaths that returns made by them were true would not be likely to come into court afterwards and swear that they were false."

Buller vs. Lehman (majority report), 37th Cong......I Bart., 357

"When the official act of one holding public place is rejected because he has violated the law and neglected his duty, what he himself says to sustain this act is entitled to little credit. The same evidence which impeaches his official acts will also impeach his unofficial declarations."

Hurd vs. Romeis (minority report), 49th Cong......Mobley, 433

Where "the officers of election violated their official oath and the penal statute of the State, and shamefully disregarded their duties which they had sworn to perform" the committee did "not think any testimony given by them in this case uncorroborated by other evidence is entitled to much weight."

Bisbee vs. Finley, 47th Cong......2 Ells., 179

Testimony of election officers not weakened by charges of fraud.

The testimony of election officers can not be discredited merely by *charging* them with fraud.

Buller vs. Lehman (minority report, sustained by House), 37th Cong...Report 6, p. 28

Testimony of election officers the strongest possible evidence.

"If a return, local or general, be attacked for fraud or illegality, the testimony of officers holding the election is of great weight, because of opportunities to know, and the motive of duty to observe all things relating to the election in their charge; and such is the weight of their evidence that it can not be overthrown by circumstantial evidence unless so strong as to admit of no reasonable hypothesis compatible with the truthfulness and integrity of the officers."

Bisbee vs. Finley (minority report), 47th Cong......2 Ells., 203

When returns lost, evidence of officers of election received.

When returns are shown to have been lost, the evidence of the officers of election may be received to show what their contents were.

Spencer vs. Morey (minority report), 44th Cong......Smith, 480

Ballots best evidence.

The best evidence of the true state of the vote of a precinct is the ballots themselves, when they have been properly preserved.

McLean vs. Broadhead (minority report), 48th Cong......Mobley, 389

"The committee are of opinion that where the ballots themselves cast at any election are preserved, they will furnish the best evidence of the number of votes which each candidate received. And it seems that the laws of Pennsylvania contemplate that in case the division returns are disputed the ballots themselves shall finally settle the question."

Buller vs. Lehman (majority report), 37th Cong......1 Bart., 355

The ballots are higher and better evidence than the poll list.

McDuffie vs. Davidson, 50th Cong......Mobley, 598

Ballots best evidence of vote, and must be produced.

The ballots are the best evidence of the vote, and when they are accessible no other testimony as to the vote can be received until they are produced.

Craig vs. Shelley (minority report), 47th Cong......2 Ells., 48

The ballots, when preserved, are the best evidence, and secondary evidence should not be received if the ballots were accessible and not produced.

McDuffie vs. Davidson, 50th Cong......Mobley, 579

Where fraud in count charged, ballots best evidence.

Where it was charged that the returns at many precincts did not represent the correct vote, and it was sought to establish this fact by oral testimony that many more voters voted for contestant than were returned for him, the committee held that the ballots should have been introduced in evidence as the best evidence of the correctness or incorrectness of the count.

McDuffie vs. Turpin, 52d Cong......Stofer, 62

Where fraud proved, ballots not primary evidence.

Where it was proved, to the satisfaction of the minority, that many returns were false, evidently as the result of fraud on the part of the election officers, they held that the poll lists and ballots had lost their primary character as evidence, and other evidence of the state of the vote was therefore admissible without first pro-

ducing these papers. It would be absurd to be required to establish any facts in regard to the election by the papers in the custody of the very officers who committed the fraud.

McDuffie vs. Turpin (minority report), 52d Cong......Stofer, 102

Where ballots themselves attacked, voters' testimony admissible.

"Where the integrity of the ballots themselves is questioned, as in the case here, the testimony of the voters who cast the ballots as to who they voted for is always admissible for the purpose of throwing light, if possible, upon that particular question."

English vs. Hilborn, 53d Cong......Report 614, p. 7

Ballots best and primary evidence.

"When the ballots have been safely preserved, as required by law, they become the best and primary evidence as to how the elector voted, and the testimony of the voter is secondary and inadmissible. The ballots are not only a part of the election returns, but are of a higher grade of evidence than the tally papers or a summary made from them. To permit voters to come up after an election, as in this case, and swear they voted differently from what the ballots show, would open up a field of unending perjuries and frauds. If such should be the rule, every election might be tried over a second time by the oath of the voter instead of the ballots deposited in the ballot box. A mistake in the count or in tallying the vote, or an impeachment of the returns or tally papers, even for fraud, do not, of themselves, discredit the ballots. To them the law points as the source to correct all such errors and mistakes. They commit no perjury and can not be bribed."

English vs. Hilborn (minority report), 53d Cong......Report 614, p. 12

Ballots best evidence, when returns rejected.

Where it was charged that the returns were false, the minority held that this fact should have been shown by the ballots themselves. "It needs only to be stated that the ballots themselves constituted the best and only admissible evidence until explanation was made as to why they were not and could not be introduced." The minority, however, agreed to the rejection of 9 returns on other evidence.

Aldrich vs. Robbins, 54th Cong......Report 572

Under Australian law, ballots not best evidence.

"The rule, whatever it is, on the subject of the ballots being the primary and best evidence in contested-election cases grew up and was established long before the adoption of the Australian or reform ballot law by any State of the Union. Formerly the ballots were furnished by the respective parties and distributed to the voters outside of the polling places. The illiterate voter received his ballot away from the polls, and took it to some person or persons in whom he had confidence, persons of his own selection, and had it made out according to his own direction. This was his own voluntary act. Even after his ballot had been prepared for him at his own solicitation, if he had any doubt in his mind as to it being according to his wish, he could expose it to some one else to more fully satisfy himself that it was as he desired. He took his ballot to the polling place and saw that it was deposited in the box. All this was his own voluntary action. Nothing compulsory about it. Upon such a state of facts, and under such circumstances, it could be well said that he had voluntarily reduced his intention and his action to writing, and that his written expression of what he did and intended, the ballot, was the best evidence. It was under this system of voting that the rule of the ballot being the best evidence grew up.

"A different system of voting exists now almost everywhere, and especially in California. The political parties no longer furnish their own ballots. An official ballot is furnished. It is retained inside the polling place; none are allowed outside. The voter must pass inside of the polling place and obtain his ballot from an official of the election board. If he is illiterate, or from any cause he is unable to make out his ballot, some member of the election board makes it out for him. He may or he may not have confidence in the official who prepares his ballot. The preparation of his ballot is not his free and voluntary act. It is compulsory. He must submit to having some one not of his own selection—some person who may be a stranger to him—prepare his ballot for him, or he can not vote. This is especially so in California. * * *

"In view of the different plans and methods now in use in the conduct of elections from those employed when the rule that the ballot, if properly preserved, is the best evidence, was adopted, the committee suggests whether that rule ought not now, in some degree at least, to be relaxed."

English vs. Hilborn, 53d Cong Report 614, pp. 7, 8

Ballots evidence of the vote.

Where a return was rejected because the ballot box was taken away over night and counted the next day, the committee accepted a recount of the ballots as proof aliunde of the vote.

The minority held that as the ballots were the very thing discredited a recount of them was no proof aliunde of the vote.

Pearson vs. Crawford, 56th Cong. Report 199

Discredited ballots inadmissible for any purpose.

Where a large share of the ballots in the boxes were shown to be fraudulent, the committee held that they could not be received as evidence, even to show for whom the fraudulent ballots were cast. They were tainted for all purposes.

The minority held that they could be received as a guide in purging the poll of fraud, as, though fraudulently deposited, they had probably been correctly counted.

Van Horn vs. Tarsney, 54th Cong. . Report 355, part 1, p. 18; part 2, p. 2; part 3, p. 2.

Ballots in a fraudulent box no evidence how vote cast.

"Returns which are impeached are good for no purpose whatever." It is absurd to attempt to prove for whom illegal votes were cast by the numbered ballots in a box, when the ballots are shown to have been fraudulently numbered, and the whole conduct of the election officers was fraudulent.

Le Moyne vs. Furwell (minority report), 44th Cong. Smith, 423

"A party to a judicial proceeding is bound to produce the best evidence the nature of the case admits of, or, if not produced, to account for its absence." Where a party claims to have been defrauded of votes actually cast for him, the best evidence would be the testimony of the men who committed the fraud or saw it done; the next best would be the testimony of the men who voted for him. The evidence of the ballots themselves, on a recount, is remote and circumstantial.

Buller vs. Lehman (minority report sustained by House), 37th Cong. ... Rept. 6, p. 25

"The ballots can not be entitled to much weight as evidence of the result of the election where it has been shown that the acts and conduct of the election officers are unworthy of credit and their returns set aside and regarded as unreliable. Having created for themselves, in violation of law and their official oaths, opportunities for tampering with the box, it is legitimate to infer that they would endeavor to put ballots in the box that would support the return."

Bisbee vs. Finley, 47th Cong. 2 Ells., 180

Lists of voters kept by outside parties admitted.

Where lists kept by outsiders were introduced as evidence to impeach the correctness of the returns, the committee considered them, saying: "It is obvious that the credit to be attached to this testimony is entirely dependent upon the accuracy with which these outside lists were kept." In this case they were found to be insufficient to overthrow the returns.

Littell vs. Robbins, 31st Cong 1 Bart., 140

Where voters who voted for contestant exhibited their tickets as they voted them, and a list of their names was taken down, this list and the testimony of the person making it were received as evidence of the vote at a precinct where the box had been stuffed.

Lee vs. Richardson (minority report), 47th Cong 2 Ells., 532

The evidence of persons who issued tickets and claim to know that they were voted is admissible to prove that the vote of a precinct differed from the return, and if sufficiently clear and convincing may be conclusive of the falsity of the returns.

McDuffie vs. Turpin, 51st Cong Rowell, 299

Lists of voters kept by outside parties not sufficient.

Where the voters of one party voted open tickets and their names were taken down by one of their number, who had been appointed judge but was refused permission to act, and the judges who did act adjourned for dinner, and there were many indications of fraud, and the ballots never were finally canvassed, the committee refused to count any votes.

Todd vs. Jayne, 38th Cong. 1 Bart., 558

RETURNED MEMBER.

See CREDENTIALS, AND PRIMA FACIE RIGHT.

SHIFTING OF BALLOT BOXES.

See BALLOTS in Wrong Boxes.

SOLDIERS.

See RESIDENCE AND LEGISLATURE.

STATE LAWS (see also House of Representatives).**Allegation of irregularity insufficient under State law, immaterial.**

Allegations of irregularities which would not be sufficient to vitiate the election under the laws of the State in which the contest originated held to be immaterial, and contest dismissed.

Van Rensselaer vs. Van Allen, 3d Cong. C. and H., 73

The construction of State laws by State courts will be followed.

"It is an established rule in the Congressional adjudication of election cases that where the law of the State under which an election was held has received judicial construction in the courts of that State, that construction shall be accepted as binding upon Congress."

Delano vs. Morgan (minority report), 40th Cong. 2 Bart., 178

"It is a well-established and most salutary rule that where the proper authorities of the State government have given a construction to their own constitution or statutes, that construction will be followed by the Federal authorities. This rule is absolutely necessary to the harmonious working of our complex governments, State and National, and your committee are not disposed to be the first to depart from it."

Tennessee election, 42d Cong. Smith, 6

The rule stated in McCrary, section 313, "that the House of Representatives of the United States in construing a State law will follow the construction given it by the authorities of the State, whose duty it is to construe and execute it," quoted and approved by the minority of the committee.

Le Moyne vs. Farwell, 44th Cong. Smith, 425

If the State courts have not construed the State law, the committee will determine whether its provisions are directory or mandatory; but if the State courts have ruled on any provision of the law, the committee will follow their ruling.

Spencer vs. Morey (minority report), 44th Cong. Smith, 458

"If any rule of law can ever be regarded as settled, certainly the rule that Federal authorities would follow the construction of State statutes by State courts must be regarded as settled by a long line of able and unbroken decisions. The only exceptions made to this rule by the Supreme Court of the United States are where the State courts have made conflicting decisions. * * * To say that the Supreme Court of the United States will only follow a State court 'on a rule of property' is a total misconception of the principle announced by the court." (Many authorities cited.)

Lynch vs. Chalmers (minority report), 47th Cong. 2 Ells., 375-378

"Your committee, in conformity with an almost invariable rule, follow the construction of the statutes given by the court of last resort of the State from which the cases come. Such is the rule of the Supreme Court of the United States, and we do not perceive why one so well based upon reason and common sense should be departed from."

California case, 49th CongMobley, 484

The qualifications of a member depend on the Federal Constitution and laws; his election depends on the people of his district and the laws of his State. Where (in Indiana) the State law is that votes cast for an ineligible candidate are void, and the eligible candidate receiving the highest number of votes is elected, this rule should be followed in a contest from that State.

Loury vs. White (Mr. O'Neill), 50th CongMobley, 645

Construction of State laws by executive officers not binding.

The opinion of the attorney-general of a State, given to the governor to guide him in the exercise of purely ministerial duties, is not a rule for the guidance of courts or legislative bodies in the exercise of their judicial functions.

McKenzie vs. Braxton, 42d CongSmith, 24

"Decisions of State courts in interpreting local statutes are heeded in the Federal courts. It is not so with the interpretations put upon the law by an executive officer. * * * It comes to this: In cases of doubt the practice of the authorities of the State is only a practical construction, to which the courts will give more or less heed in determining what the proper construction is. The line between the executive and judicial tribunals is clearly drawn."

Pool vs. Skinner (minority report), 48th CongMobley, 71, 72

Construction of, by State courts, not always binding.

The decision of the supreme court of Illinois, that the legal residence of a pauper was the place from which he came to the poorhouse, was held not to apply to his voting residence, because it was made in a case arising under the police law of the State providing for the support of paupers by the townships of their residence. But the minority held that the decision in its terms covered the whole question of residence, and under the rule universally adopted by Federal tribunals was binding on Congress as a construction of the State law.

Le Moyne vs. Farwell, 44th CongSmith, 419, 425

Construction of State laws by State courts strongly persuasive on the House.

The committee "are not prepared to hold that the decision of the highest authority of a State upon the meaning of its constitution in reference to whether the day of the election of State officers is fixed by that constitution or not, so far as it is material in determining the legality of an election of Representatives in Congress, is absolutely binding on this House." But the rule that such constructions will be followed by the Federal authorities is a salutary one, and "we are not disposed to be the first to depart from it, and we certainly think that such a decision, made in good faith and acquiesced in at the time by the people of the State, and followed by a full and fair election, should not be overthrown or questioned except for the gravest reasons, founded on an undoubting conviction that it was plainly an error, and that the error had worked some substantial injury."

Holmes and Wilson, 46th Cong1 Ells., 330

Construction of State laws by State courts persuasive but not binding on the House. In this case disregarded.

Where a decision or line of decisions of State courts interpreting a State law has become a rule of property in the State, the rule of the United States Supreme Court is to follow such decisions in cases from that State. But it is too broad a statement to say that a decision of the supreme court of a State, construing a State law, is binding on all Federal tribunals. "It may be stated generally that the House of Representatives will, as a general rule, follow the interpretation given to a State law regulating a Congressional election by the supreme court of a State, where decisions have been continued and uniform in such a way and for such time as to become the fixed and settled law of a State." "But a single decision, made by a court of doubtful jurisdiction over this part of the case, not made until after the election in question, and made on points not necessary to be decided in the case

before the court, and hence *obiter dicta*, is not binding on Congress. In the case of State laws regulating Congressional elections it is further to be said that "every State election law is by the Constitution made a Federal law where Congress has failed to enact laws on the subject, and is adopted by Congress for the purpose of the election of its own members," and the House in the exercise of its judicial prerogative may therefore be regarded as a court of appeal in the interpretation of such laws. A decision of a State court declaring ballots containing printer's dashes to be in violation of the statute and void was disregarded, and the ballots counted.

Lynch vs. Chalmers, 47th Cong. 2 Ells., 346-350

Generally accepted constructions to be sustained.

"We suppose it to be well settled in cases of the doubtful construction of a statute involving the rights of the people, and only their rights as distinguished from individual rights, the adoption of a particular construction with entire unanimity has never been disturbed by a power only interested to preserve the right of the State."

Patterson vs. Belford (minority report), 45th Cong. 1 Ells., 63

Alternative ground of decision not dictum.

"An *obiter dictum* is an expression of opinion by way of argument or illustration, and rendered without due consideration as to its full bearing and effect." But in a case involving three issues, a negative decision of any one of which would render unnecessary a decision of the other two, but an affirmative decision of any one of which would require a decision of the other two, the fact that the court decided the first two issues in the affirmative, and then decided the third in the negative, would not render the decisions upon the first two in any sense *obiter dicta*, though the negative decision of the third controlled the case.

Lynch vs. Chalmers (minority report), 47th Cong. 2 Ells., 369-372

Qualifications of voters fixed by States.

"The power to fix the qualifications of voters is vested in the States, subject only to the limitation contained in the fifteenth amendment to the Constitution of the United States. Each State fixes for itself these qualifications, and the United States must adopt and has uniformly adopted the State law upon the subject, and the House of Representatives should not in any case fail to act in conformity with it."

Greevy vs. Scull, 52d Cong. Stofer, 158

The construction of State laws by State courts will be followed.

"Your committee are of the opinion that the decision of the court of last resort of a State upon the construction of a statute of that State, and in a matter before them involving the construction of a statute of that State, should be binding upon them."

Noyes vs. Rockwell, 52d Cong. Stofer, 28

Committee should follow construction of State courts.

In a case in which a State statute had been construed by a divided court, the committee stated reasons for preferring the dissenting opinion, but added: "However, the highest court in the State has construed the statute, and the committee feels it should follow where that conclusion leads."

Williams vs. Settle, 53d Cong. Report 337, p. 10

Interpretation by State courts followed.

Under the provision of the constitution of Tennessee that "there shall be no qualifications attached to the right of suffrage," except the payment of a poll tax and satisfactory evidence thereof, it had been claimed that an Australian ballot law requiring the printing of the names in alphabetical order and permitting assistance to the voter only in case of physical disability, was unconstitutional as imposing in effect an educational qualification, but the supreme court of Tennessee had decided that it came within the constitutional power of the legislature to enact "laws to secure the freedom of elections and the purity of the ballot box." The committee accepted this decision, and the minority, while clearly of the opinion that the decision was wrong, were "constrained to follow that decision in the present case."

Thrasher vs. Enloe, 53d Cong. Report 842, pp. 7, 12

Decision of State supreme court followed as to residence of inmates of Soldiers' Home.
Where the supreme court of Michigan had, since the election, decided that inmates of the Soldiers' Home could not gain a legal residence by being quartered at the Home, the committee followed this decision and threw out the votes. A dissenting opinion by Mr. Thomas held that if the decision were to be taken as retroactive the action of the people in subsequently amending the constitution so as to reverse the effect of the decision should also be taken as retroactive.

Belknap vs. Richardson, 53d Cong......Report 1946, part 1, p. 1; part 2, pp. 1-6

Where State court held law constitutional, committee expressly refrained from deciding; minority held it unconstitutional.

Where the constitutionality of the Virginia election law was brought in question, but the supreme court of Virginia had, since the election, declared the law constitutional, the committee expressly refrained from deciding the constitutional question, but held that even if the law were invalid in its assailed sections, these were not so vital as to justify declaring that there had been no legal election.

The minority held that the decision of the Virginia court being dictum, and this being a matter of public importance, of which the House had original and final jurisdiction, the House could consider the question, and argued that the law was clearly unconstitutional.

Cornett vs. Swanson, 54th Cong......Report 1473, parts 1 and 2

Rulings of State courts less binding on House than its own precedents.

"But in judging of the elections, returns and qualifications of its own members under the grant of the Constitution, this House exercises judicial power, and is a court of competent and exclusive jurisdiction. In passing upon these returns and elections, even if no Federal statute is in existence regulating the elections of its members, it interprets and construes the State election laws which, for the purposes of such election, are to be regarded as having the quality of Federal legislation, and the opinions of State judges are only to be adopted so far as they commend themselves by the intrinsic force of their reasoning; and where such decisions are in conflict with its own determinations, the precedents established by Congress are the expression of the law, and must control that court with the same force and effect that its own prior deliberate rulings guide and control any other court."

Patterson vs. Carmack, 55th Cong......Report 895, p. 18

Repeal by implication to be avoided.

"The well-established rule of construction is this, that one statute is not to be construed as the repeal of another, if it be possible to reconcile the two together."

Patterson vs. Belford, 45th Cong......1 Ells., 57

STIPULATION.

See AGREEMENT AND WAIVER.

STUDENTS.

See RESIDENCE of Students.

SUPERVISORS OF ELECTION.

See UNITED STATES SUPERVISORS.

SUPPRESSION OF EVIDENCE.

A party can not benefit by the absence of testimony suppressed by his own act.

Where the day on which the contents of the ballot boxes must be destroyed by the custodians, unless restrained by an order of the court, fell on the last day of contestant's time for taking testimony, and it was shown that the affidavits of voters which should have been filed in the prothonotaries' offices were in many cases in

the ballot boxes, and contestant did not produce these boxes, either for the purpose of procuring these affidavits or of showing by the ballots how the unregistered voters had voted, and resisted the petition of contestee for an order of the court by which they might be preserved, so that contestee could put them in evidence in his time, and in accordance with the contention of contestant the prayer was denied and the contents of the boxes destroyed, the committee held that he had been a party to the destruction of the evidence by which it might have been shown who was elected, and he could not ask that the contestee be unseated on account of an uncertainty which he had helped to produce.

Curtin vs. Yocum (minority report, adopted by the House), 46th Cong...1 Ells., 423

The majority held that this objection would have been well taken were it not for the fact that contestant was shown to have used an "extraordinary degree of diligence to account for and explain every alleged illegal vote."

Curtin vs. Yocum (majority report), 46th Cong.....1 Ells., 433

Primary evidence suppressed by contestee he can not object to secondary evidence.

Where the counsel for contestee forcibly removed from the possession of the notary the box containing the ballots and returns of a precinct, contestee can not be heard to say that secondary evidence shall not be produced, his agent having suppressed the primary evidence.

Smalls vs. Elliott (minority report), 50th Cong.Mobley, 72b

Strict proof not required of other party.

Where one party suppresses testimony strict and technical proof will not be required of the other. Where the first witness called in a precinct, after having testified that he saw 3 more votes cast for contestant than were shown by the returns, was arrested for perjury, and it was publicly announced by the attorney for contestee that "anyone else testifying falsely" would be similarly arrested, and in consequence of these threats no further testimony was taken in this precinct, the committee held that contestee could not be heard to object to the sufficiency of the testimony, his attorney having by his own act prevented the taking of other testimony.

Featherston vs. Cate, 51st Cong.....Rowell, 106

Attempted by contestee personally connects him personally with frauds.

The attempt of a successful candidate to suppress the evidence of frauds committed to secure his election connects him with the frauds, and brings him within the scope of the rule that fraud committed by a successful candidate invalidates the election.

Hill vs. Catchings (views of Mr. Lacey), 51st Cong.....Rowell, 812

By dilatory cross-examination.

Where contestant began taking certain testimony a reasonable length of time before the expiration of the first forty days, but was prevented from finishing it by the long cross-examinations of contestee's attorney, evidently made for the purpose of delay, he continued taking it until it was finished. Contestee had opportunity to answer it, and could have cross-examined it if he had chosen. The taking of his own testimony was not interfered with, as he did not begin until some time after contestant had finished. Under these circumstances the committee received and considered the testimony.

Bisbee vs. Finley, 47th Cong.....2 Ells., 193

Where in one precinct contestant began taking testimony twenty-three days before the expiration of his time, in pursuance to a notice containing the names of 292 persons who, it is claimed, would have testified that they voted for him in said precinct, and the first two witnesses, the ticket distributors, were cross-examined by the contestee throughout the entire twenty-three days, held that the contestee is estopped from claiming that the evidence of these ticket distributors is insufficient unless corroborated by that of the voters themselves, he having by his own act prevented the latter testimony from being taken.

Langston vs. Venable, 51st Cong.....Rowell, 450

"The House of Representatives may in a proper case grant additional time to take testimony, but it will never, until all principles governing judicial procedure and the hearing and determination of causes are set aside and utterly disregarded, strengthen and bolster up a weak and feeble attempt to annul the solemn act of election officials upon the mere assertion of a party that he could, if he had been favored with more time, have proved his case."

Langston vs. Venable (minority report), 51st Cong. Rowell, 497

Where official recount suppressed, private recount received.

Where contestant had undertaken to have all the ballots recounted, but had been prevented by an injunction, issued at the instance of contestee, the committee accepted the result of a private recount of part of the precincts, made by an outsider during a recount of the votes on local officers, on the ground that contestee had made this recount admissible by himself preventing an official recount from being held. But the House agreed with the minority and voted to recommit the case for a recount.

Rinaker vs. Downing, 54th Cong. Report 1400

Where first witness arrested, whole township thrown out.

Where the first witness in a township (in which there were eight precincts) testified that an attempt had been made to bribe him, and he was the same day arrested for perjury, and the witnesses called on the following day failed to appear, the committee threw out the vote of the entire township on the ground of suppression of testimony, asserting that the case was analogous to that of *Featherston vs. Cate*. But when the case came before the House, the author of the report moved to strike this ruling from it, and the case was decided on other grounds.

Pearson vs. Crawford, 56th Cong. Report 199, p. 13

The minority held that this case was not analogous to *Featherston vs. Cate*, and said: "No just inference could be drawn that the purpose was to intimidate witnesses. Witnesses who testify in contested election cases do so under regulations of law as in other cases, and men who rely upon the testimony of such witnesses have no right to have them protected in the violation of law."

Pearson vs. Crawford (minority report), 56th Cong. Report 199, pt. 2, p. 32

TAX.

Work on the road not a payment of a tax.

Under the law for the government of the Territory of Michigan, prescribing, among other things, the payment of a county or territorial tax as a requisite for voting, held that labor on the roads was not the payment of such a tax, especially when it was done voluntarily upon a road never legally established, a few days before the election, evidently for the purpose of acquiring the right to vote.

Biddle and Richard vs. Wing, 19th Cong. C. & H., 512

Must be paid by the voter himself to entitle him to vote.

Where a voter was required to possess an estate of £50, but it was provided that a person who had paid taxes was to be held to possess this property qualification, the committee held that only *bona fide* taxpayers could vote, and where the tax was paid for the voter by another person on election day, the vote was rejected.

New Jersey case, 26th Cong. 1 Bart., 27

Paid by draft, and draft not cashed until after the election, tax held not to be paid until after the election.

Under the Virginia law requiring the payment of a capitation tax as a prerequisite for voting, many voters voted on tax receipts issued by "special collectors" appointed by the auditor of public accounts, and their deputies, the taxes being paid not by the voters but by a party committee. The committee reserved its decision on the question of the legality of the appointment of these special collectors and their deputies, but held that, conceding this point, only those voters could be held to have voted legally whose taxes had been paid *in cash* previous to the election. A cash payment of \$125 was shown to have been made, and the committee allowed the votes of as many delinquents as this \$125 would have paid for.

But the remainder of the sum being paid by a draft, and this draft not being indorsed nor cashed by the collector until after the election, the committee held that the taxes paid by this draft were not paid until after the election, and deducted the votes.

O' Ferrall vs. Paul, 48th Cong......Mobley, 138, 153

Paid by party committee, valid if ratified by voter on election day.

Where, under the Virginia capitation-tax law, the taxes of many voters were paid for by a party committee, and receipts issued to the voters, the minority said: "We contend that if the delinquent's tax was paid by some one, the receipt given, and filled up by the collector or some one for him and by his express direction and authority, and at any time before the day of election, the acceptance of the receipt by the delinquent on the day of election ratified the act of the party paying the tax, and such ratification adopts the act as of the time of its performance."

O' Ferrall vs. Paul (minority report), 48th Cong......Mobley, 152

In Virginia, legal if paid to "special collectors."

"We are of opinion that the votes cast [in Virginia] on receipts issued by the tax collectors appointed by the auditor of public accounts, which were paid for by the voters or other persons for them prior to the day of election, were legal votes, and were properly received and counted by the election officers."

Massey vs. Wise, 48th Cong......Mobley, 366

Must be paid within legal time.

Where the statute required, among other things, that a voter must have paid a poll tax legally assessed within two years, and the last date on which it could be legally assessed was October 1, but it was customary to allow persons to be assessed, pay the tax, and vote on election day in November, the committee unanimously held that two votes so cast were illegal.

Abbott vs. Frost, 44th Cong......Smith, 618

Paid by others, if accepted by the voter, sufficient.

"We are of the opinion that when the voters accepted the poll-tax receipts for taxes paid by others for them, they ratified the payment so made for their benefit." It was not necessary that the voter should bind himself to repay the tax, neither did the acceptance of its payment in itself constitute bribery.

Patterson vs. Carmack, 55th Cong......Report 895, p. 25

Voter should repay or promise to repay the amount.

"Now, we fully recognize the doctrine that one's poll tax may be legally paid by another, provided the voter shall properly ratify the act afterwards, but we do not think the mere taking of the receipt and voting on the same is such a ratification as the law contemplates. We think the better and sounder doctrine is that the voter should not only accept the receipt, but he should recognize the act in the more substantial way by repaying or promising to repay the amount." However, the minority only deducted a few votes, for which the money was not paid until after the election.

Patterson vs. Carmack (minority report), 55th Cong......Report 895, pt. 2, p. 16

TAX LISTS.

See EVIDENCE, Documentary.

TENDER.

See VOTES, constructively rejected.

TERRITORIAL DELEGATE

See DELEGATE.

TESTIMONY.*See EVIDENCE.***TIE VOTE.****Not to be determined by lot.**

The law of Maryland providing that in case of a tie the governor and council should determine by lot who should be Representative, held to be unconstitutional on the ground that Representatives in Congress are to be elected by the people, and if they fail to make a choice no other authority can do it for them.

Reed vs. Cosden, 17th Cong C. & H., 354

When all rights under it waived, they can not be claimed after a new election upon allegation that the election was not in fact a tie. (*See Waiver.*)

TIME FOR TAKING TESTIMONY.*See EVIDENCE.***TIME OF ELECTION.***See ELECTION.***UNDUE INFLUENCE (see also Bribery, Deception, and Intimidation.)****Vote cast in hope of immunity from prosecution thrown out.**

Where a voter who preferred to vote for contestant voted for contestee, in the hope that he would thereby gain immunity from prosecution, the committee threw out the vote "as being tainted, and not a perfectly free ballot."

Boynon vs. Loring, 46th Cong 1 Ells., 349

Mere personal influence not material.

Where the United States deputy marshal testified that the colored voters had unbounded confidence in him, and that he could have controlled the votes of at least 900 of them, it was held that this fact, if true, could not justify the rejection of any votes.

Bromberg vs. Harulson, 44th Cong Smith, 363

UNITED STATES MARSHALS (see also Bribery).**Their appointment under any circumstances deprecated.**

"Your committee deprecate the appointment of United States marshals under any pretext. If they are intended as conservators of the peace, the power of the State is ample for that purpose. If they are in any manner to interfere in the elections, it is clearly a violation of the laws of the States for them to do so. But the law of the United States warrants the appointment of deputy marshals, and the same must be respected until altered or repealed. It does not limit the number." The only question for the committee to decide is, "Was the conduct of the marshals such as to invalidate the whole election?"

Frost vs. Metcalfe, 45th Cong 1 Ells., 293

UNITED STATES SUPERVISORS.**Their presence may rebut inference of fraud.**

Where there was evidence that the State registrar had endeavored to procure a fraudulent registration and election, and some evidence that he had done so, the fact that the Congressional election and registration had been thoroughly supervised by Federal supervisors was cited as one of the reasons for believing that fraud such as claimed could not have been committed at it.

Sheridan vs. Pinchback, 43d Cong Smith, 323, 326, 327

Their return accepted when other return untrustworthy.

Where the ballots and returns were given to one of the managers to return according to law, but he left them in the possession of an outsider, by whom they were delivered, and they were rejected by the county board on this account, the committee counted the vote according to the returns of the United States supervisors.

Smalls vs. Elliott, 50th Cong Mobley, 666

Their returns received when ballot box stolen.

Where a ballot box had been stolen, the return of the United States supervisors was received as secondary evidence to establish the vote.

Smalls vs. Elliott (minority report), 50th Cong Mobley, 726

Their return received when other return not forwarded.

Where the return of a precinct for some unexplained reason was not forwarded to the county board, but the vote was proved by the supervisor's returns and other testimony and the election was legally held, the vote was counted according to the proof. "Voters are not to be disfranchised by any neglect of the officers after the election if the correct vote can be ascertained."

McDuffie vs. Turpin, 51st Cong Rowell, 294

Ballot box removed from their presence, fatal except for strong affirmative proof of no fraud.

Where the poll was closed for dinner and the box removed from the presence of the United States supervisor, held that but for the strong affirmative proof that no wrong was intended or done in this case the committee would unhesitatingly reject the return.

Bowen vs. Buchanan, 51st Cong Rowell, 197

Exclusion of, discredits return.

Where a United States supervisor had been unlawfully excluded from the poll, the committee held that this discredited the return. The evidence showed that 97 votes were cast for contestant, though only 29 were returned. The committee held that these 97 votes were the only ones which could be legally counted, but under the concession of contestant's brief added 68 to contestant's vote and deducted a like number from contestee.

Goodrich vs. Bullock, 51st Cong Rowell, 593

Interference with, fatal to the election.

"If it be shown that there was an unlawful interference with the United States supervisors of election whereby they were prevented from discharging duties which are committed to their hands by the law of Congress, it would undoubtedly be our duty to set aside the election at such precincts." Several precincts were rejected on this ground.

Buchanan vs. Manning, 47th Cong 2 Ells., 290

"In every instance where a United States supervisor is prevented from discharging his duties, as provided by statute, the committee hold that such fact destroys the validity of the return and requires its rejection, leaving the parties to prove the vote by other competent evidence."

Hill vs. Catchings, 51st Cong Rowell, 805

Outside of cities, mere witnesses.

At polls outside of cities of 20,000 inhabitants or over United States supervisors are mere witnesses, with no power to make returns or certificates of any sort. They should be called like other witnesses to testify to facts within their knowledge.

Lynch vs. Chalmers (minority report), 47th Cong 2 Ells., 368

United States supervisors outside of cities of 20,000 inhabitants have no power to make official returns, and papers purporting to be certified copies of such returns are not evidence.

Mackey vs. O'Connor (minority report), 47th Cong 2 Ells., 593

Duties of.

Section 2029 of the Revised Statutes is not a repeal of sections 2016, 2017, and 2018, and in no way changes the duty of the supervisors "to be and remain where the ballot boxes are kept at all times after the polls are opened until every vote cast at such time and place be counted, the canvass of all votes polled wholly completed, and the proper and requisite certificates or returns made." By section 2029 the power to order arrests is taken from United States supervisors in all places other than in cities of 20,000 inhabitants or upward, and their duties are limited to witnessing the conduct of the election, the counting, and making return of the result. This includes the power and duty to be present at all times and to scrutinize the count and return.

Hill vs. Catchings, 51st Cong......Rowell, 806

UNORGANIZED COUNTIES.**Votes returned from, rejected.**

The committee held that votes returned to the governor from unorganized counties should be rejected, and rejected the votes of three such counties. There was, however, evidence in each of these cases that the votes or returns were fraudulent.

Daily vs. Estabrook, 36th Cong......1 Bart., 299

The committee rejected votes cast in a county not legally organized under the laws of Nebraska.

Morton vs. Daily, 37th Cong......1 Bart., 408

Not organized until the election of county officers.

The act of the Territorial legislature of Nebraska declaring that territory included in certain limits "is hereby declared organized into a county" did not constitute the county an organized county. There must first be an election of county officers under the laws of the Territory for the organization of counties.

Daily vs. Estabrook, 36th Cong......1 Bart., 299

Consolidation of two counties legal in Minnesota.

The constitution of Minnesota empowered the legislature to establish new counties containing at least 400 miles, and to enlarge counties already established, but not to reduce them below 400 miles. The committee were of the opinion that the consolidation of two counties, thus virtually abolishing one of them, was not a reduction of that county below the limit of 400 miles within the meaning of the constitution and was within the power of the legislature.

Cox vs. Strait, 44th Cong......Smith, 429

Where votes from unorganized county included in return of organized county, whole vote of both counties thrown out.

Where the canvassing board of an organized county included in their return the vote of a neighboring unorganized county and there was evidence that the votes in the unorganized county were cast by nonresidents who were bribed by contestee, the committee threw out the whole vote of both counties.

Donnelly vs. Washburn (majority report), 46th Cong......1 Ells., 467

Where vote of unorganized county returned with that of organized county, the latter should at least be counted.

Where the canvassing board of an organized county included in their return the precincts of a neighboring unorganized county, held, that the votes of the organized county, being easily separable on the face of the returns, and having been separately canvassed by the State canvassing board, should at least be counted.

Donnelly vs. Washburn (minority report), 46th Cong......1 Ells., 515

Votes received where there was a de facto organization.

Where the returns of counties were rejected by the State canvassing board on the ground that they had never been recognized as organized by the legislature, but it appeared that they did have a *de facto* organization and there were no charges of fraud or illegal voting, the committee unanimously counted the votes.

Donnelly vs. Washburn, 46th Cong......1 Ells., 468, 506

UNORGANIZED TERRITORIES.*See DELEGATE.***UTAH.****Election of a polygamist is a violation of Utah enabling act.**

Under the enabling act of Utah the subsequent election of a notorious polygamist to Congress was a violation of the agreement under which Utah became a State. Sporadic violations of the law were to be expected, "but we take it that it is in the last degree a violation of the agreement or understanding when that State sends to Congress a man who is himself engaged in the persistent practice of the very thing the abandonment of which was the condition precedent to its admission, and that man the most conspicuous defier of the law and violator of the covenant of statehood to be found in Utah."

Roberts, 56th Cong. Report 85, p. 45

The condition of the enabling act was filled when the State was admitted.

The antipolygamy condition of the Utah enabling act was fulfilled by the action of the State in passing the laws required by it, and, as a condition, ceased to exist. "No power was reserved in the enabling act, nor can any be found in the Constitution of the United States, authorizing Congress, not to say the House of Representatives alone, to discipline the people or the State of Utah because the crime of polygamy or unlawful cohabitation has not been exterminated in Utah."

Roberts (minority report), 56th Cong. Report 85, pt. 2, p. 72

VACANCY (see also Resignation).**Governor may fix time of election to fill vacancy.**

If the legislature has failed to prescribe by law the time of an election to fill a vacancy in Congress the governor may fix the time in his writ of election. The notice given should be a reasonable one, but a notice of one or two days was held sufficient when the election was ordered for the same day as that fixed for the Presidential election.

Hoge, 8th Cong. C. and H., 136

Governor may take notice of.

Where a member had accepted the office of colonel in the Army, and the governor took notice of the vacancy thus created and issued writs for a new election, the member elected at this election was admitted.

Baker and Yell, 29th Cong. 1 Bart., 92

Resignation may be sent to governor.

A resignation may be sent to the governor, who is thereupon authorized to take notice of the vacancy and issue writs for an election without a certificate from the House of the existence of such vacancy.

Mercer, 2d Cong. C. and H., 44

Edwards, 3d Cong. C. and H., 92

May "happen" by expiration of term, and calling of extra session before regular election.

"The Constitution authorizes the executive power of the States, respectively, to order the filling of all vacancies which have actually happened in the mode therein pointed out, no matter how the vacancy may have happened, whether by death, resignation, or expiration of the term of members previous to the election of their successors. The word 'happen,' made use of in the Constitution, is not necessarily confined to fortuitous or unforeseen events, but is equally applicable to all events which by any means occur or come to pass." Where the Congress was called in special session before the regular day for electing Representatives from Mississippi and the governor called a special election, the House admitted the claimants for the whole Congress, but at the next session rescinded its decision and declared the seats vacant.

Gholson and Claiborne, 25th Cong. 1 Bart., 9

Created by death of majority candidate before canvass of votes.

The sole duty of the board of canvassers is "to ascertain the result when the polls closed on the day of election." Whatever that result then was, it is unalterably fixed, and if the candidate receiving the majority of the votes dies after the election and before the canvass, a vacancy is created, just as if he had died before the canvass.

Blakey vs. Golladay, 40th Cong......2 Bart., 417

Members elected to fill vacancy entitled to serve full term.

Where the governor called a special election for Representatives to serve at a called session of Congress until the regular election in November, the members so elected were admitted to serve the whole term, but this decision was subsequently rescinded and the seats declared vacant.

Gholson and Claiborne, 25th Cong......1 Bart., 9

First election in a new State not the filling of a vacancy.

"Your committee are of the opinion that the seventy-sixth section of the Revised Statutes, in reference to the filling of vacancies in Congress, has no application to the case of the election of the first Representative in Congress to which any new State may be entitled, and that the first election, if for an unexpired term, is not in any sense the filling of a vacancy as provided for in said twenty-sixth section of the Revised Statutes."

Patterson vs. Belford, 45th Cong......1 Ells., 55

Where member not legally elected, member elected to fill vacancy caused by his death unseated.

A member of Congress against whom a contest was pending having died before the decision of the contest, and his successor having been elected and sworn in under protest, and it afterwards appearing that the contestant had been elected at the first election, *held*, that no vacancy had existed to which the sitting member could have been elected.

Mackey vs. O' Connor, 47th Cong......2 Ells., 565

A member elected to fill a vacancy can not, without notice or opportunity to take testimony or action of the House, be made a party to a contest pending against his predecessor.

Mackey vs. O' Connor (minority report), 47th Cong......2 Ells., 597-801

Vacancy occurring after redistricting, in what district new election to be held. *See District.*

VIVA VOCE ELECTION.

See ELECTION, by Ballot, and Viva Voce.

VOTERS.

Can not be compelled to testify when election by ballot. *See Election by ballot.*

Qualifications of. (*See QUALIFICATIONS OF ELECTORS.*)

Evidence of, to Impeach Returns. (*See RETURNS, evidence to impeach.*)

RELATION TO CONTEST.

Not parties to the case.

Voters whose votes are charged to be illegal are not parties to a contested election case. "They are not served with notice; they have no right to appear in the contest in their own right, either in person or by counsel; they can not of their own motion even present themselves as witnesses. They are as much strangers to the case as the men of the district who did not vote, or the women and children of the district, or the other people of the United States."

Wallace vs. McKinley, 48th Cong......Mobley, 188

VOTES.

PRESUMPTION OF LEGALITY OF.

Received by election officers, presumed to be good.

All votes recorded on the poll lists should be presumed good unless impeached by evidence.

Porterfield vs. McCoy, 14th Cong C. and H., 270

After votes have been received as legal the judges can not, under the North Carolina law, decide them illegal, or authorize the judges who compare the polls to throw them out. "Having been received at the time of the election the petitioner is entitled to them unless they are proven to be bad."

Newland vs. Graham, 24th Cong 1 Bart., 7

"It is the settled law of elections that where persons vote without challenge it will be presumed that they were entitled to vote, and that the sworn officers of the election who received their votes performed their duty properly and honestly, and the burden of proof to show the contrary devolves on the party denying their right to vote."

Finley vs. Bisbee, 45th Cong 1 Ells., 91

"If a person votes at an election his vote is presumed, under the law, to be legal until the contrary be proven in a legal way, for the reasons: First. That the acts of an officer or officers of an election within the scope of their authority are presumed to be correct and honest until the contrary is made to appear, and therefore that they as such officers would not receive an illegal vote. Second. That the presumption is always against the commission of a fraudulent or illegal act, and, therefore, that a man would not cast an illegal vote."

Finley vs. Bisbee, 45th Cong 1 Ells., 93

"A vote accepted by the commissioners holding the election is *prima facie* legal. Before it can be thrown out for illegality it must be satisfactorily shown by the evidence to have been cast by one not legally qualified to vote—that is to say, the presumption of legality must be overcome by a clear preponderance of competent evidence. By competent evidence we mean such evidence as would be admitted on the trial of the issue before a judicial tribunal, except where a relaxation of the rule is made necessary by the nature of the issue."

Smith vs. Jackson, 51st Cong Rowell, 27

Every reasonable intendment should be indulged in favor of voter.

When a person offering to vote is challenged at the polls, no presumptions are indulged in favor of his right to vote. He is then and there called upon to furnish evidence of his qualifications as an elector. But when he has once voted unchallenged and his ballot has been deposited in the ballot box, and counted, and canvassed, and a certificate of election issued upon it, quite a different rule prevails. Every reasonable intendment should then be indulged in his favor, and his right to vote should not be rejected upon technical presumptions and because some degree of doubt may be thrown upon it.

Craig vs. Stewart (minority report), 52d Cong Stoffer, 16

SUNDRY IRREGULARITIES.

By proxy.

Votes given by proxy to be set aside.

Richards, 4th Cong C. and H., 99

Once given, can not be changed.

In a *viva voce* election "where a voter is first polled, and his vote recorded for one candidate, he is not at liberty afterwards to change it, and have his vote transferred to another candidate; nor if he first votes for the State officers only, has he a right to come forward afterwards to vote for a Representative in Congress."

Drapier vs. Johnston, 22d Cong C. and H., 711

Cast after legal hour, rejected.

Where the poll was kept open after the legal hour, and statements made by one of the judges, and other evidence indicated that fewer votes were cast than returned, the majority of the committee recommended that the poll be excluded. The minority excluded the votes received after the legal hour, though they were otherwise legal votes, and the House agreed with the minority.

Chapman vs. Ferguson, 35th Cong1 Bart., 267

ILLEGAL. See ILLEGAL VOTES.

NOT CAST. See INTIMIDATION AND VOTES Constructively Rejected.

EXCESS OF. See BALLOTS, Excess of.

ILLEGALLY REJECTED.**Counted as if cast.**

Votes tendered for the petitioner by qualified voters but rejected by the officers of election counted by the House.

Bassett vs. Bayley, 13th CongC. and H., 258

Votes offered for the sitting member and improperly rejected by the sheriff counted for him by the committee.

Porterfield vs. McCoy, 14th CongC. and H., 267

Where votes had been rejected by the officers of election, the committee, on proof that they were improperly rejected, counted them. (But the committee in this case laid down the general principle that votes not cast can not afterwards be inquired into. See citation from this case under Intimidation, p. 737.)

Biddle and Richard vs. Wing, 19th CongC. and H., 510

Votes improperly rejected by the election officers were counted by the committee.

New Jersey Case, 26th Cong1 Bart., 28

Where the votes of legal voters were rejected by the board of election, they were counted by the committee for the candidate for whom they would have voted if permitted.

Covode vs. Foster, 41st Cong2 Bart., 601, 611

A vote offered by an elector and illegally rejected should be counted as if cast if it be shown for whom the elector offered to vote.

Bisbee vs. Finley, 47th Cong2 Ells., 173

"When a person clearly entitled to vote offers his ballot at the proper time and place, and to the proper officers, the same should be counted, although rejected by the election officers."—McCrary, § 530, quoted with approval in—

Wallace vs. McKinley (minority report), 48th CongMobley, 193

Where qualified voters attempted to register and were refused, and offered to vote but were refused for lack of registration, their votes should be counted as if cast.

Smalls vs. Elliott (minority report), 50th CongMobley, 709

Where qualified voters properly registered offered to vote and were arbitrarily or improperly refused, their votes should be counted as if cast.

Smalls vs. Elliott (minority report), 50th CongMobley, 711

Persons otherwise qualified as voters who attempted to get certificates of registration and were prevented by the action of the registering officers, were legal voters, and if they tendered their votes to the judges of election and were refused, their votes should be counted on a contest.

Miller vs. Elliott, 51st Cong Rowell, 515

Where votes were rejected by the judges because of real or assumed doubts as to the identity of the voters presenting themselves, *held*, that where their identity is clearly established these votes must be counted for the candidate for whom they were tendered.

Mudd vs. Compton, 51st Cong Rowell, 155

Refused because others voted on same names, counted by committee.

The committee held that "the votes of legal voters who duly offered to vote and had their votes refused, the judges truthfully or falsely alleging that some one else had previously voted on the name, should be counted for the candidate for whom it is proved they offered to vote. It is bad enough that a person who has no right to vote gets his vote in; it would be worse if by getting his vote in he kept an honest man's vote out." The minority held that such votes were properly rejected and should not be counted.

Mudd vs. Compton, 51st Cong Rowell, 152, 167

Legal voters who were refused the right to vote on the ground that others had already voted on their names were counted by the committee for the candidate for whom they would have voted.

Booze vs. Rusk, 54th Cong Report 849

Registration purposely made irregular, votes rejected counted.

Votes rejected because of irregularities in the entries on the registration book, purposely placed there by the registration officers in order to invalidate the votes, were counted by the committee for the candidate for whom they would have been cast. Where the number was large and unascertainable, and there were other frauds, the whole poll was thrown out.

Martin vs. Lockhart, 54th Cong Report 2002

Judges refused to deposit ballots; whole polls thrown out.

Where a large number of voters tendered their ballots to the judges (under the North Carolina six-box law) and the judges refused to deposit them unless handed in one at a time, and the voters refused to separate them and left them on the table, and there were other wrongs, making it impossible to determine the correct vote of the precinct, the committee threw it out. The minority held that the voters should have obeyed the reasonable request of the judges.

Martin vs. Lockhart, 54th Cong Report 2002

Only "lawful votes, lawfully tendered and unlawfully refused" can be counted.

It is the safer and better rule, where the evidence will warrant it, "to count lawful votes, lawfully tendered and unlawfully refused, where the number is sufficient to change the result and it is known for what candidate the elector intended to vote. But before the vote can be counted it ought to appear by competent evidence that qualified electors, sufficient in number to change the result, had lawfully tendered their votes and were unlawfully rejected, and for whom the rejected voters would have voted."

Johnston vs. Stokes, 54th Cong Report 1229, p. 12

Where no reason appears, rejection presumed legal.

Where some votes offered at one precinct had been rejected, but the reason did not appear, it was presumed to have been good, and the votes were allowed to stand.

Watson vs. Black, 53d Cong Report 1147, p. 10

Rejection presumed legal where no proof that it was not.

Votes were offered and rejected on the ground that the applicants had not been registered at the May registration (in Alabama), but as there was no evidence that they were offered by persons who came within the excepted classes permitted to register after May, the committee held that the rejection was proper.

Goodwyn vs. Cobb, 54th Cong Report 1122, p. 1

If names on original registry list, votes to be counted.

"Where names appear on original registration books, but do not appear on copies furnished precinct judges, it is an error to reject the votes of such electors, and their votes are to be counted," but there must be satisfactory proof showing for whom they offered to vote. (Cases cited.)

Bell vs. Snyder, 43d Cong......Smith, 251

A voter whose name was on the registry list, but whose name had been left off of the copy of the list in the hands of the officers at the polls, has a right to vote, in Missouri. But the evidence that the election officers erred in rejecting his vote must be clear and conclusive.

Frost vs. Metcalfe, 45th Cong......1 Ells., 290

Illegally struck from registry list, and offered to vote and were refused, counted by the committee.

Where the "board of revision" of the city of St. Louis, acting without authority of law, and in such an unfair manner as to amount to fraud, struck from the registry lists the names of a large number of voters, the committee counted for the candidate for whom they offered to vote the votes of such as were shown to be qualified electors, to have been duly registered, and to have offered to vote, but to have been refused because their names were not on the list as revised, and also a number of votes rejected by the election officers for trivial reasons.

Sessinghaus vs. Frost, 47th Cong......2 Ells., 381-394

Names not on poll book counted by committee even when forbidden to be counted by judges.

A large number of votes were rejected because the voters, who had duly applied for registration and been registered, found their names omitted from or inaccurately copied on the poll books. It was claimed that these votes could not be counted, because the law of Maryland makes the poll books conclusive evidence of the right of a man to vote. Held, that the law simply lays down a rule of evidence for the guidance of the judges of election, so as to reduce to a minimum their judicial functions. The votes should be counted on a contest. The minority held otherwise.

Mudd vs. Compton, 51st Cong......Rowell, 153

Only such as could have been counted by the judges can be counted.

"Whenever a voter did tender his vote and his name was upon the list of voters furnished to the judges of election, although the middle name or initial might be wrongly entered, still his vote should be counted as it should have been received by the judges, the object of registration being for the purpose of identification of a voter, or if the name given by the voter was *idem sonans* with the name registered. * * * The vote of no person whose name did not appear, either properly or at least by '*idem sonans*,' could have been received by the judges, nor can they be counted by us."

Mudd vs. Compton (minority report), 51st Cong......Rowell, 166

Offer of votes and illegality of refusal must be clearly and specifically shown.

"An unlawful refusal on the part of the registration officers to register a qualified elector is a good ground for contest; but in order to make it available the proof should clearly show the name of the elector who offered to register, that he was a duly qualified voter, and the reason why the officer refused to register him; and under the statutes of the United States, if he offered to perform all that was necessary to be done by him to register and was refused, and afterwards presented himself at the proper voting place and offered to vote and again offered to perform everything required of him under the law and his vote was still refused, it would be the duty of the House to see to it that he is not deprived of his right to participate in the choice of his officers." But in a case where the proof fell far short of this requirement, though it was evident that contestant lost many votes on account of the arbitrary action of registering and election officers, the committee did not count any additional votes for him.

Buchanan vs. Manning, 47th Cong......2 Ells., 296

Must be proved legal by same evidence required on election day.

Where votes have been rejected by the election officers, "under the law they can not be counted unless each voter has adduced in the contest the same proof in every respect which would have entitled him to vote at the polls on the day of election."

Bisbee vs. Finley (minority report), 47th Cong......2 Ells., 227

Presumed to have been legally rejected.

Where voters offer their ballots and are refused by the election judges, no reasons being given actuating them, the presumption is that the judges did their duty and that the votes were legally excluded.

Garrison vs. Mayo, 48th Cong......Mobley, 58

Votes of qualified and registered voters rejected by the election officers on the ground that the voters had not presented registration certificates, the law only requiring the presentation of such certificates when the name of the voter was not found on the registry list in the hands of the judges, were unanimously counted by the committee. The majority of the committee also counted the votes of qualified voters who had either been unlawfully refused registry or whose names had been unlawfully stricken from the registry lists, and whose votes had been tendered to the officers of election and refused. The minority held that the proof of the qualification of most of these voters was insufficient.

Goodrich vs. Bullock, 51st Cong......Rowell, 581-629

Certain votes "were rejected by the inspectors because the names of the persons offering them were not found on the registration list. In the absence of proof to the contrary there is a legitimate presumption that they were properly rejected. It has been repeatedly decided by the House of Representatives that the acts of proper officers, acting within the sphere of their duties, must be presumed to be correct unless shown to be otherwise."

Goodrich vs. Bullock (minority report), 51st Cong......Rowell, 613

Vitiates whole poll.

"It is an established principle of law that where voters are kept from voting by an illegal requirement of the election officers, it voids the election at such polls."

Donnelly vs. Washburn (majority report), 46th Cong......1 Ells., 458

CONSTRUCTIVELY REJECTED.**Obstructive tactics of election officers constructive rejection.**

Where a large number of voters, intending to vote for contestant, were standing in line all day waiting for an opportunity to vote, but had not yet reached the window when the polls were closed, and the evidence, according to the majority of the committee, showed that this delay was due to the intentional acts of the officers of election and of challengers in collusion with them, the committee held that these votes had been legally tendered and rejected, and should be counted upon proof of the intention of the voters to vote for a particular candidate. The minority found that the evidence did not show that the delay was due to fraudulent acts of the election officers, but that most of it was necessary under the circumstances, and the rest was caused by the action of partisans of contestant. They held that the law as laid down by courts was that votes not cast could not be counted, but, according to the precedents of the House of Representatives, votes actually tendered and illegally rejected might be counted. These were not actually tendered. If the delay had been due to fraud, there would have been no fair election, and the seat should be declared vacant. But there being no fraud, the established rule would keep the contestee in his seat. But the minority were not satisfied of the justice of the established rule and recommended that the seat be declared vacant. The House sustained the majority.

Waddill vs. Wise, 51st Cong......Rowell, 203-253

Prevented from being cast by threats in presence of officers of election, counted by committee.

Where a voter was prevented from voting by "threats of violence made in the presence of the board, and against which it was their duty to protect him and which they did not do," the committee counted his vote for the candidate for whom he would have voted.

Covode vs. Foster, 41st Cong. 2 Bart., 611

Constructive rejection by undue delay.

If by fraudulent challenges, unduly prolonged by the connivance and collusion of the judges of the election, the voter is deprived of the opportunity to vote, the vote should be counted. If the fraudulent exclusion of votes would, if successful, give to the party of the wrongdoer a temporary seat in Congress, and the only penalty possible were merely a new election, giving another chance for similar tactics, a real election might be indefinitely prevented. But if, when such acts are done, the votes are counted upon clear proof *aliunde*, the wrong is at once corrected, and no encouragement given to such dangerous and disgraceful methods.

Waddill vs. Wise, 51st Cong. Rowell, 224

What constitutes tender.

The ability to reach the window and actually tender the ticket to the judges is not essential in all cases to constitute a good offer to vote. From the time the voter reaches the polling place and takes his position in line to secure his orderly turn in voting he has commenced the act of voting.

Waddill vs. Wise, 51st Cong. Rowell, 224

Must be specifically proved.

Where the evidence tended to show that a number of voters desiring to vote for contestant were prevented from voting by being refused opportunity to register, but the only evidence as to their number was an estimate from the appearance of the crowd and the number of tickets issued as "about two hundred," it was held to be "altogether too indefinite."

Norris vs. Handley, 42d Cong. Smith, 74

Where there were two lines of voters, one white and one colored, and the judges required them to vote alternately, and the colored line being much the longer, there was still a large number of voters in it who had not voted at the close of the polls, and the testimony showed that most of them were intending to vote for contestant, but they themselves were not called as witnesses, *Held*, that their votes could not be counted for contestant, but that if their number had equaled or exceeded the plurality returned for the contestee, so that the legality of the election depended upon them, it would invalidate his election with no further proof, and make a new election necessary. (For ruling under a different state of facts, see *Waddill vs. Wise*.)

Langston vs. Venable, 51st Cong. Rowell, 464

Can not be counted unless offered at the polls and illegally rejected.

"To count votes that were never offered at any poll is carrying the doctrine further than we ever knew it. To authorize this committee to count a vote, four things are requisite: First, the person offering to vote must have been a legal voter at the place he offered to vote; second, he must have offered his vote; third, it must have been rejected; and fourth, it must be shown for whom he offered to vote."

Frost vs. Metcalfe, 54th Cong. 1 Ells., 291

Must be actually tendered.

"To hold that anything short of an actual tender of the ballot to the election officers and a rejection by them was an offer to vote would be a most dangerous and uncertain rule, and one to which we can not give our sanction. Where the evidence plainly establishes the fact that a legal voter offers his ballot to the election officers and they unlawfully reject the same, under the precedents heretofore established such vote may be counted for the candidate for whom the voter offered to vote."

Waddill vs. Wise (minority report), 51st Cong. Rowell, 252

Not attempted to be cast, not counted.

A large number of witnesses testified that they were legal voters and had been refused registration, but very few of them appeared at the polls and offered to vote, and there was no evidence that the registration officers had demanded more proof of qualification than the law required, or that the applicants had offered all that was required, so the committee did not count the votes.

Denny vs. Owens, 54th Cong......Report, 1877

Counted, on proof.

The committee restored votes lost to contestant by the intimidation of boisterous election officers and challengers, by frivolous arrests, and by the delay in opening a poll where the ballots had been stolen.

Aldrich vs. Underwood, 54th Cong......Report, 2006

Vague testimony—how many “would have voted”—inadmissible.

“Contestant has sought to introduce the testimony of witnesses who give their opinion as to the number of persons who would have voted for him at certain places without stating who they were or giving any other particulars, but the committee is of the opinion that testimony of this character is not admissible.”

In this case, moreover, the testimony was too vague and indefinite to be trustworthy if admissible.

Moorman vs. Latimer, 54th Cong......Report 626, p. 4

Evidence must establish qualification and effort of voters.

“It is a matter of serious import and precedent to introduce into an election the count of a large disfranchised class; but if the principle is good as to 4 or 40 or 400, it should certainly be no less available for a larger number, or, briefly, the number is immaterial if capable of correct computation.” Where the evidence consisted largely of petitions to Congress, signed by the rejected voters at the polls, the committee said: “It is considered by a majority of this committee that these lists are not per se evidence in the pending contest. They are declarations, important parts of which should be proven in accordance with usual legal forms. It is not impossible so to do, and consequently we think it necessary for reaching trustworthy results. Under the authority of *Vallandigham vs. Campbell* (1 Bart., 31), these declarations might serve a use beyond a mere list for verification.” The evidence should establish that the persons named in the lists were voters according to the constitution of South Carolina, that they were present at or near the voting place for the purpose of voting, and that they would have voted for contestant.

Wilson vs. McLaurin, 54th Cong......Report, 1566

Counted on proof.

The committee counted the votes of a large number of voters who testified that they were still in line when the polls closed, intending to vote for contestant, there being other evidence to show that the delay which prevented them from voting was unnecessary and intentional.

Thorp vs. Epes, 55th Cong......Report, 428

Can not be counted under the Australian system.

“Votes not cast can not be counted as a matter of law generally. No contrary opinion can be cited from the adjudged cases of the ordinary courts of any of the States of the Union. This was a uniform rule of the House of Representatives until 1873.” The subsequent cases to the contrary were decided before the adoption of the Australian ballot system, which requires of the voter not only a clear expression of his intention, but an expression in a certain manner, and disregards an expression, even if equally clear, made in any other manner. “A counting of votes not cast under any form of the Australian ballot law is to admit parol testimony as to the intention of voters in regard to an act that is by no means altogether dependent on such intention.”

Thorp vs. Epes (minority report), 55th Cong......Report 428, pt. 2, p. 7

Counted by committee on proof.

Where a large number of voters were prevented from voting by the deliberately obstructive tactics of the election officers, the committee counted the votes on proof of the intention and sufficient effort of the voter to vote.

Wise vs. Young, 55th Cong Report 772, pp. 15, 16

The minority refused to count the votes, not agreeing as to the law, and alleging that the proof was insufficient.

Wise vs. Young (minority report), 55th Cong Report 772, pt. 2, p. 15

Excluded by obstruction, counted on proof.

Where two lines were formed, one for white and one for colored voters, and the conduct of the election was dilatory, with the result that all the white and only half of the colored votes were cast, the committee counted those of the remainder whose testimony clearly showed that they had made earnest and sufficient effort to reach the polls, were qualified voters, and intended to vote for contestant.

Brown vs. Swanson, 55th Cong Report 1070

The "majority" agreed as to the law, but denied the sufficiency of the evidence.

Brown vs. Swanson ("views of the majority"), 55th Cong Report 1070, pt. 2

Immaterial whether excluded by fraud or error.

Where votes failed to be cast before the close of the polls, through no fault of the voters, the committee said:

"For the purposes of this question it is immaterial whether the votes were excluded by the actual fraud of election officers or error of judgment on the part of administrative officers in creating precincts so large that all the votes could not be polled."

Brown vs. Swanson, 55th Cong Report 1070, p. 6

Where numerous, poll rejected or vote counted, according to circumstances.

"The purpose of elections is to register the will of a majority of the voters, and it is the duty of the officers of the law to afford every qualified voter a reasonable opportunity to exercise the important right of suffrage. If that opportunity is afforded and the voter fails to avail himself of it, or if by some fault of his own he violates some regulation in attempting to exercise the right and thereby loses his vote, he can have no just cause of complaint. But if conditions exist, for which the voter is not responsible, that operate to defeat the rights of a substantial number of electors to vote, so that it can not be said that the result at a particular poll reflects the will of a majority of the voters, it discredits the entire poll. * * * Where, however, the rejection of the poll might aggravate the wrong or would defeat the ends of justice, and it is shown by reasonably satisfactory evidence the number of votes so excluded and for whom they would have been cast, had there been an opportunity, the poll will be considered and the excluded votes will be counted for the candidate who would have received them. This has been the rule of the House for many years, and is based upon principles of justice and a wise public policy."

Brown vs. Swanson, 55th Cong Report 1070, pp. 5, 6

VOTING MACHINE.**Question of legality not decided.**

A voting machine was used in the city of Rochester, and the election was contested on this ground. No one was deprived of his vote; there were ballots provided, which any voter could have used (but none did), and contestee had a large majority in the district outside of Rochester. "The views above expressed make it unnecessary to pass upon the legality of the Myers ballot machine."

Ryan vs. Brewster, 55th Cong Report 892

WAIVER (see also Agreement, Admission, and Estoppel).**Waiver of rights under tie election binding.**

Where there was a tie at an election, and both candidates, in written communications to the governor, voluntarily relinquished all rights under it, but a petition was received alleging that ballots found in other boxes indicated an intention on the part of a plurality of electors to elect the candidate defeated at the election subsequently held, the committee held that the relinquishment of rights under the first election was binding.

Sergeant, 19th Cong......C. and H., 516

Where votes were admitted to be bad, but proved to be good, they must be counted.

Where each party assumed the burden of showing the legality of votes cast for him and charged to be illegal, and the written stipulations in two counties reserved the right of proving the qualifications of voters attacked, but in the remaining counties there was no such reservation, and the votes seem to have been admitted bad unconditionally, "the committee, however, were of opinion that, although there was no express reservation in the last-named counties, yet, if affirmative and satisfactory proof should be offered showing that the votes objected to were, in point of fact, given by persons duly qualified to vote, that the parties would have no right to stipulate that such votes should be disregarded; and that the stipulation would be only received as prima facie evidence of the want of the necessary qualification of the voter."

Draper vs. Johnston, 22d Cong......C. and H., 702-714

Waiver of time of service of notice of contest.

Where the notice of contest was served *before* the result had been declared the committee were "of opinion that this was a defect which the sitting delegate could waive, and that by answering *after* the result had been proclaimed and within the time when a new notice of contest could have been served, without availing himself of the objection, and proceeding to take the testimony, he had waived the right to object to it at the hearing."

Todd vs. Jayne, 38th Cong......1 Bart., 557

Objection to sufficiency of notice not made in time.

Where contestee objected that the notice of contest did not "specify particularly" the grounds of contest, but no such objection was raised in the answer to the notice, or in the first argument before the committee, but only in the last printed brief, the committee held that the objection came too late.

McKee vs. Young, 40th Cong......2 Bart., 427

Defects in notice of contest may be waived.

That defects in the notice of contest may be waived has been determined by at least two decisions of the House (*Otero vs. Gallegos*, 1 Bart., 178; *Bromberg vs. Haralson, Smith*, 356). An agreement in writing entered into by the parties, in which it was stipulated that the evidence offered by contestant should be and remain in the contest as part of contestant's case in consideration of additional time being granted to contestee in which to take testimony, constitutes such waiver.

Duffy vs. Mason, 46th Cong......1 Ells., 363

Hearsay evidence admitted if by express or tacit consent of both parties.

A certified copy of evidence taken by a canvassing board and spread upon their record, they not being required or authorized to make any such record, is hearsay only, but may be accepted as evidence if included in the record by the express or tacit consent of both parties.

Sullivan vs. Felton, 50th Cong......Mobley, 770

Testimony taken out of time not objected to, received.

Where parties in ignorance of the law of 1873 took testimony under the former law until after the expiration of the forty days allowed contestant under the law of 1873, and contestee did not at first object, the committee received all the testimony taken up to the time of his first objection and excluded the remainder.

Buttz vs. Mackey, 44th Cong......Smith, 684

Testimony taken out of time, excluded even where objection waived.

Where contestee had in his oral argument before the committee waived all objections to the consideration of testimony taken out of time the committee held that "the people of the district have interests and rights which can not be thus taken from them," and with but one dissenting vote excluded the testimony.

Bradley vs. Slemons, 46th Cong 1 Ells., 310

Disqualified notary not objected to, evidence considered.

Evidence was taken outside the district before a notary resident of the district, but objection was made on this ground at the taking of the testimony of only one witness. The committee considered the testimony of the others. "As to the others the absence of objection warrants the inference of consent and their evidence is legally before the House."

Goodwyn vs. Cobb, 54th Cong Report 1122, p. 5

Disqualified notary not objected to in time, evidence considered.

Testimony had been taken in New York County before a notary, who, by his recent removal from Kings to New York County, had probably technically vacated his office, but no objection to his competency was entered until the taking of testimony in rebuttal. The committee held that objection to the testimony in chief was therefore waived.

Mitchell vs. Walsh, 54th Cong. Report 1849

Parties can not entirely waive the requirements of the statute.

Where no notice of contest or answer had been served, but contestant presented a letter from contestee which he held was a waiver of notice, the committee, without deciding the question of the proper construction to be given this letter, held "that it was not competent for the parties to entirely waive the requirements of the statute of 1851; that said statute was enacted not only to aid the parties in the preparation of their case, but also to secure a record and a distinct and well-defined issue upon which the committee and the House were to pass. * * * It must be evident to every one that it is impossible for the committee or the House to hear and determine a case without an issue joined."

Thomas vs. Arnell, 39th Cong 2 Bart., 163

The parties to a contest have no power to waive the provisions of the statute as to the time for taking testimony, but should appeal to the House, or, if the right to make such agreement is conceded, the agreement should certainly be in writing.

Page vs. Pirce (minority report), 49th Cong. Mobley, 477

Parties can not admit away the rights of the people.

"The constituency are the real parties in interest; the claimants can neither add to nor impair the rights of the people by any admissions or omissions of their own."

Wallace vs. Simpson (majority report), 41st Cong. 2 Bart., 557

Right of waiver in election contests limited by rights of the public.

"We recognize the value and importance of the doctrine of waiver in cases where it is fairly applicable. Where parties *sui juris*, representing only their own private interests, do any act amounting clearly to a waiver a court may well act upon it. But no man has the legal right to estop the public as to their constitutional right to representation by any act of omission."

Abbott vs. Frost (minority report), 44th Cong Smith, 627

Presence and cross-examination a waiver of objections.

Where contestant took testimony in regard to the votes of thirteen persons whose names were not included in the notice to take depositions, but the counsel of the sitting member was present at the taking of the depositions and made no objections, the point was held to be waived.

Bell vs. Snyder, 43d Cong Smith, 255

Objection to testimony must be made before record is printed.

No part of the printed testimony in a case will be suppressed where parties fail to take advantage of the statute permitting them to appear before the Clerk of the House prior to the printing of the record and agree as to what portions of the same shall be printed.

Featherston vs. Cate, 51st Cong......Rowell, 111
Lowry vs. White, 50th Cong......Mobley, 624

WEST VIRGINIA.

When Berkeley County transferred.

The county of Berkeley remained a part of Virginia until the assent of the people of the county, of the legislature of West Virginia, and of Congress was given to its transfer to West Virginia, and it retained its right to vote for a representative from Virginia until the change was completed.

McKenzie vs. Kitchen, 38th Cong......1 Bart., 468



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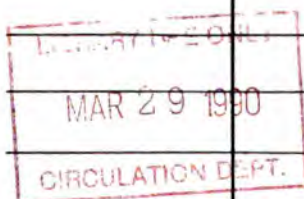
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